1970 *Present :* **Siva Supramaniam, J., and Samerawickrame, J.**

W. A. SUNDARA BANDA, Petitioner, *and* A. G. D. D. PATHIRANA, Respondent

S. C. 69/1969—Application for a Mandate in the nature of a Writ of Quo Warranto under s. 42 of the Courts Ordinance

Village Council—Qualification for membership—" Ordinarily resident "—Election of a candidate who is not " ordinarily resident "—Whether such election can be declared void—Quo warranto—Local Authorities Elections Ordinance (Cap. 262 as amended by Acts Nos. 9 of 1963 and 15 of 1965), ss. 8, 9, 10, 11, 24, 28 (1), 28 (2), 32, 65, 69.

The expression " ordinarily resident " in section 8 (*b*) of the Local Authorities Elections Ordinance, as amended by Act No. 15 of 1965, should be given its usual and ordinary meaning. It connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.

Where a candidate who is not " ordinarily resident " within the meaning of section 8 of the Local Authorities Elections Ordinance has been elected as a member for any ward of a local authority after his nomination papor was accepted by a returning officer, there is no provision in the Ordinance for the question of his qualification under section 8 to be canvassed thereafter, except perhaps when there are circumstances which enable the validity of the election to be attacked under section 69.

APPLICATION for a writ of *quo warranto.*

J. W. Subasinghe, with *J. F. P. Deraniyagala,* for the petitioner.

Felix R. Dias Bandaranaike, with *Dharmasiri Senanayake,* for the respondent.

Cur. adv. vult.

February 25, 1970. SIVA SUPRAMANIAM, J.—

This an application by the petitioner for the issue of a mandate in the nature of a writ of quo warranto calling upon the respondent to show cause by what authority he has assumed the office of a member for ward No. 14, Penthenigoda, in the Village Council of Narammala and for a declaration that the election of the respondent as member for the aforesaid ward is void. It is common ground that at a general election of members of the Village Council of Narammala held under the provisions of the Local Authorities Elections Ordinance (Cap. 262 as amended by Acts Nos. 9 of 1963 and 15 of 1965, hereinafter referred to as "the Ordinance") held on 6th December 1968, the respondent received the greatest number of votes for ward 14 (Penthenigoda) and was declared elected as the member for the said ward in terms of S. 65 of the said Ordinance. He assumed office as a member of the said Council at a meeting held on 13th January 1969 and was elected Chairman of the said Council and has continued to function in that capacity up to date.

The ground on which the present application is made is that the respondent was not qualified for election as a member for the said ward under S. 8 (*b*) of the Ordinance in that, on the relevant date, namely, the 1st day of June 1967, he was not "ordinarily resident" in the said ward or in any other ward of the electoral area of the Narammala Village Council. It is averred in the affidavit filed by the petitioner (and this is not denied in the counter-affidavit filed by the respondent) that the respondent's name did not appear in the electoral lists of the Narammala Village Council in force at the said general election.

In 1966 a part of the electoral area of the then existing Narammala Village Council was separated off and the Narammala Town Council was established as the local authority in respect of that area. The respondent was at that time the Chairman of the Narammala Village Council and was residing at No. 345, Kuliyapitiya Road which was situated within the ward of which he was the member of the Council. On the establishment of the new Town Council, the area where he was residing fell whithin the electoral area of the Town Council. The respondent's name was included in the electoral lists of the Town Council and at the first general election of members of the Town Council he was a candidate for Ward No. 2 but was defeated on a contest. The respondent still continues to reside at No. 345, Kuliyapitiya Road.

In paragraphs 4 and 5 of his affidavit the respondent has averred as follows :—

"4. For the purpose of protecting and safeguarding my village Council seat of Penthinigoda.....I decided to establish an ordinary residence in Penthenigoda village and for this purpose I made arrangements with Kiri Banda Abeyratne of Penthenigoda who is my wife's cousin brother to set apart a building having two rooms for my exclusive use as and when required by me from and after the month of December 1965. I have been using one of these rooms as an office and on a few days in each year I have occupied the other room and stayed the night there, sometimes accompanied by my wife and had our meals with my wife's cousin brother, for the purpose of establishing an ordinary residence within Penthenigoda village in the Narammala Village Council area.

5. I admit that my wife and I dwell for the larger part of the year at our house at No. 345, Kuliyapitiya Road."

The respondent's contention is that, on the aforesaid facts, he had two "ordinary residences" and he was therefore qualified under S. 8 (*b*) of the Ordinance to be elected as a member of the Village Council. The first question for determination is whether, on the facts stated above, the respondent can be said to have been "ordinarily resident" in the Penthenigoda ward on the relevant date.

The expression "ordinarily resident" has been the subject of Judicial interpretation. In the case of *Gout v. Cimitian*[1] the Privy Council in considering the proper interpretation to be placed on the said expression contained in a provision of an Order in Council which declared that "any Ottoman subject who was ordinarily resident and actually present in Cyprus on November 5, 1914" should be deemed to have become a British subject, said: "The appellants contended that in construing the Order we ought to apply the same consideration as in determining the case of domicil, but their Lordships are of opinion that the words "ordinarily resident" cannot be interpreted by such considerations and must be given their usual and ordinary meaning". In S. 8 (*b*) of the Ordinance too the expression "ordinarily resident" is not used in any technical or special sense and should therefore be given its usual and ordinary meaning. The question of "ordinary residence" is primarily one of fact and the "intention" or "motive" with which a person takes up residence is not material. The word "reside" is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". In *Levene v. Inland Revenue Commissioners*[2] Viscount Cave L. C. said: "The expression 'ordinary residence' ..... connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

[1] *(1922) 1 A. C. 105.*

[2] *(1928) A. C. 217.*

I am unable to agree that on the facts averred by the respondent he was "ordinarily resident" in the Penthenigoda village on the relevant date. He was accordingly not qualified under S. 8 for election as a member for Ward 14—Penthenigoda.

The next question that rises is whether the absence of qualification under S. 8 on the part of the respondent entitles the petitioner to a writ of quo warranto to have the election declared null and void. To answer this question, it is necessary to consider the scheme of the Ordinance.

S. 9 sets out certain disqualifications for membership and provides that a person subject to those disqualifications is not qualified to be elected or to sit or to vote as a member of any local authority. S. 10 (1) provides that where any member is disqualified under any of the provisions of S. 9 from sitting or voting as a member, his seat shall *ipso facto* become vacant. Under S. 10 (2) provision is made for the filling up of the vacant seat as if such member had resigned his seat. Under S. 11 a penalty attaches to a person who acts in the office of a member after his seat has become vacant under S. 10 . It is significant that the absence of qualification under S. 8 is not treated as a disqualification under S. 9 disentitling a member from sitting or from voting. Nor does S. 10 (1) apply to a case where a person is not qualified under S. 8 to be elected as a member. There is no other provision in the Ordinance in terms of which the seat of a person who is not qualified to be elected under S. 8 *ipso facto* becomes vacant. The Legislature does not therefore appear to have regarded nonqualification under S. 8 as a ground on which an election should be declared void or the seat rendered vacant *ipso facto*.

Under S. 24 "every general election of the members . . . . . shall be held in the manner hereinafter provided by the Ordinance". Under S. 28 (1) it is only a person who is qualified under the Ordinance for election as a member that may be nominated as a candidate for election. A nomination paper tendered under S. 28 (2), in order to comply with the provisions of the Ordinance, should therefore nominate one who is qualified under the Ordinance for election as a member. Under S. 32 (1) objection may be lodged against a nomination paper of a candidate for election if, *inter alia*, the nomination paper does not comply with the provisions of the Ordinance. Under S. 32 (2) "no objection shall be entertained by the returning officer unless it is lodged during the hour of nomination and the half hour, immediately succeeding the hour of nomination on nomination day". Under S. 32 (5) the decision of the returning officer on an objection is final and conclusive. Once an order has been made by a returning officer, after hearing any objections, accepting the nomination paper of a candidate, there is no provision in the Ordinance for the question of the qualification of the candidate

under S. 8 to be canvassed thereafter, except perhaps when there are circumstances which enable the validity of the election to be attacked under S. 69.

S. 69 reads as follows :—" No election shall be invalid by reason of any failure to comply with the provisions of this Ordinance relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provisions, and that such failure did not affect the result of the election ".

As was stated by His Lordship the Chief Justice in the Divisional Bench judgment in *Martin Perera v. Madadombe* [1] section 69 implies that " if there is in the case of any election a failure to comply with any of the provisions of this Ordinance relating to elections *and* if it appears that the election was not conducted in accordance with the principles laid down in such provisions, *and* if it appears that thereby the result of the election was affected, the election shall be invalid ".

His Lordship further stated : " As for a candidate, it may in a limited sense be proper to say that he participates in the conduct of an election. The term election in the present context means ' choosing by vote ', and the conducting of an election is accordingly the conducting of the process by which electors are able to cast their votes. It is a necessary step in this process that persons should offer themselves for the electors to make their choice. To this extent the submission of a nomination paper by a candidate may be regarded as part of the conduct of the election ".

If, therefore, acceptance of the nomination paper of a candidate who was not qualified under S. 8 is regarded as a failure to comply with the provisions of the Ordinance, such failure can invalidate the election only if (1) such election was not conducted in accordance with the principles laid down in such provisions, and (2) it affected the result of the election. In the instant case, it was not the contention of the petitioner either that the election was not conducted in accordance with the principles laid down in the provisions of the Ordinance or that the result of the election was affected by the failure to comply with those provisions. Indeed, the contention of learned Counsel for the petitioner was that S. 69 had no application at all to the facts of this case.

For the foregoing reasons I am of opinion that a writ of quo warranto does not lie in this case and I dismiss the application with costs fixed at Rs. 105.

SAMERAWICKRAME, J.—I agree.

Application dismissed.

[1] *(1969) 73 N. L. R. 25.*