

1948

Present : Gratiaen J.

I. H. WIJESINGHE, Petitioner, and THE MAYOR OF COLOMBO, *et al.*, Respondents

S. C. 250—IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON THE MAYOR AND THE SECRETARY OF THE COLOMBO MUNICIPAL COUNCIL.

Writ of mandamus—Charity Commissioner—Appointment by Local Government Service Commission—Refusal of work by Municipal Council—Temporary suppression of post—Private or public right—Nature of remedy—Municipal Councils Ordinance, No. 29 of 1947, section 41 (e).

Petitioner was appointed to the post of Charity Commissioner by the Local Government Service Commission. The Municipal Council declined to recognize his appointment and refused to let him attend to his work. They subsequently passed a resolution that, in view of the deadlock created, as a temporary measure, the post of Charity Commissioner be suppressed. On application for a writ of *mandamus*—

Held, (i) that the petitioner had been properly appointed to the post.

(ii) that the functions of the office of Charity Commissioner were of a public character and that a writ of *mandamus* would lie to restore him to office.

(iii) that the temporary suppression of the post did not amount to its abolition within the meaning of section 41 (e) of the Municipal Councils Ordinance, No. 29 of 1947.

¹ (1933) A. I. R. Rangoon 138. (Full Bench).

THIS was an application for a writ of *mandamus* on the Mayor and the Secretary of the Municipal Council, Colombo.

F. A. Hayley, K.C., with G. E. Chitty, L. G. Weeramantry, and G. C. Niles, for the petitioner.

H. V. Perera, K.C., with D. S. Jayawickreme, for the respondents.

Cur. adv. vult.

September 16, 1948. GRATTIAEN J.—

The petitioner who was the principal of the Government Training College, Mirigama, resigned from his post in order to assume duties as Charity Commissioner of the Colombo Municipal Council on appointment to that office by the Local Government Service Commission with effect from April 10, 1948. He complains that he has been and is being prevented by the respondents, who are the Mayor and Secretary respectively of the Council, from performing his functions in this new office. On the first day on which he reported for work he was forbidden by the Mayor to assume duties. He nevertheless attended his office regularly until May 4, 1948, but throughout this period his presence was completely ignored not only by the Mayor and the Secretary but also by the subordinate officers of his own department, acting apparently on the instructions of the Mayor and the Secretary. On May 4 the plot thickened. He arrived to find the doors of the Charity Commissioner's office locked against him. Up to date he has not been paid any salary or allowances pertaining to his office.

This remarkable behaviour was not part of any strange ritual habitually performed by city fathers in welcoming new employees of the Council. On the contrary, it was intended to manifest a determined refusal to recognize in any way the petitioner's appointment. When there seemed to be little likelihood of a change of attitude, the petitioner came to this Court and asked "for a mandate in the nature of a writ of *mandamus* to order the respondents to permit him to perform his duties in the exercise of his lawful functions as Charity Commissioner of the Colombo Municipal Council without let or hindrance"—in other words, he seeks the intervention of this Court to compel the respondents to admit him to his office and to recognize him in that office.

The respondents have made no serious attempt to claim that their conduct was justified by law. It is contended, however, on their behalf that on various legal grounds a remedy by way of *mandamus* is not available to the petitioner.

It transpired in the course of the argument and it is quite apparent from the affidavits and documents filed in these proceedings that the unhappy position in which the petitioner finds himself had been brought about by a situation which approximated very closely to "a state of war" between the Colombo Municipal Council and the Local Government Service Commission. Neither the history nor the merits of that dispute have any relevancy to the present proceedings. I am strictly concerned

with only two questions; the legality or otherwise of the respondents' actions, and in the latter event the appropriateness of the remedy which the petitioner seeks. But before I proceed to consider these questions, I feel constrained to express my disapproval of the tactics employed in the course of the dispute by the Council in so far as they have victimised the petitioner. He was never a party to the dispute between the "belligerents" concerned. He had given up the security of a lucrative appointment in the Government Service to take up an important executive office in the Municipality for which post candidates were publicly invited to apply. He has done nothing to deserve the calculated insults of which he complains.

It is clear that the petitioner was duly appointed to the office of Charity Commissioner by the Local Government Service Commission. The office was originally created by the Council in terms of section 3 of the Municipal Councils (Amendment) Ordinance, No. 23 of 1928, and was at the relevant date preserved by the present Municipal Councils Ordinance, No. 29 of 1947. Under the earlier Ordinance the powers of appointment and dismissal in respect of this office were vested in the Council itself, but have now been superseded. The Local Government Service Commission (to whom I shall hereafter refer as "the Commission") was created by Ordinance No. 43 of 1945, section 11 (c) of which vests the Commission alone with power to appoint or dismiss any member of the Local Government Service. The office of Charity Commissioner of the Colombo Municipal Council was admittedly an office in the Local Government Service within the meaning of the Ordinance. The legal position then is that the Commission alone has the power of appointment and dismissal in respect of an office which the Council alone has the power to create and abolish. It is not difficult to understand how, in the absence of the closest and most cordial co-operation between the Council and the Commission, the situation can lead to much unpleasantness and irritation.

The office of the Charity Commissioner fell vacant on the retirement of the Rev. C. E. V. Nathanielsz after very nearly 20 years of service. The Council thereupon requested the Commission to make an appointment to fill the vacancy, and after the necessary formalities had been complied with, the petitioner was appointed to succeed the Rev. Nathanielsz. I hold that the petitioner was, during the period of the acts which he complains of and at the date of the present application, the duly appointed Charity Commissioner of the Colombo Municipal Council.

What then was the legal relationship between the Commission, the Council and the petitioner as from the date of the latter's appointment to his new office? An examination of section 15 (1) of the Local Government Service Ordinance supplies the answer. The petitioner entered the "service of the Commission" and he became at the same time an "employee" of the Council. It is not necessary for the purpose of these proceedings to seek to ascertain the distinction which the Legislature intended to draw between "service" and "employment". All that is relevant is that, so long as the Local Government Service Ordinance of 1945 and the Municipal Councils Ordinance of 1947 exist

side by side in their present form, the Council and all who are entrusted with the administration of its business are under a statutory obligation to recognise and implement appointments duly made by the Commission. In wilfully refusing to admit the petitioner to his office as Charity Commissioner the Council and the respondents, who are its Mayor and Secretary, have committed a breach of this statutory obligation. The only serious question which arises in this case is whether a writ of *mandamus* lies to compel its performance.

“A *mandamus*”, says Lord Hansfield in *Rex. v. Barker*¹ “will be granted whenever a man is entitled to an office or function and there is no other adequate remedy for it”. The issue of a writ of *mandamus* is discretionary, and the Courts in England and in this country have granted writs admitting or restoring a man to his office only upon satisfactory proof of a “legal right on the part of the petitioner to the performance by the respondent of some duty of a public and not merely private character”. (*Shortt on Mandamus*, page 228). In such cases a writ is granted “for public purposes and to compel the performance of a public duty, but not where there is a dispute merely about private rights.” (*Rex v. Bank of England*, 106 *English Reports* 492). In accordance with this principle this Court has issued a writ of *mandamus* to restore the Secretary of an Urban Council to his office (*Perera v. Sockalingam Chettiar*²) but has refused writs in the case of Municipal doctors (*Perera v. Municipal Council of Colombo*³ and *Suriyawansa v. Local Government Service Commission*⁴) and of a municipal clerk (*Rodrigo v. Municipal Council, Galle*⁵).

I have already held that the Council and the respondents were under a statutory obligation to recognise the petitioner's appointment. This is a duty of a public character. It would be quite intolerable and very much against the public interest if local authorities and their senior executive officers deliberately and as part of an organised campaign flout the law merely because they did not like it in its present form.

Another aspect of the matter which occurs to me is that the Local Government Service Ordinance of 1945 is a comparatively recent enactment creating new rights and new obligations. Where as has happened in this case new statutory rights and obligations are wilfully ignored by a public body and its officers, I think that on the analogy of *Simpson v. Scottish Union Insurance Company*⁶ a writ of *mandamus* is the most appropriate remedy. In the words of My Lord the Chief Justice in *Perera v. Sockalingam Chettiar* (*ibid*) “the application for a writ is the only means of testing the legality of the respondent's actions, and if such actions are contrary to law, *mandamus* would seem in principle a convenient and in fact the only way of obtaining a judicial opinion to that effect.”

I do not agree that the petitioner's right to the office of Charity Commissioner was only of a private nature which could adequately be enforced in a civil suit. The petitioner is an executive officer of the Council by virtue of section 176 of the Municipal Councils Ordinance of

¹ 96 *English Reports* 196.

² (1946) 47 *N. L. R.* 265.

³ (1947) 48 *N. L. R.* 66.

⁴ (1947) 48 *N. L. R.* 433.

⁵ (1947) 49 *N. L. R.* 89.

⁶ 71 *English Reports* 270.

1947. Under section 3 of the earlier Ordinance of 1928 and under section 175 of the present Ordinance the Council was empowered to define the duties of the Charity Commissioner, and many, if not all, of the powers and functions contemplated are clearly powers and functions of a public nature. The second respondent has, however, sworn an affidavit to the effect that to the best of his "knowledge, information and belief" the duties of the Charity Commissioner have never been defined by the Council. The second respondent has not indicated the extent of his researches into the countless resolutions passed by the Council since the office of Charity Commissioner was created in 1928 and occupied ever since. I can only hope that his information is incorrect and his belief not justified. It seems monstrous to suggest that the Rev. Nathanielsz who functioned as Charity Commissioner from December 15, 1928, till May 25, 1947, merely functioned in a decorative sense. I also refuse to believe that when the Council wrote to the Commission in June, 1947, that an appointment to the office vacated by the Rev. Nathanielsz had "become necessary", the true position was that the new Charity Commissioner would really have no lawful functions or duties to discharge, and would be expected to occupy a meaningless office at the rate-payers' expense. It is in evidence that the Charity Commissioner's department, which is presumably still functioning, includes a Registrar and a number of other officers. The petitioner is entitled to supervise the work of his department. I am satisfied that the legal right which the petitioner is seeking to enforce in these proceedings is of a public character.

It was also submitted on behalf of the respondents that a *mandamus* did not lie because the petitioner was already in "legal" though not "actual" possession of his office and that he therefore did not require a writ of *mandamus* to assist him to obtain legal redress against those who interfered with his rights. Mr. Perera argues that a man enjoying the cold comfort of "legal possession" of an office would not be granted a writ unless he had been wrongfully dispossessed after commencing to function in his office. It is correct that some such distinction was drawn by two of the distinguished Judges in *Rex v. D. et C. Dublin*¹ but I find that Eyre J. expressly dissented from that view and said "I think that a *mandamus* is very proper to admit a man to the exercise of his office". Moreover the Court was only considering this particular question incidentally. The main matter for consideration in those proceedings was whether a writ of error lay when a person complained that a writ of *mandamus* had wrongfully issued from the Court. I have not been referred to any later case where the same distinction between "legal possession" and "actual possession" was drawn. On the contrary, in *Rex v. Barker*² Lord Mansfield stated four years later that "the Court would assist by a writ of *mandamus* where there is a right to execute an office or perform a service and . . . where a person is *either kept out of possession of or dispossessed of such rights*". With respect, I do not think that this Court should be swayed by any refined distinctions when dealing with cases such as the present case. As Lord Mansfield said in the judgment to which I have just referred "the writ was introduced to prevent disorder from a failure of justice. Therefore it

¹ 93 *English Reports* 685.

² 97 *English Reports* 823.

ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one. *It has been liberally interposed for the benefit of the public and the advancement of justice.*" These words seem to me to be very appropriate to the present case. When the petitioner came to this Court for relief he had no other specific or adequate remedy by which he could enforce his right to perform the functions of his office against persons who kept him out of this right without any serious pretence that they were entitled in law to act as they did. For the reasons which I have given I hold that at the time this application was filed in this Court, the petitioner was entitled to a writ of *mandamus* compelling the respondents to admit him to his office.

The only question which remains is whether the writ should now be refused on the ground that since these proceedings commenced the office of Charity Commissioner has been duly abolished by the Council in the exercise of a right which is clearly vested in it under section 41 (e) of the Municipal Councils Ordinance, No. 29 of 1947. It has been proved that on June 9 a few days after the petitioner had filed this application the Council passed a resolution in the following terms :—

"In view of the deadlock now created between this Council and the L. G. S. C., this Council resolves that as a temporary measure the post of Charity Commissioner be suppressed."

Does this purported temporary "suppression" of the office of Charity Commissioner amount to its "abolition" within the meaning of section 41 (e)? If that was the intention of the members of the Council it would have been a very simple matter for them to have passed a resolution to that effect in clear and precise language. But this, for some reason which has not been explained to me, is just what they refrained from doing. Am I justified in assuming that an important executive office which, in the Council's opinion had become "necessary to fill" in June, 1947, has now been abolished *although it has not been stated to have since become unnecessary*? No single member of the Council has sworn an affidavit to the effect that it was his intention to abolish the office concerned. I feel that it would not be fair to the petitioner or to the Council or to the many persons for whose benefit the office was first created, to decide that the resolution of June 9 has had the effect of abolishing the post of Charity Commissioner. I am not satisfied that "suppression" and "abolition" are necessarily synonymous terms. When something is abolished it no longer exists. There seem to be something less final about a "suppression". A man can suppress his true name, but his true name still exists. A witness giving evidence in a Court of Law can suppress the truth but this only means that the truth is kept secret and is not revealed. If the members of the Council desired and still desire to abolish the petitioner's office, they are free to pass a resolution to that effect in unambiguous language, although I express no opinion as to the validity of such a resolution which is not passed *bona fide* but from some extraneous motive. In the meantime the petitioner is entitled to his writ against the respondents. I hold that the Council's resolution of June 9, 1948, has in no way defeated the petitioner's right to function

in his office. The Council does not appear to be vested with any statutory power to suppress his office. I allow the petitioner's application with costs. A writ of *mandamus* will issue from this Court requiring the Mayor and the Secretary of the Colombo Municipal Council to admit Mr. I. H. Wijesinghe to the office of the Charity Commissioner of the Colombo Municipal Council to which office he has been duly appointed by the Local Government Service Commission. The respondents are ordered and directed to permit the petitioner to perform his duties for the exercise of his lawful functions as Charity Commissioner of the Council without let or hindrance.

Application allowed.

