

1931

Present: Akbar J.

SIMON SILVA *v.* ASSISTANT GOVERNMENT  
AGENT, KALUTARA.IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS.  
ON THE ASSISTANT GOVERNMENT AGENT, KALUTARA.

*Mandamus—Local Government—Objection to names appearing on roll of electors—Duty of Government Agent—Notice to persons affected—Issue of writ—Ordinance No. 11 of 1920, s. 29 (3).*

Under section 29 (3) of the Local Government Ordinance it is the duty of the Government Agent to cause notice of objections to the names of persons appearing on the roll of electors, to be served on the persons affected.

A mandamus will not issue when it would be futile and could not be obeyed.

THIS was an application for a writ of mandamus on the Assistant Government Agent, Kalutara.

*C. V. Ranawaka* (with him *Abeywickrama*), for petitioner.

*Deraniyagala*, Acting C.C., for the respondent.

November 16, 1931. AKBAR J.—

The petitioner applies for a writ of mandamus on the Assistant Government Agent of Kalutara directing him to hold an inquiry into certain objections raised by the petitioner to the names of 117 persons appearing in the roll of voters under section 29 of Ordinance No. 11 of 1920. It appears that the Assistant Government Agent caused a notice to be issued under section 29 of the Ordinance indicating that on August 24, 1931, he would inquire into all claims for the insertion of names in the electoral roll for division No. 1 of the town of Panadure and also that he would inquire into all objections to the names already entered the roll for the electoral area having been prepared and published on July 17, 1931. On August 12, 1931, petitioner submitted written objections to the names of 117 persons appearing in the roll. On August 24 the Assistant Government Agent made order that as 7 clear days' notice had not been given as required by sub-section (3) of section 29, he could not inquire into these objections. There is nothing in the papers submitted to me to show that any one of the 117 persons raised any objection to the hearing of the petitioner's case. The affidavit of the petitioner states that this preliminary objection was taken by Mr. D. S. de Fonseka, one of the contesting candidates for the ward. I cannot understand why the Assistant Government Agent did not inquire from any of these 117 persons whether they had 7 days' notice or not, because the written objections to the 117 persons having been submitted on August 12

there was an interval of nearly 11 days between that day and August 24. The Assistant Government Agent has explained in an affidavit that the objections were submitted at 4 P.M. on August 12 and that August 13 being a public holiday he forwarded the objections to the Mudaliyar only on August 14 and that the objections reached the Mudaliyar on August 15 which day was a Saturday. The Mudaliyar explains in a separate affidavit that on August 15 he was away on duty and only returned home at 6 P.M. that day, and that as August 16 was a Sunday he handed the notices to the Vidane Muhandiram for service on August 17. In the opinion of the Assistant Government Agent service after August 17 would not give 7 clear days' notice to the persons objected to and that was the reason why he upheld the objection of Mr. D. S. de Fonseka to the hearing of the petitioner's objections. Mr. Deraniyagalla argues that under sub-section (3) of section 29 there is no legal obligation on the Assistant Government Agent to cause notices to be served at all and, that being so, a writ of mandamus cannot issue from this Court on the Assistant Government Agent. It is true that the sub-section is ambiguously worded. The sub-section is as follows:—"No objection shall be entertained unless the objector shall give seven days' notice in writing of his objection through the Government Agent to the person against the insertion of whose name in the roll the objection is to be taken." This sub-section has not been modelled on any section that I know of in the English law, but I think the clear implication was that the Assistant Government Agent was to serve the notices in the best manner that he could adopt in the circumstances. Under section 227 of the Ordinance there is provision made for the service to be effected through the post. The section states that the service may be effected by personal service on the 117 persons or by sending the notices by registered letters and in such event the law provides that the notices should be deemed to have been served at the time the letters containing the same would be delivered in the ordinary course of post and in proving such service it would be sufficient to prove that the notices were properly addressed and put into the post. The petitioner states in his affidavit that this was the course adopted on a previous occasion. I cannot understand why the Assistant Government Agent did not adopt this obvious method of service because the objections being delivered on August 12, there was ample time for service by the post before the inquiry came on, on August 24. The whole question I have to decide is whether there was a legal obligation on the Assistant Government Agent to cause notices of objections to be served on the persons affected or whether he could decline to cause such service to be effected or adopt his own method to serve these notices. The Assistant Government Agent should have realized that the time though ample was somewhat short in view of a public holiday and a Sunday intervening. The very fact that the Assistant Government Agent accepted these notices for service when they were handed over to him on August 12 shows that he recognized that there was a legal obligation on him to cause these notices to be served. In my opinion there was this legal obligation not only implied in the sub-section but recognized by the Assistant Government

Agent on the occasion in question and also by the practice from the time this Ordinance came into force. The other point I have to decide is whether it will lead to any good to issue the writ at all. If a writ of mandamus is to be issued now compelling the Assistant Government Agent to hear the objections after giving 7 days' notice in writing to the 117 persons, I cannot see how the election can be held without violating the time limits mentioned in the Ordinance. Under section 32 of the Ordinance the election has to take place either in November or in December. The date of election has already been fixed for November 28 but this can be varied under section 11A of the Interpretation Ordinance, No. 21 of 1901, and the date can be refixed for any day in December. But even then there are other time limits fixed by sections 29 and 30. If a writ were to be issued now, compelling the Assistant Government Agent to hear the objections, he must refix the date of the inquiry for some date after this writ is issued; but by section 29 (1) (b) the notice fixing the date of the inquiry cannot be later than 2 months before the holding of the election. Even if the election is to be held on the last day of December, it is not possible for the Assistant Government Agent to fix the inquiry into the objections on a date that will leave at least a period of 2 months between the hearing of the objections and the date of the election. I cannot see how this difficulty can be got over. In view of the objection that Mr. Deraniyagala has taken it is not possible at this stage for the Assistant Government Agent without violating the provisions of the law to inquire into the objections to certify the rolls under sub-section (5) of section 29 and for the election to be held on a date to be refixed by notice under section 30 of the Ordinance. Mr. Ranawaka argues that under section 38 it is open to the Governor in Executive Council to make rules under Chapter III. to meet this difficulty. I do not think that this is possible because I have no power to order the Governor in Executive Council, neither do I think that that section applies to this particular case. A writ cannot be issued on the Governor in Executive Council for the simple reason that section 38 giving the power to the Governor in Executive Council is permissive and does not impose any obligation on that body (see *10 Halsbury*, p. 97, and the cases cited therein). This is a difficulty which has been brought on by the petitioner himself to some extent by his delay in applying to this Court for a writ. So that it seems to me that even if a writ were to issue it will not be possible for the Assistant Government Agent to carry out the terms of the writ without violating the other section of the Ordinance. In the case of *Wright v. Eastbourne Corporation*<sup>1</sup>, Smith L.J. stated as follows:—"If it is in contravention of a public Act of Parliament, it seems to me obvious that the Queen's Bench Division ought not to grant a mandamus. A mandamus ought not to go when it would be futile and could not be obeyed." On these grounds I am afraid the application must be refused, but I make no order as to costs.

*Application refused.*

<sup>1</sup> *83 Law Times Report*, p. 338.