1950 *Present:* **Swan J.**

DHARMARATNE, Petitioner, *and* COMMISSIONER OF ELECTIONS *et al.*, Respondents

S. C. 305—Application for a Writ of Mandamus on the Commissioner of Elections (Local Bodies)

Mandamus—Quo warranto—*Election of village committee member—Disqualification—Proper remedy—Necessary parties—Local Authorities Elections Ordinance, No. 53 of 1946, ss. 27 (2), 28, 33.*

The fact of the disqualification of a village committee member to hold office may be urged in an application for a writ of *quo warranto* although it was not urged before the Government Agent at the time of nomination.

Where a person has been irregularly elected as a member of a local body but has not yet assumed office the proper remedy to have his election set aside is by way of *mandamus* and not *quo warranto*.

In an application for a prerogative writ to have an election held under the Local Authorities Elections Ordinance set aside, both the successful candidate and the returning officer under whose responsibility the election was held should be made parties respondent.

THIS was an application for a writ of *mandamus* on the Commissioner of Elections (Local Bodies) to require him to take steps to have a new election for a ward of the Bentota Village Committee.

Frederick W. Obeyesekere, for the petitioner.

M. Tiruchelvam, Crown Counsel, for the 1st respondent.

C. S. Barr Kumarakulasinghe, for the 2nd respondent.

Cur adv. vult.

[1] *(1895) 1 N. L. R. p. 288.* [2] *(1946) 47 N. L. R. p. 280.*

June 6, 1950. SWAN J.—

This is an application for a writ of mandamus on the Commissioner of Elections (Local Bodies) " to require him to take steps to have a new election for Ward No. 4 of the Bentota Village Committee for the election of a competent person as a member thereof in lieu of an incompetent member for the said Ward No. 4."

The elections were held on 1st June, 1949, but as the new members were not to function till 6th July, 1949, the application which was filed on 30th June, 1949, asked for a writ of mandamus on the Commissioner. The " incompetent member " whose election was challenged was made the 2nd respondent to the application.

The petitioner alleged in the petition and affidavit filed by him that as the 2nd respondent was an unknown man it was not possible, within the short time allowed to lodge objections to nominations, to object to his nomination at the appropriate time. Subsequently, on a scrutiny of the electoral list, it was discovered that the name of the 2nd respondent did not appear therein. The 2nd respondent, therefore, was disqualified and ineligible to serve as a member of the Bentota Village Committee.

In *James v. Fernando* [1] Nagalingam A.J. following the view taken by Maartensz A.J. in *Karunaratne v. Government Agent, W. P.* [2], and by Wijeyewardene J. in *Mendis Appu v. Hendrick Singho* [3], held that a writ of quo warranto lay to set aside the election of the respondent although the fact of his disqualification had not been urged before the Government Agent at the time of nomination.

One of the objections taken by the 2nd respondent was that the petitioner was not a voter and therefore had no right to make this application. The petitioner filed a counter affidavit in which he stated that he was known as Tantrige Sediris *alias* Pediris Dharmaratne and that his name appeared in the electoral list as Tantrige Pediris Dharmaratne and that there was no other person in the village known as Tantrige Pediris Dharmaratne. This was supported by a certificate from the Village Headman.

The other objections taken in the statement filed by the 2nd respondent and pressed by Counsel appearing for him at the hearing of this matter were:

(1) that the application was misconceived in law, and
(2) that the 2nd respondent had been wrongly added as a party to the application.

As the application was made before the elected members assumed office I would hold that the proper remedy was by way of mandamus and not by quo warranto. I would add that as the 2nd respondent was the person whose election was challenged he was properly made a party to the proceedings. In the case of *Goonetilleke v. Government Agent, Galle* [4], Keuneman S.P.J. held that in an application for a writ of certiorari or mandamus to set aside an election the successful candidate should be made a party respondent.

[1] *(1946) 48 N. L. R. 40.*
[2] *(1930) 32 N. L. R. 169.*
[3] *(1945) 46 N. L. R. 126.*
[4] *(1946) 47 N. L. R. 549.*

The 1st respondent has filed an affidavit stating that he was not the returning officer for the election of a member for Ward No. 4 of the Bentota Village Committee, that the returning officer was Mr. D. T. E. A. Fonseka and that he, the 1st respondent, has been wrongly made a party to these proceedings.

Learned Crown Counsel who appeared for the 1st respondent drew my attention to section 4 of the Local Authorities Elections Ordinance, No. 53 of 1946. That section authorises the appointment of:

(*a*) a fit and proper person to be or to act as the Commissioner of Elections (Local Bodies) and any other such person or each of two or more persons to be or to act as an Assistant Commissioner of Elections (Local Bodies); and

(*b*) for each district of the Island a fit and proper person to be or to act as the Elections Officer and any other such person or each of two or more such persons to be or to act as an Assistant Elections Officer.

He pointed out that under section 28 the Elections Officer of the district appointed a returning officer for each ward and that under section 33 it was the duty of the Returning Officer to deal with and decide on the validity of every objection to a nomination and that his decision was final and conclusive.

A perusal of certain other sections of the Ordinance will reveal that in the case of uncontested elections it is the Returning Officer who declares the candidate elected, and in the case of contested elections it is he who appoints presiding officers for each polling station and makes the arrangements for taking the poll and counting the votes. It is also he who declares the result of an election and reports it, through the Elections Officer of the district, to the Commissioner.

In the event of a by-election it will be the duty of the Elections Officer for the district to take the necessary steps to hold the election (see section 27 (2)).

Learned Crown Counsel's argument was that the petitioner's application should have been made either against the Returning Officer who was responsible for the last election or against the Elections Officer for the district who would have to take the necessary steps to hold a by-election in case the election of the 2nd respondent were set aside.

I think there can be no question that the 1st respondent has been improperly made a party to these proceedings.

Advocate Obeyesekere appearing for the petitioner, however, contends that as the Returning Officer is appointed by the Elections Officer who is " subject to the general supervision and control of the Commissioner " (see Section 5 (1) (*b*)) it is the last named against whom the writ would lie. The application, he submitted, should be made against the superior and not the subordinate officer. In support of his contention he cited a case reported in *5 Supreme Court Circular, page 168.* There an application was made to the Supreme Court for a writ of mandamus on the Chief Clerk of the Court of Requests, Colombo, to compel him to accept a plaint. It was held that the application should have been made against the Commissioner and not the Chief Clerk.

What had happened in that case was that the Commissioner had issued instructions to the Chief Clerk not to accept plaints containing printed matter. Apparently the Commissioner believed, mistakenly I would say, that any printed matter did not fall within the meaning of the word " written " used in section 1 of Ordinance 9 of 1859. The Chief Clerk, acting not of his own volition but on the instructions of the Commissioner, refused to entertain the plaint. Clarence J. who delivered the judgment of the Court said that as no independent duty was cast on the Chief Clerk in the matter of the acceptance and rejection of plaints, and as he had acted simply as an officer of the Court, the head of which was the Commissioner, the application was wrongly made against a subordinate officer.

The facts of that case are entirely different from those which confront us here. There can be no question that the Elections Officer of the district and the Returning Officer of a ward each has to perform functions which are quite independent of the functions assigned to the Commissioner of Elections. In this case I am of the opinion that the application, if based on good grounds, should have been made against the Returning Officer for Ward No. 4 under whose responsibility the last election was held. In any event, I am certain that the Commissioner has been improperly made a party.

No application has been made to substitute the Elections Officer of the district or the Returning Officer for the Ward in place of the 1st respondent. Had such an application been made I should have followed the ruling of my brother Nagalingam in *Jamila Umma v. Mohamed* [1] and refused it.

The rule is discharged with costs payable to the 1st respondent. I am not disposed to allow any costs to the 2nd respondent.

Rule discharged.

[1] *(1948) 50 N. L. R. 15.*