1967 *Present :* **T. S. Fernando, A.C.J., and Alles, J.**

G. B. DE SILVA, Applicant, *and* E. L. SENANAYAKE and 2 others, Respondents

S.C. 185 of 1967—Application for a mandate in the nature of a Writ of Mandamus on the Mayor of Kandy and others

*Municipal Council—General meeting for transaction of business—Notice of motion given by member—Scope of Mayor's power to refuse to place the motion on the agenda—Remedy of member—*Mandamus*—By-law 12 (1) (2)—Municipal Councils Ordinance (Cap. 252), ss. 17, 19, 20, 40 (1) (r).*

[1] *(1877) 2 Q. B. D. 575 at 578.*

[2] *(1959) 1 All E. R. 95.*

Prior to the date when a statutory monthly general meeting of the Municipal Council of Kandy was due to be held on 30th April 1967, the applicant, who was a member of the Council, gave notice in writing to the Commissioner that he would then move the following motion :—

" In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967. "

The notice of the motion was given as required by by-law 12 (1) of the Council's by-laws. By-law 12 (2) reads as follows :—

" All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda."

The applicant's motion was not included in the agenda for the meeting of 30th April 1967 for the reason that before the agenda was prepared the Mayor (the 1st respondent) had ruled the motion out of order. On the present application for *mandamus* to compel the inclusion of the motion in the agenda, it was claimed on behalf of the Mayor that he had an absolute power of ruling any motion out of order.

Held, that, inasmuch as the motion was one raising a general question of financial policy, section 40 (1) (*r*) of the Municipal Councils Ordinance conferred on the applicant the right to give notice of the motion. Where a member has a right to give notice of a motion, by-law 12 (2) cannot be construed so as to frustrate the exercise of the power conferred by the statute itself. By-law 12 (2) does not vest in the Mayor an absolute power or discretion to rule out motions. By making the ruling complained of in the present case, the Mayor failed or refused to perform his statutory duty, and *mandamus* was the appropriate remedy. The remedy could be granted although the date of the meeting had already passed, if the motion could be brought forward at a subsequent meeting of the Council and could still serve some purpose.

Held further, that section 20 of the Municipal Councils Ordinance did not provide an alternative remedy.

APPLICATION for a writ of *mandamus* on the Mayor of Kandy.

Felix R. Dias-Bandaranaike, with *Nihal Jayawickrama*, for the applicant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte* and *N. S. A. Goonetilleke*, for the respondents.

Cur. adv. vult.

November 10, 1967. T. S. FERNANDO, A.C.J.—

The applicant, a member of the Municipal Council of Kandy elected to represent Ward No. 11 thereof, seeks a mandate in the nature of a writ of mandamus from this Court to compel the inclusion in the agenda of the first statutory monthly general meeting of the Council to be held following the determination of this application of a motion notice of which had been duly given by him, but which he complains was unlawfully excluded from the agenda of the general meeting held in April, 1967.

The respondents to this application (filed within a fortnight of the alleged unlawful exclusion) are : (1) The Mayor, (2) The Municipal Commissioner, and (3) The Secretary of the said Municipal Council. The duty of including a motion in the agenda falls in terms of the Council's by-laws on the Municipal Commissioner, but the mandate is sought primarily on the Mayor for reasons which become apparent on an examination of the relevant facts and of the by-laws governing the question in issue. No relief is sought as against the Commissioner and the Secretary who, it has been stated, have been made parties so that they may have notice of the application for this mandate. A previous decision of this Court, *Cooray v. Grero* [1], has ruled that in similar circumstances the remedy should be sought against the Mayor and not on an executive officer of the Council who is bound to carry out the Mayor's orders.

Section 17 of the Municipal Councils Ordinance (Cap. 252) enacts that there shall be twelve general meetings of each Municipal Council in every year for the transaction of business. One such meeting of the Kandy Municipal Council was due to be held on April 30, 1967. By-law 12 (1) of the Council's By-laws—proclaimed in *Gazette* No. 8,987 of August 14, 1942—requires notice of motion to be given in writing, signed by the member giving the notice and addressed to the Commissioner. Notice as required by this by-law was duly given by the applicant on April 16, 1967, and the text of his motion is as set out hereunder :—

> " In view of the precarious position of its finances, this Council resolves that no money should be expended out of the Municipal Fund for holding civic receptions, civic lunches, tea parties and dinners except out of the money allocated for such expenditure in the budget of 1967."

It would appear from the affidavits that in the 1967 budget of this Council a sum of Rs. 5,000 had been allocated for " civic receptions ", and a further sum of Rs. 5,000 as " entertainment allowance " of the Mayor and to meet the cost of receptions and refreshments at meetings. Before these sums were exhausted, the Council had at the general meeting held on March 27, 1967 passed a supplementary estimate sanctioning certain expenditure aggregating some Rs. 6,050, apparently already incurred on account of civic receptions, entertainment and attendance of the Mayor at a Conference abroad.

[1] *(1954) 56 N. L. R. 87 at 90.*

The motion set out above of which notice, as already stated, had been duly given was not included in the agenda for the meeting of April 30, 1967 for the reason that before the agenda was prepared the Mayor had ruled the motion out of order. It is claimed on his behalf that he had an absolute power of ruling any motion out of order. This claim necessitates an examination of the source of the alleged power, which is said to be by-law 12 (2), reproduced below :—

> " 12 (2)—All questions or motions of which notice has been received by the Commissioner not less than three days before a meeting (exclusive of Sundays and public holidays) shall, unless the Mayor rules the questions or motions out of order, be included in the agenda. "

The applicant contends that his motion was not one which the Mayor had power to rule out of order. I agree with the observation of Swan J. in *Cooray v. Grero* (*supra*) that, if the motion is one which a councillor had a statutory right to move, there is a duty cast on the Mayor to place such a motion on the agenda unless it is out of order for the reason stated in that case which need not concern us here on this application. Some attempt was made by Sinnetamby J. in the later case of *Wijesuriya v. Moonesinghe* [1] to illustrate what kind of motion may be out of order. Illustrations can, of course, never be exhaustive as the circumstances in which the question can arise may be legion. He did, however, point out that even a motion which a councillor ordinarily has a right to move may be out of order for want of the requisite notice or on account of its being couched in improper language or being unintelligible, unlawful or illegal. No reason is advanced here as a justification for ruling the motion out of order save the plea of absolute power or discretion. A court must surely be slow to recognise the existence of such a power in an officer elected to head a local body exercising powers affecting the public and functioning apparently within a democratic framework.

The applicant points to section 40 (1) (*r*) of the Municipal Councils Ordinance which confers upon the Council for the purpose of the discharge of its duties thereunder the power to bring forward general questions connected with the Municipal Fund. The exercise of this power of the Council can normally be invoked only by some one or more of the councillors bringing forward the question for discussion in the Council. The motion we are concerned with in this case is one raising a general question of financial policy, and ordinarily no question can be more germane to a prudent administration of the revenue of the Council which the councillors are under an implied duty to foster. There is some suggetion in the Mayor's affidavit that the motion has been induced by malice and with a desire to ventilate private grievances, but one fails to see any reason for these suggestions in the text of the motion which on its face appears to be entirely proper. We entertain no doubt that any chairman of a meeting has inherent power to prevent a speaker making use of an occasion which has lawfully presented itself to him to make some improper or illegal use of it to give vent to his malice. There was,

[1] *(1959) 64 N. L. R. 180 at 183.*

however, no justification for a premature fear which could not fairly have arisen from the text of the motion without more. If, as I hold, the applicant had the right to give notice of this motion, then I agree with the contention on behalf of the applicant that the by-law cannot be construed so as to frustrate the exercise of the power conferred by the statute itself. Correctly interpreted, by-law 12 (2) does not, in my opinion, vest in the Mayor an absolute power or discretion to rule out motions. In the instances in which the discretion is available and has been exercised, even where it may have been exercised erroneously, this Court will not ordinarily grant the remedy of *mandamus*. Subject, however, to the exceptional cases of which some indication has been given in the judgment of Sinnetamby J. referred to above, I am of opinion that the Mayor has no discretion to rule out of order motions of which a member has a statutory right to give notice. The motion we are concerned with here was one such, and there was neither power nor ordinarily a discretion to rule it out of order. By making the ruling complained of in this case the Mayor has failed or refused to perform his statutory duty, a duty he owed to the applicant on behalf of the ratepayers of Kandy, and *mandamus* is the appropriate remedy. It is pertinent to point out that Basnayake C.J. in *Mohamed v. Gopallawa* [1], in ordering by way of *mandamus* that a certain special meeting of a Municipal Council which had been declared closed by its chairman be continued, stated as follows :—

> "In view of the chairman's wrong decision on the point of order that was raised he failed to discharge his duty to give the meeting an opportunity of deciding whether or not the resolution should be confirmed. The chairman by an erroneous decision on the point of order could not disable himself from performing the duty enjoined by law of transacting the business of the meeting at which he presided."

As a reason against the issue of a writ of *mandamus* in this case, learned counsel for the respondents advanced the argument that the local authority is master of its own house and that this Court will not seek to review the correctness of what is essentially a domestic question. He cited certain University cases, but it is sufficient to point out that the bodies there concerned with were not public bodies in the sense local authorities are and that the jurisdiction to compel by mandamus the performance by local authorities of statutory duties has been exercised in this Country by this Court for long years.

Another ground advanced for a refusal of the remedy sought is that an alternative remedy was available. The contention is that if the applicant was aggrieved by his motion being ruled out of order *in limine* he could have brought it before the meeting by obtaining the permission of the Council as indicated in section 20 of the Ordinance. Counsel for the applicant referred to the proceedings as indicating that the Mayor who presided at the meeting of the Council held on April 30, 1967 had refused to allow the applicant an opportunity to obtain the permission of the

[1] *(1956) 58 N. L. R. 418 at 124.*

members present at the meeting to move his motion which had been ruled out of order. We did not find it possible to agree with learned counsel that the minutes of the proceedings disclosed that such permission had been sought. We must therefore decide this application on the basis that there was no attempt made to invoke the provisions of section 20 of the Ordinance. It may be mentioned that De Kretser J. in *Goonesinghe v. The Mayor of Colombo* [1] and Swan J. in *Cooray v. Grero* (*supra*) have both stated that the procedure indicated in sections similar to section 20 provides an alternative remedy. Sansoni J. in *Seenivasagam v. Kirupamoorthy* [2] and again in *Sameraweera v. Balasuriya* [3], however, did not think that this was a remedy at all because it was conditional on the party aggrieved obtaining the permission of the Council. Sinnetamby J., who considered all the previous views in *Wijesuriya v. Moonesinghe* (supra) preferred to adopt the view taken by Sansoni J. As he put it, " in respect of a resolution which is not out of order a member has a right, even if the majority of the other members of the council are against it, to have it discussed at a meeting of the Council, but under rule 2 (*b*) he cannot even move it unless the majority permit him to do so ". The true construction of the relevant provisions of the Ordinance appears to be that while section 19 which requires the Mayor to cause notice of the business to be transacted at every general or special meeting or adjourned meeting (other than a special meeting convened by the Commissioner under section 18 (2)) to be served on each councillor recognises the right of the individual councillor to have his motions discussed, section 20 recognises the right of the Council (which in practice is the majority of the councillors) to discuss business even though not specified in the agenda. I agree with the contention of learned counsel for the applicant that where a councillor has a statutory right to bring forward a question for discussion, he has a duty to give valid notice of it in the form of a motion, and that once that notice has been so given the Mayor is under a duty to have it inscribed on the agenda. When a motion has been thus inscribed on the agenda, the Council has no right to stop a discussion. It is therefore apparent that section 20 does not provide an alternative remedy. In these circumstances it is unnecessary to consider whether, even if there was an alternative remedy, such remedy was " equally convenient, beneficial or effectual ". Nor should one fail to take note of current practice in two-party assemblies where the chances of obtaining the permission of the majority to bring up for discussion a motion already ruled out by the Mayor before notice of meeting had been served cannot ordinarily survive beyond the realms of theoretical possibility.

I would for the reasons outlined above grant the remedy prayed for by the applicant. As Swan J. said in *Cooray v. Grero* (supra), a writ of mandamus, if available, could be issued although the date of the meeting has already passed. We were informed that a monthly meeting of this Council is due to be held towards the end of this month, and as the budget year has not yet ended, the motion could still serve some purpose. It

[1] *(1944) 46 N. L. R. 85.* [2] *(1954) 56 N. L. R. 450 at 454.*
[3] *(1955) 58 N. L. R. 118 at 120.*

is well to remember that the democratic tradition is better ensured by not denying to the minority the opportunity of ventilating grievances which the majority may regard as but fancied. Argument is still a potent medium capable of converting honest sceptics.

Let, therefore, a mandate in the nature of a writ of *mandamus* issue forthwith directing the 1st respondent to include the motion in question on the agenda of the first statutory general meeting of the Municipal Council of Kandy to be held following the date of this judgment. The 1st respondent must pay to the applicant his costs of this application.

ALLES, J.—I agree.

Application allowed.