

1954

Present: Swan J.

B. N. COORAY, Petitioner, and C. T. GRERO, Respondent

*S. C. 140—Application for a Writ of Mandamus*

*Municipal Council of Colombo—General meeting—Notice of motion by member—Chairman's refusal to include motion in agenda—Remedy of member—Municipal Councils Ordinance, No. 29 of 1947—Section 21—By-Law 10—Amending Act No. 39 of 1951, s. 15 (2)—Mandamus—Effect of alternative remedy—Necessary parties.*

A writ of *mandamus* is not available where there is another remedy open to the party seeking it. The alternative remedy need not be an action at law; it may be by way of an appeal to a *forum domesticum*.

The petitioner, a member of the Colombo Municipal Council, gave notice of a motion for the removal of the respondent from the office of Mayor, and desired that the matter should be put up for discussion at a general meeting of the Council. The respondent, who was the Chairman of the Council, purporting to act under By-Law 10 (c), ruled that the motion was out of order, and the Secretary so informed the petitioner. The Secretary accordingly omitted to place the motion on the Agenda of the meeting. On an application by the petitioner for a writ of *mandamus* on the Mayor—

*Held*, that *mandamus* was not available for the reason that the petitioner had an alternative remedy, namely, an appeal to the Council itself under section 21 of the Municipal Councils Ordinance.

*Held further*, (i) that if *mandamus* was available the proper party respondent to the application was the Mayor and not the Secretary.

(ii) that the discretion of the Mayor under By-Law 10 to allow or disallow a motion must not be exercised arbitrarily.

(iii) that the proposed motion was a question affecting the Municipal Administration of Colombo within the meaning of By-Law 10 (d).

(iv) that a writ of *mandamus*, if available, could be issued although the date of the meeting had already passed.

**A**PPPLICATION for a writ of *mandamus* on the Mayor of the Colombo Municipal Council.

Izzudeen Mohamed, with A. Kamalanathan and A. S. Vanigusooriar, for the petitioner.

H. V. Perera, Q.C., with N. M. de Silva and Eric LaBrooy, for the respondent.

July 7, 1953. SWAN J.—

This is an application for a writ of mandamus on the respondent who is the Mayor of the Colombo Municipal Council. The petitioner is a duly elected member of the Council and he states that, in the exercise of his rights as such Councillor he, on the 12th March, 1953, gave notice of the following motion :—

“ This Council resolves that Mr. C. T. Grero be removed from the Office of Mayor.”

He desired that the matter should be put up for discussion at the meeting to be held on 17th March, 1953. His complaint is that the respondent wrongfully ruled that the motion was out of order.

The conduct of the business of the Council is regulated by By-laws which were duly framed for this purpose under the old Municipal Councils Ordinance of 1910 and which have been kept alive under the various amending and replacing ordinances and finally made operative under the enactment now in force, namely, Ordinance 29 of 1947 by virtue of two Notifications published in *Government Gazettes* Nos. 9,773 of September 24, 1947 and 9,875 of June 8, 1948.

Under this Ordinance the Mayor was to hold office for one year, but by the Amending Act 39 of 1951 that period of the Mayor's office was extended to be co-terminous with the life of the Council. The Ordinance made provision for the removal of the Mayor or Deputy Mayor from office on a resolution for such removal by a certain majority of the total number of Councillors. This provision has been slightly altered, i.e., as regards the requisite majority, by the Amending Act referred to above which provides as follows :—

*Section 15 (2)*

“ A Mayor or Deputy Mayor may be removed from office on a resolution for such removal duly passed at any meeting of the Council by not less than one half of the total number of Councillors and confirmed by a resolution similarly passed at the next Meeting of the Council. Upon the date of the confirmation of any resolution for removal, the Mayor or Deputy Mayor affected by such resolution shall be deemed to vacate his office as such.”

I shall at this stage quote the relevant portions of By-Law 10 :—

- “ (a) Every notice of motion shall be in writing signed by the Councillor giving the notice. Unless such notice shall be in the hands of the Secretary three clear days, exclusive of Sundays and Government holidays, before the Meeting of the Council, the motion shall not be included in the Agenda.
- (b) All notices of motion shall be dated and numbered as received, and shall be entered by the Secretary upon the Agenda Paper in the order in which they are received.

(c) Before any notice of motion is placed on the Agenda Paper it shall be submitted to the Chairman who, if he be of opinion that it is out of order, shall cause the giver of the Notice to be so informed.

(d) Every Notice of Motion shall be relevant to some question affecting the Municipal Administration of Colombo.

(e) No motion to rescind any resolution which has been passed within the preceding six months nor any motion to the same effect as any motion which has been negatived within the preceding six months shall be in order, unless notice thereof shall have been given and specified in the Agenda, and the notice shall bear, in addition to the signature of the Councillor who proposes the motion, the signatures of five other Councillors; and when such motion has been disposed of it shall not be competent for any Councillor to propose a similar motion within a further period of six months.

(f) \_\_\_\_\_.

(g) \_\_\_\_\_.

(h) \_\_\_\_\_.

(i) Immediately after the motions of which due notice has been given have been disposed of a Councillor may propose a motion asking the permission of Council to bring forward a motion of which due notice has not been given, and in such case he will hand to the Secretary a copy of such motion."

The respondent, purporting to act in the exercise of the powers vested in him under By-Law 10 (c), ruled that the said motion was out of order and the Secretary by his letter dated 13th March, 1953, so informed the petitioner.

The petitioner states that the refusal of the Mayor to place the motion on the Agenda of the Meeting to be held on 17th March, 1953, was wrongful and unlawful, and he prays that this Court should command the Mayor to place it on the Agenda of the meeting next to be held after order is made on this application.

The respondent has filed an affidavit in which he states that he ruled out the motion in question in the bona-fide belief that the motion was out of order for the following reasons :—

"(a) That under the Local Authorities (Election of Officials) Act, No. 39 of 1951, the term of office of the Mayor had been extended until the expiration of the term of office of the Councillors then in office, and that the Mayor and Deputy Mayor were *not subject to removal until the end of that period.*"

“(b) On or about the 1st day of February, 1952, the Council had discussed a motion referred to in para. 11 of the petition which motion was defeated at the said meeting. I had done nothing nor had I omitted to do anything in the performance of my duties as Mayor to justify the petitioner giving notice of a motion in identical terms as that which was defeated, and as no reason had been given and no reference made to any act or omission of mine as Mayor subsequent to the defeat of the earlier motion, I was of opinion that the motion was frivolous and out of order.”

Mr. H. V. Perera appearing for the respondent says that, inasmuch as a discretion is vested in the Mayor to allow or disallow a motion, this Court cannot review the propriety of that discretion. He also submits, in addition to the reasons set out by the respondent in his affidavit, that the motion was out of order under By-Law 10 (d) because there was nothing to show that it was relevant to some question affecting the Municipal Administration of Colombo. He argued further that, in any event, this Court would refuse the application for a writ of mandamus for the following reasons:—

- (a) It would be futile to grant a writ of mandamus because the date of the meeting is long past ;
- (b) The petitioner has an alternative remedy in that he could have obtained and even now can obtain under Sec. 21 of the Ordinance the permission of the Council to move this resolution even though it does not appear on the Agenda.
- (c) Inasmuch as it is the duty of the Secretary to place motions on the Agenda, and as it was the Secretary who refused to place the petitioner's motion on the Agenda of the Meeting of the 17th March, 1953, the application should have been made against the Secretary and not against the Mayor.”

I shall deal with the last objection first. Undoubtedly it is the Secretary who places motions on the Agenda, but he does so on the directions of the Mayor. The motion in question was ruled out by the Mayor, and the Secretary was merely carrying out the orders of the Mayor when he did not put it on the Agenda of the Meeting of 17th March, 1953. In my opinion if mandamus is available it should be against the Mayor and not the Secretary.

In a case reported in *5 S. C. C. 168* an application was made before three Judges of this Court for a mandamus on the Chief Clerk of the Court of Requests of Colombo to entertain a plaint. The Chief Clerk acting on the orders of the Commissioner had refused to accept it. This Court dismissed the application on the ground that under the Ordinance the Chief Clerk had no independent duty to the public, that he was merely doing something for which he was responsible to the Commissioner, and therefore no mandamus could issue on him.

Before dealing with the other points taken by Mr. Perera I shall dispose of the reasons given by the respondent in his affidavit for ruling that the petitioner's motion was out of order. Mr. Perera did not seriously attempt to support those reasons. In my opinion they cannot be supported.

Although the term of office of the Mayor and Deputy Mayor was extended by Act 39 of 1951 the right of removing them from office by a resolution was not abolished. It was in fact made easier by reducing the requisite majority from two-thirds to half.

The reason given by the respondent in para. 3 (b) of his affidavit is amusing. He says that since the defeat of the earlier motion to have him removed from office he had done nothing nor omitted to do anything to justify the petitioner's motion. Surely it was not for him to be the judge of that—it was a question for the Council to decide.

I shall now deal with the other objections taken by Mr. Perera. As regards the Mayor's discretion to allow or disallow a motion undoubtedly By-Law 10 says that *if he be of opinion* that the motion is out of order he can reject it. But he has a duty to perform in the matter which is of a quasi-judicial nature, and he must perform that duty judiciously and not arbitrarily as he has done in this case. If I were satisfied that the petitioner had no other remedy I should not hesitate to command the respondent to place the petitioner's motion on the Agenda of the next meeting to be held.

In the case of *Goonasinghe v. Mayor of Colombo*<sup>1</sup> de Kretser J. dealing with Sections 82 and 85 of the old Ordinance (which correspond to Sections 20 and 21 of the present enactment) and the identical By-Laws referred to herein before, held that a member of the Council had the right to bring forward, at a general meeting, a resolution of which he had given three clear days' notice to the Secretary, despite the fact that the Chairman has, prior to the date of the meeting, expressed the opinion that the resolution was out of order and directed that it should not be placed on the Agenda.

If the view taken by de Kretser J. is correct then clearly the petitioner is not without a remedy. I shall deal with this matter more fully later.

Regarding Mr. Perera's contention that under By-Law 10 (d) the proposed motion was out of order because it did not show that it was relevant to some question affecting the Municipal Administration of Colombo I would say that *ex facie* a motion to remove the Mayor from office is a question that vitally affects the Municipal Administration of the City, because the Mayor is the Chief Executive Officer of the Council and has several administrative functions to perform. It is not necessary for the mover in giving notice of the motion to state his reasons for wanting the Mayor removed. Those reasons would be revealed at the meeting. The motion may fail if there is nobody to second it. It may fail after it has been put to the house. It is a motion which every Councillor has a statutory right to move. There is, in my opinion, an absolute duty cast on the Mayor to place such a motion on the Agenda unless it is out of order by reason of By-Law 10 (e) quoted above.

<sup>1</sup> (1944) 46 N. L. R. 85.

As regards the question of futility I do not think that merely because the date of the meeting at which the resolution was to have been moved is past an order of this Court would be ineffectual. The Mayor and Council are still in office, and there will be many more meetings held before they vacate office.

I shall now deal with the last question, namely, whether the petitioner had, and still has an alternative remedy. Mr. Mohamed argues that the alternative remedy must be a legal remedy. I do not agree. *Allen on Law and Orders* at page 62 puts the matter thus :—

“ When any public authority or official is under an absolute (not a discretionary) duty to perform a certain function and refuses to do so any person who has a demonstrable interest in its performance may move the High Court for a mandamus to compel the fulfilment of the duty, and the Court, if satisfied by the application, will make an order accordingly, *provided that there is no other remedy, equally convenient, beneficial and effectual open to the applicant.*”

In a very recent case, namely, *Rex v. Dunsheath, Ex parte Meredith* <sup>1</sup> Lord Goddard C.J. said :—

“ It is important to remember that mandamus is neither a writ of course, nor a writ of right, but that it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided *there is no more appropriate remedy.* This Court has always refused to issue a mandamus *where there is another remedy open to the party seeking it.*”

In this case the learned Chief Justice cited several instances where the alternative remedy was not an action at Law but an appeal to a *forum domesticum*. Here too the petitioner could have sought his remedy by an appeal to the Council itself under Sec. 21.

To have brought up the matter before the Council at the meeting held on 17th March, 1953, or at some subsequent meeting would have been as convenient as, if not more convenient than, as beneficial and effectual as, applying to this Court for a writ of mandamus. It certainly would have been speedier, and cost the petitioner nothing at all.

Mr. Mohamed also contends that it would have been useless for the petitioner to have moved this resolution under Sec. 21 because the Mayor would have ruled it out of order.

Sec. 21 provides as follows :—

“ Without the permission of a Municipal Council, no business shall be brought before or transacted at any general or special meeting, other than the business specified in the notice of the meeting.”

Mr. Mohamed, pointing to By-Law 10 (i), says that any motion moved under Sec. 21 must be one of which no notice was given and not a motion of which notice has been given and which the Mayor has ruled to be out of order. I am unable to place such a restricted interpretation on Sec. 21.

<sup>1</sup> (1950) 2 A. E. R. 741.

In fact de Kretser J. in the case cited above took the same view when construing Sec. 85 of the old Ordinance. I think that the petitioner's fear that the Mayor would have ruled the motion out of order under Sec. 21 is groundless. Under Sec. 21 the mover has to obtain not the Mayor's but the Council's permission to move a motion not on the Agenda.

In my opinion the act of the Mayor in ruling the petitioner's motion out of order was clearly wrong and improper, but I dismiss the application for a writ of mandamus because the petitioner had, and still has, an alternative remedy. In the circumstances I make no order as to costs.

*Application dismissed.*

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