1939

Present : **Hearne J.**

WICKREMESINGHE *v.* ABEYGUNEWARDENE

In the Matter of an Application for a Writ of *Quo Warranto.*

Writ of quo warranto—*Election of Basnayake Nilame—Counting of votes—Ballot paper put aside at first—Admitted on an equality of votes—Buddhist Temporalities Ordinance, s. 8 (2) (a) (Cap. 222) ; Interpretation Ordinance, s. 11 (e) (Cap. 2).*

At a meeting held under section 8 of the Buddhist Temporalities Ordinance for the election of a Basnayake Nilame, the presiding officer, at the first count of ballot papers, put aside one as doubtful and proceeded to sort the rest. Finding that the respondent and another person had an equal number of votes, he announced that subject to objection he proposed to allot the ballot paper he had put aside to the respondent, as it bore the number assigned to him. There being no objection, the presiding officer declared the respondent duly elected.

Held, that the proceedings were regular.

Held, further, that the words "executing the functions of an office", in section 11 (e) of the Interpretation Ordinance, mean lawfully executing the functions of an office.

THIS was an application for a writ of *quo warranto* to have the election of the respondent as Basnayake Nilame of the Dewundera Devale set aside. The facts are stated in the judgment.

Colvin R. de Silva, for the petitioner.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.,* and *C. J. Ranatunge*), for the respondent.

D. W. Fernando, C.C., for the Public Trustee.

Cur. adv. vult.

November 23, 1939. HEARNE J.—

On May 6, 1939, a meeting was held under section 8 of the Buddhist Temporalities Ordinance (Cap. 222) to appoint a Basnayake Nilame for the Sri Vishnu Maha Devale, Dondra. The Public Trustee was in the Chair. At the conclusion of the meeting he declared that the respondent "had received the majority of votes and had been duly appointed to be the Basnayake Nilame for the Devale".

The applicant prayed for the issue of a writ of *quo warranto* on the respondent who entered an appearance through Counsel to show cause why the application should not be allowed. Notice was ordered to be given to the Public Trustee who was also represented by Counsel. The Public Trustee filed a record of the proceedings at the meeting held under his direction, and for the purposes of his arguments Counsel for the applicant accepted it as a true record of those proceedings.

The objections originally taken were two-fold. The first is contained in paragraphs 7 to 14 of the affidavit filed in support of the application which read as follows:—

7. After the votes were cast the Public Trustee opened the ballot box in the presence of the candidates, the voters and members of the general public, and proceeded to place in separate heaps the votes cast in favour of each candidate.

8. In the course of thus sorting the votes the Public Trustee rejected one ballot paper and did not allot it to any of the candidates.

9. Having scrutinized and sorted out the votes in this manner, the Public Trustee proceeded to count the votes cast in respect of each candidate, beginning with the ballot papers cast in favour of the respondent who had been allotted the No. 1.

10. He declared and his clerk, under his direction so noted immediately, that 21 votes had been cast in favour of the respondent.

11. He then counted the ballot papers relating to candidate No. 2 and declared, and his clerk so noted immediately, that 21 votes had been cast in favour of the said candidate.

12. Similarly he declared that 6 votes had been cast in favour of No. 3.

13. Having thus declared that an equal number of votes had been received by candidates Nos. 1 and 2 the Public Trustee took up again the ballot paper that he had previously rejected.

14. I understand and verily believe that the said ballot paper bore no figure whatsoever in that blank portion in which the voters had been expressly directed to place the number allotted to the candidate whom they favoured; but the Public Trustee pointed to an alleged figure in another part of the ballot paper where printed instructions appeared along with the seal of the Public Trustee, and declared that the said figure indicated that the voter using the said ballot paper had cast his vote in favour of candidate No. 1.

It will be noted that the affidavit alleges that the Public Trustee had rejected one of the ballot papers and that he later acted on "the ballot paper he had previously rejected". In the argument before this Court that allegation of fact was abandoned, and the position was accepted, as

the Public Trustee averred, that he announced that with the exception of one doubtful vote (this as I understand from Counsel for the applicant the Public Trustee had put aside in the course of making the count) the result was that the respondent had received 21 votes, Mr. Goonesekere 21 votes, and Mr. Dissanayake 6 votes. He then proceeded to say that subject to objections that might be raised he proposed giving the vote he had described as doubtful to the respondent, as it had on it the number "1" which was the number which had been assigned to the respondent. Mr. Goonesekere said it looked like "1". No objection having been taken to the course the Public Trustee proposed to adopt he declared the voting as being 22 votes in favour of the respondent and 21, as he had previously announced, in favour of Mr. Goonesekere.

If it is correct, as Counsel for the applicant was instructed to say, that the Public Trustee had put aside one of the ballot papers in the course of his count, it would undoubtedly, as matters have transpired, have been better if at that time he had decided whether or not he proposed to admit or reject the ballot paper in question. This course would at least have prevented a reckless allegation being made against him that he had acted so improperly as to have rejected a vote and then admitted it when he found there was an equality of votes.

But, as Mr. Perera for the respondent has pointed out, there was in what the Public Trustee did, no infraction of a rule of law, no disregard of any rules of procedure that have been laid down (the Ordinance prescribes no particular form of procedure) no departure from principles of justice and fairplay and no protest from any member of the meeting. In fact the meeting acquiesced in what the Public Trustee proposed to do, and in my opinion the objection is completely without merit.

The second objection is that the Public Trustee had improperly refused to allow Mr. G. L. Ranasingha, described in the affidavit as an Acting Mudaliyar, the right to vote. The relevant portion of the proceedings, accepted by the applicant as correct, is as follows :—

Public Trustee : Anybody acting for the Four Gravets Mudaliyar?
Acting Mudaliyar : Present.
Public Trustee : Have you received a summons ?
Acting Mudaliyar : No, Sir.
Public Trustee : When were you appointed ?
Acting Mudaliyar : On 17th March. The permanent Mudaliyar is ill in hospital. I am merely acting for him temporarily.
Public Trustee : Not appointed ?
Acting Mudaliyar : No, Sir.
Public Trustee : Then I will not accept you.

It has been argued that by reason of the provisions of section 8 (2) (*a*) of the Buddhist Temporalities Ordinance (Cap. 222) read with section 11 (*e*) of the Interpretation Ordinance (Cap. 2) Mr. Ranasingha should have been accorded the right to vote.

Section 11 (*e*) reads—"In all Ordinances, for the purpose of indicating the application of a law to every person or number of persons for the

time being executing the functions of an office, it shall be deemed to have been and to be sufficient to mention the official title of the officer executing such functions at the time of the passing of the Ordinance".

Clearly the words "executing the functions of an office" must be interpreted as meaning "lawfully executing the functions of an office". If they were not so interpreted they would include, as Mr. Perera pointed out, a person who had usurped the functions of a particular office.

I asked Counsel for the applicant who would ordinarily appoint an Acting Mudaliyar to execute the functions of the office of Mudaliyar in the event of the person substantively appointed to such office being unable, by reason of illness or otherwise, to execute the functions of his office. I was told the appointment would rest with the Assistant Government Agent. I take it that Mr. Ranasingha had not been appointed to act by the Assistant Government Agent. If it had been so an affidavit even at this late stage would have been forthcoming.

Now what this Court has in effect been asked to rule is that a person who had received no summons to attend the meeting and who had not been appointed to act as Mudaliyar by the Government Officer entitled so to do, should have been allowed to vote on his verbal representation, which may or may not be the truth, that he was acting as Mudaliyar. To do justice to Mr. Ranasingha he appeared to claim no more, and the Public Trustee understood him to claim no more, than that as the Mudaliyar was ill (this does not mean he had ceased to exercise the functions of his office) he was acting as his agent in attending to matters which fell within the province of a Mudaliyar. Whatever authority he had he had apparently derived from the permanent Mudaliyar, in other words the permanent Mudaliyar, if he had in fact appointed him to act in the fullest sense, had exercised a power of appointment which is exercisable, not by him but by the Assistant Government Agent. It is unlikely he would have done this—if he had he would probably have sent to Mr. Ranasingha the summons addressed to "The Mudaliyar, Four Gravets"—but even if he had it would have been ineffectual in the absence of a legal right to do so, and Mr. Ranasingha could not be said to have been lawfully exercising the functions of Mudaliyar.

In my opinion Mr. Ranasingha was rightly excluded from the meeting. He would appear to have thought so too.

Other questions were discussed in the argument of Counsel—whether the Public Trustee was exercising a judicial discretion, whether an information in the nature of *quo warranto* lies against a person holding an office not created by Charter from the Crown or by Statute, and whether the Buddhist Temporalities Ordinance merely recognizes but does not create the office of Basnayake Nilame. The last mentioned, Counsel for the applicant stated, is a historical question which would involve a consideration of ancient correspondence between the Secretary of State and the Ceylon Government. Fortunately, in the view of the facts which I have taken, it does not arise for determination. Nor do the others.

I discharge the rule against the respondent with costs.

Rule discharged.