

1961

*Present : T. S. Fernando, J.*

THE COLOMBO BUDDHIST THEOSOPHICAL SOCIETY LTD.,  
Petitioner, and S. F. DE SILVA (Director of Education), Respondent

*S. C. 568 of 1960—Application for a mandate in the nature of a Writ of  
Mandamus*

*Mandamus—Not granted by way of a prohibitory injunction—Availability of writ to restore a person to office—Unaided school—Proprietorship or managership of it—Not a public office—Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960, ss. 3, 4, 5, 6 (c) (f)—Education Ordinance No. 31 of 1939 (as amended by Ordinance No. 26 of 1947).*

The remedy of *mandamus* is not granted by way of a prohibitory injunction requiring a person to refrain from doing something unlawful.

The petitioner (Colombo Buddhist Theosophical Society Ltd.) was the proprietor of two assisted schools (Ananda College and Dharmaraja College) prior to 1st December, 1960. It complained that, although it had elected in terms of section 5 of the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960, to administer these schools as unaided schools, the respondent, who was the Director of Education, took over the management of the two schools in the purported exercise of powers vested in him by Act No. 5 of 1960.

*Held*, that, inasmuch as the only substantive grievance alleged against the respondent was his act of assuming managership of the two schools, the petitioner was not entitled to a writ of *mandamus* ordering the respondent to refrain from acting as manager.

*Held further*, that *mandamus* lies to restore a person to office of which he has been dispossessed, but the office must be a public office. Neither the proprietorship nor the managership of an unaided school amounts to the holding of public office.

**A**PPPLICATION for a writ of *mandamus* on the Director of Education

*H. V. Perera, Q.C., with E. B. Wikramanayake, Q.C., G. T. Samarawickreme and W. T. P. Goonetilleke, for the petitioner.*

*V. Tennekoon, Crown Counsel, with B. C. F. Jayaratne and H. L. de Silva, Crown Counsel, for the respondent.*

*Cur. adv. vult.*

August 21, 1961. T. S. FERNANDO, J.—

The petitioner is the proprietor of Ananda College and Dharmaraja College, two assisted schools established and conducted by it at Colombo and Kandy respectively prior to 1st December 1960. The Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960, which came into force on 17th November 1960, made provision for the appointment of the Director of Education as the manager of every assisted school other than a school which the proprietor has elected before 1st December 1960 to administer as an unaided school,—vide sections 3, 4 and 5 of the Act. The petitioner contends that it has made the requisite election in terms of section 5 of Act No. 5 of 1960 to administer these two schools as unaided schools—(an unaided school being defined by the Education Ordinance, No. 31 of 1939, as amended by Ordinance No. 26 of 1947, as a school which is not a government school or an assisted school)—and that therefore as from 1st December 1960 these two schools require to be administered as unaided schools.

The petitioner complains that on 1st December 1960 the respondent who is the Director of Education acting in the purported exercise of powers vested in him by Act No. 5 of 1960 has taken over the management of the said two schools. By his action in seeking to exercise the powers and duties of manager of the said schools, it is further complained, that the respondent has unlawfully failed and refused to give effect to and comply with the law applicable to unaided schools which require to be administered by the proprietors of those schools. The petitioner therefore seeks the intervention of this Court by way of a mandate issuing from it in the nature of a Writ of *Mandamus* ordering the respondent to act in compliance with the law applicable to unaided schools and to refrain from acting as manager of the two schools referred to above and from exercising, performing and discharging powers, functions and duties as manager of these two schools.

The respondent does not admit the validity of the election alleged to have been made by the petitioner in terms of section 5 of Act No. 5 of 1960. Counsel for the parties have not been heard by me on the question

of the validity of the election as the respondent by his counsel raised, at the commencement of the argument, a preliminary objection to the application that the remedy of *mandamus* is not granted by way of a prohibitory injunction which is the substantive relief claimed by the petitioner. In support of this objection it has been urged that an order of *mandamus* is essentially one which requires the person on whom it is issued to do some particular thing therein specified which appertains to his office and is in the nature of a public duty.—see Halsbury's Laws of England, (Simonds ed.), Vol II, page 84, section 159 et seq. What has been stressed on behalf of the respondent is that the order is not issued by way of a prohibition addressed to a person designated to refrain from doing something, and that such an order by its very nature would be something the execution of which the Court would not be capable of supervising. No decided case was cited to me by counsel for either side in which a court has expressly stated that a *mandamus* either lies or does not lie to prohibit a person from doing something nor have I myself discovered such a case. Mr. Tennekoon, however, has brought to my notice the following statement at page 434 of Professor S. A. de Smith's treatise on *Judicial Review of Administrative Action* where the author refers to the English common law :—

“ It would seem, moreover, that *mandamus* is not the proper means of enforcing a duty to abstain from acting unlawfully. Thus, if a public authority or officer threatens to act *ultra vires*, the appropriate remedy will be an injunction or a declaration, and not an application for *mandamus* not to exceed the powers conferred by law.”

Mr. Perera, for the petitioner, was not understood by me as arguing that *mandamus* lies to prohibit a person from acting unlawfully, but rather that, assuming there was a valid election under section 5 of Act No. 5 of 1960, the respondent's action in assuming managership of the two schools amounted to a refusal to recognise the status of the petitioner as the proprietor of unaided schools having the authority to appoint its own manager or managers. It was argued that there was an implied duty on the respondent to recognise the status of the two schools as unaided schools and of the petitioner as the proprietor thereof, and that the failure to perform the “ duty ” of recognising that status was sufficient to support an application for an order of *mandamus*. Mr. Tennekoon, however, contended that, if the grievance of the petitioner be that the status of the schools or of the proprietor is not being recognised by the respondent, there is the remedy of an action for a declaration of status, and, alternatively, a remedy by way of an injunction. Mr. Perera attempted to counter this contention by submitting that if the petitioner is required to seek remedies in the District Court the process will be so tardy as to defeat its object. It is, however, unnecessary for me to discuss whether any other remedy or remedies which may be open to the petitioner will be less convenient or effectual, as I am of opinion

that the preliminary objection raised is sound and that effect has to be given to it. Mr. Perera has invited reference to section 6 of Act No. 5 of 1960 as indicating that the Director of Education has certain functions to perform in relation to unaided schools. Non-recognition of the status of the schools, so it is said, involves a refusal by the Director to perform certain functions he is required by the statute to perform in respect of such schools—see paragraphs (c) and (f) of section 6. It appears to me to be a sufficient answer to this contention to say that no refusal to perform any specific function of the Director is being relied on in the petition that has been presented to the Court by the petitioner, the only substantive grievance alleged being the Director's act in assuming managership of the two schools in question.

I have been referred to the decision of this Court in *Wijesinghe v. The Mayor of Colombo*<sup>1</sup> as showing that mandamus lies to restore a person to office. It is undoubtedly good law that mandamus lies to admit a person to office of which he had never had possession or of which he has been dispossessed, but the office must be a public office. It cannot be said that the petitioner has been hitherto deprived of the proprietorship of the school, but, even if it had been so deprived, it does not appear to me that proprietorship of the schools in question amounts to the holding of public office; nor indeed does managership of an unaided school amount to the holding of such office.

The substantive relief claimed by the petitioner is an order on the respondent to refrain from acting as manager of the two schools in question, and its real grievance is the non-recognition of the alleged status of the schools as unaided schools. Such non-recognition seems to me to be essentially a matter to be questioned by an action for declaration of that status. The remedy sought by the application now before me is, in my opinion, misconceived, and I would therefore uphold the preliminary objection taken by the respondent and dismiss this application with costs.

I fix the costs payable by the petitioner at Rs. 315/-.

*Application dismissed.*

<sup>1</sup> (1948) 50 N. L. R. 87.