

1945

Present: Wijewardene J.

CARRON and THE GOVERNMENT AGENT, WESTERN PROVINCE.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON THE GOVERNMENT AGENT, WESTERN PROVINCE, TO HOLD A FRESH ELECTION FOR DIVISION 1, KALUBOVILA EAST OF THE DEHIWALA-MOUNT LAVINIA URBAN COUNCIL.

Writ of Mandamus—Urban Council election—Nomination of candidates—Permission given to nominated candidate to withdraw—Alleged irregularity—Failure to make person elected respondent.

Where an application was made for a Writ of *Mandamus* to set aside an election to an Urban Council and to hold a fresh election on the ground of alleged irregularities committed by the Returning Officer with regard to the nomination of candidates and to the permission granted to one candidate to withdraw from the election,

Held that the failure to make the member elected a respondent to the application was a fatal irregularity.

In the Matter of an Application of John Neill Keith for a Writ of *Mandamus* on the Government Agent, Western Province (3 S. C. C. 12) followed.

THIS was an application for a Writ of *Mandamus*.

E. B. Wikremanayake (with him *H. Wanigatunge*), for the petitioner.

H. H. Basnayaka, Acting S. G. (with him *H. A. Wijemanne, C.C.*), for the respondent.

Cur. adv. vult.

May 30, 1945. WIJEWARDENE J.—

This is an application for a Writ of *Mandamus* in connection with the by-election held on July 22, 1944, in respect of Kalubowila East Ward No. 1 of the Dehiwala-Mount Lavinia Urban Council.

The respondent published on May 29, a notice under section 10 of the Urban Councils Ordinance requiring the delivery of the nomination papers on July 3, and intimating that a poll would be taken on July 22, if more than one candidate was nominated.

On July 3, nomination papers were delivered on behalf of three candidates—Mr. T. V. K. Carron (petitioner), Mr. N. W. de Costa, and Mr. S. de S. Jayasinghe. The Additional Assistant Government Agent, Colombo, who received the nomination papers upheld an objection against the nomination of Mr. de Costa. He declared the other two candidates duly nominated and issued on July 4, the requisite notice under Rule 1 of the Rules in the First Schedule to the Ordinance with regard to the poll on July 22.

On a petition of Mr. de Costa this Court made order on July 17, directing the Assistant Government Agent, Colombo, "to accept the petitioner's (Mr. de Costa's) nomination paper and declare him to be a candidate for election" (*vide* judgment reported at page 476 of Volume 45 of the New Law Reports). On receipt of that order the Assistant Government

Agent gave notice immediately to all the three candidates stating that he would accept the nomination paper of Mr. de Costa on July 18, at the Urban Council Office.

On July 18, the Assistant Government Agent accepted the nomination paper of Mr. de Costa in the presence of the three candidates. Mr. de Costa, thereupon, asked for a postponement of the poll and the Assistant Government Agent replied he had no authority to do so. Then Mr. de Costa gave a writing withdrawing from the candidature and stating that the Assistant Government Agent's refusal to give the postponement asked for was the reason for his withdrawal. The Assistant Government Agent issued immediately under section 11 (4) of the Ordinance a written notice announcing the withdrawal of Mr. de Costa.

At the election on July 22, ballot boxes were provided only for the petitioner and Mr. Jayasinghe. The poll resulted in 963 votes being cast for Mr. Jayasinghe and 641 votes for the petitioner.

On the above mentioned facts the petitioner states that the election of Mr. Jayasinghe is void. He contends (a) that Mr. de Costa should not have been allowed to withdraw on July 18, as a candidate could withdraw under section 11 (4) only "before the hour specified in the notice under section 10 as the time limit for the delivery of nomination papers." which in this case was 10.30 A.M. on July 3, and (b) that, therefore, ballot boxes should have been provided at the poll for the reception of ballot papers in favour of Mr. de Costa, as required by Rule 3 of the Rules in the First Schedule of the Ordinance. He pleads that he has "been gravely prejudiced" by the failure to place such ballot boxes. He explains as follows in the affidavit the manner in which he has been prejudiced:—

Paragraph 9.—"I am a Burgher and a Christian and the said Mr. Jayasinghe is a Sinhalese and a Buddhist. I state that the racial and religious cry was raised in the said electorate and that my defeat at the said election was due to the said cause".

Paragraph 10.—"The said Mr. de Costa is also a Sinhalese and a Buddhist and if the said Mr. de Costa's ballot box had been placed in the Polling Booth the votes of the Sinhalese Buddhists would have been divided. I therefore state that I have been gravely prejudiced by the act of the said Presiding Officer".

It was admitted at the argument before me that Mr. Jayasinghe has accepted and acted in the office of a member of the Urban Council. It was also admitted that the petitioner did not raise any objection until August 4, when he forwarded a written objection to the respondent under section 19 of the Ordinance. The respondent replied to that letter that he saw no reason to declare the election null and void.

It is argued for the respondent on the authority of the *Application for a Writ of Mandamus on the Chairman of the Colombo Municipal Council*¹ that a writ of *mandamus* does not lie in the present case.

The order of this Court made on July 17, directed the Assistant Government Agent to accept the nomination paper of Mr. de Costa. There was no further direction given in the order as to what should be done

¹ (1913). 18 N. L. R. 97.

after the acceptance of that paper. In the absence of any express provision in the Ordinance the Assistant Government Agent construed the Order of this Court as extending the time limit fixed by the original notice under section 10 for the delivery and acceptance of the nomination paper of Mr. de Costa and proceeded to act as if July 18 was the date specified in that notice. In accordance with that view the Assistant Government Agent permitted Mr. de Costa to withdraw immediately after he delivered the nomination paper. In the special circumstances of this case I am not prepared to hold that the view taken by the Assistant Government Agent was wrong.

Even if a Writ of *Mandamus* could issue in the present case there is a serious objection to the present application. The petitioner wants to have the election declared void but has failed to make Mr. Jayasinghe a party respondent. The petitioner's Counsel did not at any stage move to have him added as a party. The application must fail on that ground also (vide *In the matter of an application of John Neill Keith for a Writ of Mandamus on the Government Agent, Western Province*¹).

There is moreover no evidence before me to show that the petitioner has been "gravely prejudiced" or prejudiced in any manner by Mr. de Costa being permitted to withdraw on July 18. I am unable to draw from the mere statement of belief referred to in the affidavit of the petitioner any inference that some of the voters who voted for Mr. Jayasinghe would have voted for Mr. de Costa if a ballot box was placed for Mr. de Costa and that it would have resulted in his being returned as a member for the Ward.

I discharge the rule with costs.

Rule discharged.
