

1950

Present: **Basnayake J.**

AMUGODAGE JAMIS, Petitioner, and BALASINGHAM *et al.*,
Respondents

S. C. 573—In the matter of an Application for a Writ of Mandamus under section 42 of the Courts Ordinance on C. Balasingham, Elections Officer, Kalutara District

Writ of mandamus—Non-performance of duty—Must there be a demand and a refusal before application for mandamus is made?—Local Authorities Elections Ordinance, No. 53 of 1946—Sections 17 and 83 (a)—Requirement of notice must be strictly complied with.

The rule that before the Court will grant a *mandamus* it must be convinced that there has been a demand made by a party having a right to make it for the performance of the duty sought to be enforced and a refusal to perform it by the party against whom the application is made can only apply to duties of a private nature and not to those which affect the public at large.

Where a statute enjoins a duty in imperative language, it must be performed in the way the law requires it to be done, and it is not open to anyone to substitute any other method of performance even though such method may serve the purpose which the Legislature had in view. The publication, therefore, of the notice prescribed in section 17 of the Local Authorities Ordinance is a vital step in the preparation for an election and omission to publish it in the prescribed manner is fatal. Further, the publication of the notice must, where necessary, be in English, Sinhalese and Tamil—Section 83 (a).

Where the time prescribed by statute for the performance of a duty which has not been performed has passed, the Court when granting a *mandamus* has power to appoint a date for its performance.

THIS was an application for a mandate in the nature of a writ of *mandamus* on the Elections Officer of the Kalutara District and the Returning Officer for Ward No. 7 of the Town Council of Alutgamwidiya.

H. V. Perera, K.C., with *E. B. Wikramanayake, K.C.*, *H. W. Jayewardene, G. T. Samarawickreme* and *M. S. Abdullah*, for the petitioner.

Walter Jayewardene, Crown Counsel, with *B. C. F. Jayaratne*, Crown Counsel, for the 1st and 2nd respondents.

D. S. Jayawickrama, for the 3rd respondent.

G. E. Chitty, with *Tissa Gooneratne*, for the 4th respondent.

Cur. adv. vult.

November 29, 1950. BASNAYAKE J,—

This is an application for a mandate in the nature of a writ of *mandamus* on the Elections Officer of the Kalutara District (hereinafter referred to as the 1st respondent) and the Returning Officer (hereinafter referred to as the 2nd respondent) for Ward No. 7 of the newly constituted Town Council of Alutgamwidiya (hereinafter referred to as the Town Council). The 3rd and 4th respondents to this application are persons who have been nominated as candidates for election to that ward. The 1st and 2nd

respondents are officers appointed to their respective offices under sections 4 and 28 of the Local Authorities Elections Ordinance, No. 53 of 1946 (hereinafter referred to as the Ordinance).

The petitioner alleges that the 1st respondent has failed to comply with the requirements of the Ordinance and prays that a mandate in the nature of a writ of *mandamus* be issued on him ordering him—

- (a) to prepare electoral lists in conformity with law after giving due notice for Ward No. 7, and
- (b) to take all necessary steps for the purpose of holding a due and proper election of a member to represent Ward No. 7.

Shortly, the material facts are as follows:—

By order published under the Town Councils Ordinance, No. 3 of 1946¹ a new Town Council under the name of "Alutgamwidiya Town Council" was constituted. Its term of office was to commence on the 1st of January, 1951. The entire territorial area of the Town Council was carved out of the village area of the Beruwal-Alutgam and Malewan Baddas. By order under the Village Communities Ordinance the limits of the village area were accordingly altered with effect from January 1, 1951².

In order that elections might be held for the Town Council steps were taken for the preparation of electoral lists and their certification. Thereafter nominations for the seven wards into which the Town Council was divided were received on November 3, 1950, and the 3rd and 4th respondents were nominated for Ward No. 7. On November 11, 1950, the petitioner filed the present application.

Learned counsel for the Crown raised the following preliminary objections to the hearing of this application:—

- (1) that there was unreasonable delay in making the application,
- (2) that there was no demand for the performance of the duty which the petitioner alleges was not performed, and
- (3) that even if there had been non-compliance with the requirements of the statute, no *Mandamus* should issue as the steps taken were in keeping with the spirit of the Ordinance.

It is settled law that the Court will refuse a *Mandamus* where there has been unreasonable delay in applying for it, but in this instance the petitioner has in my view asked for relief within a reasonable time, for the last of the impugned steps was taken on October 7, 1950. I am therefore not prepared to hold that there has been delay.

The rule that before the Court will grant a *Mandamus* it must be convinced that there has been a demand made by a party having a right to make it for the performance of the duty sought to be enforced and a refusal to perform it by the party against whom the application is made, is, in my opinion, not one that applies to all cases³. In my view that rule can only apply to duties of a private nature and not to those which affect the public at large. In the former class of cases a demand and a refusal must precede an application for relief by *Mandamus*. In the latter, a

¹ Gazette No. 10,085 of March 17, 1950.

² Gazette No. 10,138 of August 18, 1950.

³ Halsbury's Laws of England, Vol. 9 p. 771, sec. 1307.

literal demand and refusal are unnecessary¹. The instant case falls into the latter class of cases. It is clear from the affidavits of the 1st and 2nd respondents that such a demand even if it had been made would have been futile.

In regard to the third objection I find myself unable to accede to learned Crown Counsel's submission that what he calls a substantial compliance of section 17 is sufficient. Where a statute enjoins a duty in imperative language, it must be performed in the way the law requires it to be done, and it is not open to anyone to substitute any other method of performance even though such method may serve the purpose the legislature had in view.

In the instant case the Elections Officer was under a duty to exhibit the notice required by section 17 of the Ordinance at the office of the Local Authority of the area². The Local Authority of the area which is to come under the aegis of the Town Council on January 1, 1951, was at the relevant date the Village Committee of the Beruwal-Alutgam and Malewan Baddas. The notice should therefore have been exhibited at the office of that Village Committee and nowhere else. It is admitted that the notice was not exhibited at the office of the Village Committee. The statute has therefore not been obeyed by the Election Officer. The publication of the notice prescribed by section 17 is a vital step in the preparation for an election and omission to publish it in the prescribed manner is fatal. It was also submitted that even the notice exhibited at the office of the Muslim Educational Welfare Society, which was a place selected for exhibiting the notice required by section 17, was not published in the Tamil language. It appears from the affidavits—

- (1) that the majority of the inhabitants of the area within the Town Council are Muslims,
- (2) that the language of the Muslim inhabitants is Tamil,
- (3) that many of them know Sinhalese, and
- (4) that in no school in the area is Sinhalese taught.

In this state of the facts I am of opinion that the notice required to be published under the Ordinance should be published in English, Sinhalese, and Tamil, as section 83 (a) requires that it should be published in English and in accordance with the requirements of the area to which it relates in Sinhalese or in Tamil or both in Sinhalese and in Tamil. It is clear from the facts of this case that the requirements of the area in question are that the notices should be published both in Sinhalese and in Tamil.

It is settled law that where the time prescribed by statute for the performance of a duty which it is alleged has not been performed has passed, the Court when granting a *Mandamus* has power to appoint a date³ for its performance. In the instant case section 13 requires that the preparation of the electoral lists shall commence on the 1st of May of the year preceding the year in which the term of office of the members to be elected at the general election is due to commence. As far as the electoral lists are concerned there is no complaint against their preparation except that electoral lists in Tamil have not been prepared.

¹ *Shortt on Mandamus* p. 249.

² Section 83 (b) of Ordinance.

³ *Halsbury's Laws of England*, Vol. 9, pp. 752, 753—Sec. 1281. *Ibid.* p. 748—sec. 1273.

I therefore allow the application for a mandamus and order that the steps prescribed in Part III of the Ordinance be taken as follows:—

On 7th December, 1950—the step prescribed by section 17.

On 20th January, 1951—the step prescribed by section 23 (4).

On 24th January, 1951—the step prescribed by section 27 (1) (a).

On 10th February, 1951—the step prescribed by section 29.

On 3rd March, 1951—the step prescribed by section 39.

I also order the Elections Officer to do all other things that may be necessary for the purpose of holding the first election of members of the Alutgamwidiya Town Council.

The date fixed in *Gazette* No. 10,085 of March 17, 1950, as the date on which the term of office of the Alutgamwidiya Town Council shall commence and the date fixed in *Gazette* No. 10,138 of August 18, 1950, as the date on which the limits of the Beruwal-Alutgam and Maiewan Baddas' village area should be redefined need alteration. I have no doubt that the executive will take necessary action to alter those dates.

The 1st and 2nd respondents will pay the petitioner's costs of this application, which I fix at four hundred guineas.

Application allowed.
