1927.

Present: Lyall Grant J.

In the Matter of the Application of JAMES DE SILVA WIMALASURIYA for a Writ of *Mandamus* on the Chairman, Urban District Council, Matale.

Mandamus—*Suspension from office—Restoration before issue of writ - Naming of member—Ordinance No. 11 of 1920, s. 25.*

A writ of *mandamus* will not be granted to restore a person to an office of which he has been temporarily deprived and to which he has been restored by the effluxion of time before the writ is issued.

APPLICATION for a writ of *Mandamus* against the Chairman of the Urban District Council, Matale, by the petitioner who is a member of the Council. On February 5, 1927, at a meeting of the Council at which the petitioner was present and took part in the deliberations, the Chairman ruled that the language used by the petitioner in reference to the subject under discussion was objectionable. The chairman called upon him to explain or withdraw. The petitioner offered an explanation by which he maintained that the remark was not objectionable. The chairman held that the explanation was not satisfactory and called upon the petitioner to withdraw the remark, whereupon the petitioner left the meeting. The chairman then moved that the petitioner be suspended from the service of the Council for (*a*) disregarding the authority and ruling of the chairman, (*b*) abuse of the rules for the conduct of business of the Council. The motion was carried and the petitioner was suspended.

Keuneman (with *M. C. Abeywardene*), for petitioner.—The chairman could not act under section 22 in the light of the provisions of section 20. In section 20 the words themselves must be objectionable. If there is an explanation the chairman's peremptory powers are suspended.

The chairman cannot suspend the petitioner after he had left the hall. The Chairman has not followed Parliamentary Procedure. Under section 24 the chairman must be shown to have authority. There should have been a definition of the offence of "disregarding the authority of the chair." The member was not "named" (see *Erskine May on Parliamentary Procedure*). The chairman has exercised his discretion upon a wrong principle. He has been influenced by extraneous considerations which he ought not to have taken into account.

E. W. Jayewardene, K.C. (with *Navaratnam*), for respondent.—The writ should have been applied for against the corporation and not the chairman see *Ordinance No. 11 of 1920, ss. 9 and 16 : Tapping*

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on Mandamus, pp. 17, 29, 317: re Bristol and North Somerset Railway Company [1]). The granting of a writ would be futile in effect as the suspended member's period of suspension terminates today (see *Tapping*).

The Chairman had a discretion which he is empowered to exercise (*Short on Mandamus* [2]; *Rex v. Board of Education* [3]; *Hals, 95 and 96*).

March 9, 1927. LYALL GRANT J.—

This is an application for a writ of *mandamus*. The petitioner is a member of the Urban District Council of Matale and the respondent is the Chairman of the Council.

On February 5, 1927, the petitioner was present at a meeting of the Council. Part of the business of the Council was the appointment of a sub-committee to deal with the question of public latrines serving private tenements. While this subject was under discussion the petitioner made a remark to which exception was taken by another member. On the precise nature of this remark, the petitioner and respondent are at issue.

According to the account given by the respondent, which is embodied in the minutes of the meeting, the petitioner made the remark "Put in Sollamuttu" with reference to the composition of the committee. Mr. Gopalawa rose to a point of order.

The Chairman ruled that the language used was objectionable and that the remark under the circumstances under which it was uttered was undignified and insulting to the Council.

The minutes state that Sollamuttu is an illiterate immigrant Indian cooly who does conservancy work for the Council and that the tone and the manner in which the remark was made was derisive and contemptuous. The chairman called upon Mr. Wimalasuriya to explain or withdraw. Mr. Wimalasuriya offered an explanation by which he maintained that the remark was not objectionable.

The Chairman held that the explanation was not satisfactory and called upon Mr. Wimalasuriya to withdraw the remark. The petitioner declined to do so and left the meeting.

The chairman then informed the Council that the member had to be dealt with under by-law 22 and moved "that Mr. Wimalasuriya be suspended from the service of the Council for (*a*) disregarding the authority and ruling of the Chairman, and (*b*) an abuse of the rules for the conduct of the business of the Council."

[1] *(1877) 3 Q. B. D. 10 at p. 12.*

[2] *(1887) 260.*

[3] *(1910) 2 K. B. 165.*

The motion was seconded and carried, and the petitioner was suspended.

By the terms of by-law 22 this suspension continued for one month.

The account given by the petitioner of the proceedings differs only in regard to the nature of the remark made by him and of the explanation given. He says that he suggested the name of Mr. Sollamuttu, the Council's contractor, as that of a fit and proper person to be appointed a member of the committee. He says that Sollamuttu is not an illiterate cooly but is a contractor in charge of the conservancy of the Council, and that he thought that he was an appropriate person to be appointed to this committee. He says that he explained this to the chairman when called upon and referred to section 25 of the Local Government Ordinance, No. 11 of 1920, for the purpose of showing that the committee need not necessarily consist wholly of members of the Council.

The prayer of the petitioner is for a *mandamus* directing the respondent to restore the petitioner to the office of a councillor and to permit him to exercise and perform the functions of the said office.

Two preliminary objections to the issue of a *mandamus* have been taken by the respondent:—

(1) The suspension expired on March 4, the very day on which the application was before the Court, and therefore a *mandamus* is unnecessary and nugatory.

(2) The proper respondents to the petition are all the members of the Council and not merely the chairman; the Ordinance provides that a District Council shall be a corporation with perpetual succession under a common seal and may sue and be sued by its name. (Local Government Ordinance, section 10.)

In regard to the first objection a writ of *mandamus* lies to compel the restoration of a person to an office of a public nature of which he has been wrongfully dispossessed, but I cannot find that it has ever been issued to restore a person to an office of which he has been temporarily deprived and to which he has been restored by the effluxion of time before the writ has time to issue.

Mr. Short in his book on *Mandamus and Prohibition* at page 289 says that—

> "If a person is merely suspended illegally from his office, he is still in possession, and it seems a *mandamus* to restore will not be granted, and the Court will always look more to the right of a person applying to be restored than to that of a person strictly applying to be admitted."

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In the case of the *Mayor of Durham*,[1] it was held that a mayor who was deforced from his office during his year of office could not obtain a *mandamus* to restore him to serve such time as was necessary to complete a year of service, after his year of office had expired.

This decision appears to be in accordance with the principles underlying the exercise of the Court's powers to enforce by *mandamus* a public duty. The Court will not order that to be done which either cannot be done or is already done.

It was however argued for the petitioner that the issue of the writ would not be a mere empty formality as by-law 22 under which the petitioner was suspended provides that on the first occasion suspension shall continue for one month, on the second occasion for two months, and on the subsequent occasion for three months.

If therefore the Court should declare the proceedings in regard to the suspension to be null and void, a possible future suspension would only last for a month.

I do not think that such considerations are appropriate to the remedy of *mandamus*. That remedy is provided for the purpose of compelling a certain thing to be done [in this case to restore a person to the enjoyment of his office] and for that purpose only.

I can find no instance in which it has been exercised where the petitioner can enjoy his office without the intervention of the Court. On this view the petition must be refused.

There appears to me to be great force in Mr. Jayewardene's contention that the act complained of was not the act of the chairman but that of the whole Council. I do not however express any decided opinion on this point as it is unnecessary to do so.

Into the substantial merits of the dispute it is not necessary to enter, but as they were argued at considerable length and as there appears to be doubt as to the proper interpretation of the by-laws dealing with the suspension of members, it is perhaps desirable that I should offer some *obiter dicta*.

Taking the account of the matter which is given by the chairman and which appears in the minutes of the Council, I cannot help feeling that both the Chairman and the Council have been unduly sensitive.

I do not think that so grave a penalty as suspension is intended to be put into operation, except where the conduct of a member is so grossly disorderly that no other remedy is adequate.

It is true that the decision of the Chairman on all disputed points of order is final and binding on members. That being so, it was the duty of the petitioner upon the order of the chairman to have withdrawn his remark. Although, however, the petitioner did not withdraw the remark, he withdrew from the Council meeting and offered no further interruption to its proceedings.

[1] *1 Siderfin s. 33, Eng. Rep. Vol. 82 p. 953.*

Considerable discussion turned upon the meaning to be attached to the words used in by-law 22 that the Chairman may " name " a member immediately after the offence of disregarding the authority of the chairman. Neither the Ordinance nor the by-laws explain what is meant by " naming."

The term is presumably taken from a practice which obtains in the House of Commons where the ordinary custom is to refer to members not by their names but by the constituencies they represent. In a case of disorder the Speaker calls upon the offending member by name, usually for the purpose of directing him to withdraw a remark or to apologize for his conduct.

It seems to me that the use of the expression in this by-law presupposes the presence of the member and that it is intended to bring to the member's notice that unless he complies with the order of the chairman, proceedings will be taken for his suspension.

So far as appears from the minutes of the meeting, nothing occurred which could properly be called " naming "—that is to say, it was not brought to the notice of the member that proceedings were about to be taken for his suspension.

On the cross-affidavits, however, which have been furnished and in the absence of complete evidence, it is a little difficult to say what exactly occurred.

Although, therefore, one may think that the penalty inflicted was more than was adequate to any offence that may have been committed and that the proceedings were probably irregular, it is difficult for the court to hold definitely that the Council acted *ultra vires*.

As already stated I prefer to rest my decision on the ground that in the circumstances of the case the time of suspension having expired, a writ of *mandamus* should not issue.

The respondent is entitled to his costs.

Rule discharged.