

1949

*Present: Basnayake J.*

WIJEANATHAN, Petitioner, and ELECTIONS OFFICER,  
TRINCOMALEE DISTRICT *et al.*, Respondents

S. C. 62.—IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON THE ELECTIONS OFFICER, TRINCOMALEE DISTRICT, AND THE ASSISTANT COMMISSIONER OF LOCAL GOVERNMENT, EASTERN REGION.

*Writ of Mandamus—Petitioner candidate for Urban Council—Objection to name on list overruled—List certified—Name erased on appeal to Supreme Court—Petitioner elected pending appeal—Petitioner entitled to sit till office declared vacant in appropriate proceedings—Powers of Elections Officer—Local Authorities Elections Ordinance, 53 of 1946—Sections 17, 18, 19 (5), 21 (1), 23 (1 and 3), 24, 33.*

Petitioner applied under section 18 (1) of the Local Authorities Elections Ordinance to have his name inserted in the electoral list for Ward 4 of the Trincomalee Urban Council. His application was opposed but the objection was overruled, and the name included. The objector appealed to the Supreme Court. In the meantime the list was certified under section 23 (1) and (3) and pending the appeal the petitioner was elected. The Supreme Court thereafter made order allowing the appeal and erasing the petitioner's name from the list. The first respondent then wrote to the petitioner stating that he was not to sit and vote and that action was being taken to fill the vacancy.

*Held*, that the authority to fill a vacant seat given by section 11 (2) of the Ordinance is confined to cases falling within 11 (1) and that the petitioner was entitled to sit until his right to do so was successfully challenged in appropriate proceedings before the Supreme Court.

<sup>1</sup> (1929) 30 N. L. R. 256

<sup>2</sup> (1934) 14 C. L. R. 47.

**A**PPPLICATION for a writ of *mandamus* on the Elections Officer, Trincomalee District, and the Assistant Commissioner of Local Government, Eastern Region.

*C. S. Barr Kumarakulasinghe*, with *A. I. Rajasingham* and *T. W. Rajaratnam*, for the petitioner.

*M. Tiruchelvam*, *Crown Counsel*, for the respondents.

*Cur. adv. vult.*

February 25, 1949. **BASNAYAKE J.—**

The petitioner Balasubramaniam Wijeathan was elected a member for Ward No. 4 of the Trincomalee Urban Council at a poll held on December 4, 1948. On December 22, 1948, he received the notice contemplated in section 33 (1) of the Urban Councils Ordinance, No. 61 of 1939, signed by the second respondent. That notice is dated December 21, 1948, and is in the following terms :—

*“ Trincomalee Urban Council—Election of Chairman.*

I have the honour to inform you that under the provisions of section 33 (1) and (3) of the Urban Councils Ordinance I hereby convene the First Meeting of the members of the Trincomalee Urban Council for 10 a.m. on Friday, 7th January, 1949, at the office of the Urban Council, Trincomalee.

Your presence is kindly requested.

Please acknowledge receipt of this letter.”

On the following day the petitioner received the following letter dated December 22, 1948, signed by the second respondent :—

*“ Trincomalee Urban Council—Election of Chairman.*

Please consider my registered letter No. UCT. 1A of 21.12.48 on the above subject as cancelled.

Please acknowledge receipt.”

The subsequent events are better stated in the language of the petitioner's affidavit, which remains uncontradicted.

“ 9. On the 4th of January 1949 the said Assistant Commissioner of Local Government Mr. H. Ismail telephoned me cancelling his second letter dated 22nd December 1948 and asked me to be present at the meeting to be held on the 7th January 1949 for the election of a Chairman.

“ 10. On the 5th January 1949 the said Assistant Commissioner of Local Government Mr. H. Ismail visited me at my hotel at about 6.30 p.m. and informed me that his letter of 22nd December 1948 would stand and he further informed me verbally that I could not attend the first meeting of the Urban Council and vote at the meeting as the Assistant Government Agent, Trincomalee, had notified him that my seat in the Urban Council was vacant.

“ 12. The meeting convened for the 7th of January 1949 was cancelled late on the evening of 6th January 1949 and I received letter No. UCT/1A dated 7th January 1949 (marked E) purporting to be a confirmation of a telegram sent to me on the 6th January 1949 cancelling the meeting, which telegram I never received.”

The letter dated January 7, 1949, marked (E) sent to the petitioner by the second respondent reads as follows :—

*“ Trincomalee Urban Council—Election of Chairman*

I hereby confirm the following telegram sent to you yesterday from Colombo :

Reference my UCT./1A of 21. 12. 48, first meeting of Trincomalee Urban Council will not be held on 7.1.49 as informed stop shall inform date and time of meeting in due course.”

Thereafter on January 11, 1949, the petitioner received the following letter dated January 10, 1949, from the first respondent :—

*“ Trincomalee Urban Council*

The Supreme Court has decided that your name should be removed from the electoral list of Ward No. 4 in Trincomalee Urban Council. Therefore the election proceedings are invalid and you are not entitled to sit or vote at the meetings of the Urban Council. Action is being taken by me to fill the vacancy.”

The order of this Court referred to in the first respondent's letter came to be made in this way. Upon the publication of the notice contemplated in section 17 of the Local Authorities Elections Ordinance, No. 53 of 1946 (hereinafter referred to as the Ordinance), the petitioner, whose name did not appear on the electoral list, applied under section 18 (1) (a) of that Ordinance to have his name entered therein. His application was opposed by one Francis de Silva. After hearing the petitioner's claim and the objections thereto, on September 6, 1948, the first respondent allowed the petitioner's claim to have his name entered in the electoral list and under section 19 (5) made therein the amendment necessary to give effect to his decision. The objector thereupon appealed to this Court under section 21 (1) of the Ordinance, and on December 15, 1948, this Court directed that the petitioner's name be erased from the electoral list. Meanwhile, pending the hearing of the appeal, the first respondent had under sections 23 (1) and (3) certified the electoral lists. By virtue of section 24 the electoral lists so certified come into force on the date of such certification subject to such alteration as may subsequently be made therein in accordance with section 23 (3).

The nominations for the election of a member for Ward No. 4 were received on November 9, 1948. On that day the petitioner's name was on the electoral list, and as he had none of the disqualifications specified in section 10, he was duly nominated under section 29 (1). As there was more than one candidate duly nominated, a poll appears to have been taken on December 4, 1948, while the petitioner's name was still on the electoral list and he was subject to no disqualification.

The question that arises for decision is whether the second respondent is under a legal duty to serve on the petitioner the notices he is required to give under section 33 of the Urban Councils Ordinance, No. 61 of 1939, in respect of the first meeting of the newly elected Urban Council of Trincomalee. In my opinion he is bound to serve the notices contemplated in section 33 on the petitioner so long as he holds the office and his seat is not declared to be vacant by this Court. It is settled law that where a person has been duly admitted to a corporate office and by some act or circumstance has forfeited it, the mere act or circumstance does not operate as a vacation of the office, but the holder must be duly removed therefrom by the corporation or other competent authority<sup>1</sup>.

Now the only provision of the Ordinance that declares that in certain events the seat or office of a member shall *ipso facto* become vacant is in section 11 (1). That provision reads: "Where any member of a local authority is, by reason of the operation of any of the provisions of section 10, disqualified from sitting or voting as a member of such authority, his seat or office shall *ipso facto* become vacant". The instant case does not fall within the ambit of that provision nor is there any provision of the Ordinance which declares that like consequences shall attend the removal of the name of a member from the electoral lists. The authority to fill a vacant seat given by section 11 (2) is confined to vacancies caused by the operation of sub-section (1) of section 11. In the absence of a provision similar to section 11 in respect of a member whose name is removed from the electoral roll after his election the Elections Officer has no power to declare the election void as he has done in this case, nor has he power to hold another election for Ward No. 4 until the petitioner's right to hold the office has been successfully challenged before this Court by appropriate proceedings<sup>2</sup>.

The first respondent in his letter of January 10, 1949, takes upon himself the responsibility of declaring the petitioner's election invalid, which he has no right to do, and he has committed himself therein to a course of conduct which is unwarranted by law. The first respondent as Elections Officer is entitled to exercise only such powers as are given to him by statute and no more.

The second respondent's conduct in this case is in my view inexcusable in a public officer charged with such important functions. The instant case indicates vacillation of the highest order on his part. He seems to have been utterly confused as to the course he should adopt. His conflicting injunctions must undoubtedly have perplexed the petitioner. After first noticing the petitioner to attend a meeting he cancels that notice, then he cancels by telephone the letter cancelling the notice to attend. He next cancels the telephone message and informs the petitioner that he has no right to attend or vote at the meeting. He follows it up by giving the petitioner notice that the meeting fixed for January 7, 1949, will not be held and promising to inform him of the date and time of the next meeting. Placed in the predicament he was in, and threatened with consequences so serious as the loss of his office and forfeiture of his

<sup>1</sup> *Halsbury, Vol. 8, p. 39 (Hailsham Edn.)*.

<sup>2</sup> *The Queen v. Ricketts (1838) Vol. III., Nevile & Perry, p. 151 at 153.*

rights as a member of the Urban Council, the petitioner has been compelled to invoke the powers of this Court for the enforcement of his rights.

It is in the public interest that officers exercising such statutory functions as have been entrusted to the respondents to this application should properly understand their functions, and act strictly within the scope of the statute they are called upon to administer. They should not, as the respondents appear to have done in this case, take upon themselves functions which have not been given them by the statute whose creatures they are.

I think this is a case in which a mandate in the nature of a writ of *mandamus* must issue. No immediate relief is claimed against the first respondent. No mandate need therefore issue on him.

I order the second respondent to serve on the petitioner all notices under section 33 of the Urban Councils Ordinance. There is nothing in the statute which prevents the petitioner from exercising the rights of membership so long as his election remains unquashed by an authority competent in law so to do.

The petitioner is entitled to costs as against both respondents.

*Application allowed.*

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