

1948

Present ; Basnayake J.

PODI SINGHO, Petitioner, and A. E. GOONESINHA, Respondent.

IN THE MATTER OF AN APPLICATION FOR MANDATE IN THE NATURE OF A WRIT OF QUO WARRANTO AGAINST A. E. GOONESINHA.

Writ of Quo Warranto—Seat in Municipal Council—Holder of public office—Parliamentary Secretary—Local Authorities Elections Ordinance, No. 53 of 1946—Section 10 (1)(d).

A Parliamentary Secretary appointed under section 47 of the Ceylon (Constitution) Order in Council, 1946, is the holder of a public office within the meaning of section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946.

APPPLICATION for a writ of *quo warranto*.

E. B. Wikramanayake, with *C. S. Barr Kumarakulasinghe* and *M. A. M. Hussein*, for the petitioner.

C. V. Ranawake, with *W. D. Goonesekera*, for the respondent.

Cur. adv. vult.

May 21, 1948. BASNAYAKE J.—

The petitioner, Sooriya Aratchige Podi Singho, is a duly registered voter for the Borella Ward of the Municipality of Colombo. At the election of members for the Municipal Council of Colombo held in December 1946, the respondent, A. E. Goonesinha, was elected a member of the Borella Ward and in January, 1947, commenced to exercise, and was at the date of this application exercising, his functions as a member of the Municipal Council. On September 20, 1947, the respondent was elected a member of the House of Representatives, and on September 26, 1947, he was appointed Parliamentary Secretary to the Minister of Labour and Social Services.

The petitioner contends that the respondent by virtue of his appointment as Parliamentary Secretary is the holder of a public office under the Crown in Ceylon within the ambit of section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946 (hereinafter referred to as the Local Authorities Elections Ordinance). The expression "public office under the Crown in Ceylon" is not defined in that Ordinance, but sub-section (7) of section 10 excludes certain offices from its ambit. They are—

- (a) a Justice of the Peace ;
- (b) a Justice of the Peace and Unofficial Magistrate ;
- (c) a Commissioner for Oaths ;
- (d) an Inquirer appointed under section 120 of the Criminal Procedure Code ; or
- (e) the holder of any other public office declared by the Governor by Order published in the *Gazette* to be an office not included in that expression.

No Order under section 10 (7) (e) has as yet been published. The only offices excluded are therefore those mentioned in paragraphs (a) to (d). It is not disputed that the respondent is a Parliamentary Secretary appointed on September 26, 1947, by the Governor under section 47 of the Ceylon (Constitution) Order in Council, 1946. The duties of a Parliamentary Secretary are to assist the Minister to whom he is Parliamentary Secretary in the exercise of his Parliamentary and departmental duties. Section 49 of the Ceylon (Constitution and Independence), Orders in Council, 1946 and 1947 (hereinafter referred to as the Order in Council), provides that a Parliamentary Secretary shall hold office during His Majesty's pleasure and that he may resign his office by writing under his hand addressed to the Governor-General. Whenever a Parliamentary Secretary is from any cause whatever unable to perform any of the functions of his office, the Governor-General is empowered to appoint a person to act in his place either generally or in the performance of any particular function. A person so appointed is deemed to be a Parliamentary Secretary as long as his appointment shall subsist. A Parliamentary Secretary is required by section 49 (4) of the Order in Council to take the official oath in accordance with the provisions of the Promissory Oaths Ordinance. That oath is in the following form :

solemnly, sincerely, and truly declare and affirm
 " I,, do _____
 swear

that I will well and truly serve His Majesty King George the Sixth in the office of Parliamentary Secretary. (So help me God.)"

It is alleged by the petitioner that the respondent, since his appointment as Parliamentary Secretary, received and continues to receive a salary of Rs. 1,000 per mensem. Counsel has not drawn my attention to any provision of the Order in Council which provides for the payment of a salary to a Parliamentary Secretary, nor have I been able to find any such provision. Section 26, which provides that, if provision is made by law for the payment to Senators or Members of Parliament of any remuneration or allowance in their capacity as Senators or Members of Parliament, the receipt by any Senator or Member of Parliament of such remuneration or allowance shall not disqualify him from sitting or voting in the Senate or the House of Representatives as the case may be, makes no provision for the payment of any remuneration or allowance to a member in his capacity as Parliamentary Secretary. As the allegation that the respondent in fact receives a salary in his capacity as Parliamentary Secretary is not denied, I shall assume that it is true.

The question I have to decide is whether the respondent is the holder of a public office under the Crown in Ceylon. In the case of *De Alwis v. Tyagarajah*¹ this very question arose in regard to a person holding the office of Manager of the Ceylon State Mortgage Bank, and it was held that his office was not a "public office under the Crown". The State Mortgage Bank is a body corporate and is governed by a special Ordinance, the Ceylon State Mortgage Bank Ordinance. It is not a department of Government. Learned counsel for the petitioner relies on the case of

¹ (1940) 41 N. I. R. 481; 18 C. L. W. 38

*In re Mirams*¹ wherein Cave J. says: "To make the office a public office, the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term." He also cited the following observations of Lawrence J. in *Rex v. Whitaker*²: "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer." I was also referred to the note of the case of the *Transvaal Provincial Administration (Smit. N. O.) v. Molokoane* in Volume 48 of the South African Law Journal at page 517, wherein certain tests laid down by the Court for determining whether a person was a servant of the Crown are stated. They are:

- (1) Who makes his appointment ?
- (2) Who pays his salary ?
- (3) Who controls his work ?
- (4) Who dismisses him ?
- (5) Who controls the buildings in which he works ?

These cases have no direct application to the question that arises for decision. The first named is a case in bankruptcy proceedings; the other two, apart from the fact that they are concerned with the meaning of expressions that do not arise for decision here, are criminal cases.

Neither counsel has cited, nor have I been able to find, any case which discusses the meaning of the expression "public office" in a context such as this. The expression "public office within the United Kingdom" in the Income Tax Act, 1918, is discussed by the House of Lords in the case of *McMillan v. Guest*³. Lord Wright says therein: "The word 'office' is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: 'A position or place to which certain duties are attached, especially one of a more or less public character.' This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular, *Great Western Ry. Co. v. Bater*⁴ where the legal construction of these words, which had been in Sch. E since 1803 (43 Geo. 3, c. 122, s. 175), was discussed."

This expression of opinion is not a definition of the word "office", for Lord Wright guards himself by saying "I do not attempt what their Lordships did not attempt in *Bater's* case (1922) 2 A. C. 1, that is, an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense with due regard to the requirement that there must be some degree of permanence and publicity in the office."

Lord Porter approaches the question from a different angle. He says: "That it is an office is, I think, plain. It has permanency apart from the temporary holder and is held in one of the specified corporations. One

¹ (1891) 1 Q. B. 594.

² (1914) L. R. 3 K. B. D. 1283 at 1296.

³ (1942) A. C. 561.

⁴ (1922) 2 A. C. 1.

has only to refer to sections such as ss. 145 and 151 of the Companies Act, 1929, to find the phrase 'office of director' expressly mentioned. Indeed, this is not in dispute. What is controverted is the allegation that a directorship, at any rate in a so-called private company, is a public office. The argument is put on the ground that at worst—*i.e.*, at worst, for the appellant—directors of companies not by statute requiring any directors, if appointed at all (as they may be, but are not compelled to be, in the case of a private company), are not holders of a public office. There is no magic in the phrase 'private company'. It is true that it need not have directors or issue a prospectus, and that it is not permitted to have more than fifty shareholders and may have no more than two, but it still must be registered and keep an official register of its members. It is a corporate body constituted by Act of Parliament (now the Companies Act, 1929), and that Act imposes duties on the office itself and its holder for the time being. These obligations are imposed in the public interest that some public control over its organization and activities may be obtained."

The case of *Lewis v. Cattle*¹, a decision under the Official Secrets Act, should be noticed in this connexion as the words "any person holding office under His Majesty" occur in section 2 (1) (a) of the Official Secrets Act, 1911. The question that arose for decision in that case was whether the Superintendent of Police of the borough of Southport was a person holding office under His Majesty. Lord Hewart observes: "In my opinion it is true to say that every police officer in England and Wales; whether he be a member of the Metropolitan police force, or a member of the police force of a county, city, or borough, holds the office of constable, and within his constablewick has all the duties and rights conferred by common law or statute on the holders of that office. He is required to take an oath of office, and his primary duty is to preserve the King's peace. It follows that a police officer is a person who holds office under His Majesty within the meaning of the Official Secrets Acts."

"It may be well to observe that the justices, in submitting this case for the opinion of this Court, after stating, and stating correctly, that the question at issue between the parties was whether a police officer was a person holding office under His Majesty, state that they find that a police officer is 'in the service of His Majesty', being, apparently, under the impression that a person who serves His Majesty must necessarily hold office under His Majesty. That, however, is not the case. There are many offices which are held under His Majesty the holders whereof are not in any proper sense of the words in the service of His Majesty. So also there are many persons in the service of His Majesty who do not in any proper sense of the words hold office under His Majesty."

The case of *Cleghorn v. Sadler*² deserves mention as it attempts to bring out the distinction between the holder of an office and a person on whom certain duties are cast by law. It was there held that fire-watching was a duty imposed by law and not an office.

I shall now examine the present application in the light of the dicta I have quoted above. The Order in Council, as I have stated earlier,

¹ *54 Times Law Reports* 721; (1938) 2 *All E. R.* 368.

² (1945) 1 *All E. R.* 544.

expressly provides that "every Parliamentary Secretary shall hold office during His Majesty's pleasure" (section 49) and makes provision whereby a Parliamentary Secretary "may at any time resign his office". A Parliamentary Secretary has "Parliamentary and departmental duties to perform" (section 47), and whenever he is unable to perform "any of the functions of his office" power is taken for the appointment of a substitute. He is also required to take an oath of office (section 49 (4)) like any other holder of an office. It is clear therefore that he holds an office, and that it is a public office cannot be denied. The word "public" means "of, pertaining to, or affecting the people at large or the community; distinguished from private or personal". An office in the Government of the country is a public office and is by no means a private office. Does the respondent hold office under the Crown in Ceylon? He derives his appointment from His Majesty and holds office during His pleasure. He is bound by an oath of office and allegiance. All these go to show that he holds office under the Crown. The expressions "Crown" and "His Majesty" in modern legislation mean the same thing. Maitland in his essay on the Crown as a Corporation traces the history of the gradual replacement of the expression "Crown" by the expression "His Majesty"¹. As observed by Lord Hewart in the case of *Lewis v. Cattle* (*supra*), though he holds office under His Majesty he is not in the service of His Majesty. This view gains support from section 10 (7) of the Local Authorities Elections Ordinance, which indicates that in this context even such offices as Justice of the Peace, Unofficial Magistrate, Commissioner for Oaths, and an Inquirer appointed under section 120 of the Criminal Procedure Code, fall within the ambit of the expression "public office under the Crown in Ceylon", hence their express exclusion.

The respondent is therefore not qualified to sit or to vote as a member of the Municipal Council and I declare that his seat is vacant.

I allow the petitioner taxed costs in the highest class according to the scale provided for appeals from District Courts in Part IV of the Second Schedule to the Civil Procedure Code.

Application allowed.

