

1938

Present : Maartensz J.

IN THE MATTER OF AN APPLICATION BY A. A. PERERA FOR A WRIT OF
Quo Warranto TO SET ASIDE THE ELECTION OF THE CHAIRMAN OF
 THE URBAN DISTRICT COUNCIL, KOLONNAWA.

Local Government Ordinance, No. 11 of 1920, s. 16—Residential qualification of Chairman—Ordinary resident within the administrative limits—Change of residence in order to acquire qualification—Writ of quo warranto.

A person may acquire a residential qualification in a place other than where his wife and family reside if the purpose of his change of residence was to enable him to acquire that residential qualification.

Soysa v. Perera (22 N. L. R. 464) referred to.

THE respondent was elected Chairman of the Kolonnawa Urban District Council on December 11, 1937, at a meeting held under section 16 of the Local Government Ordinance, No. 11 of 1920. The petitioner alleged that the respondent did not ordinarily reside within the limits of the Urban District Council so as to be eligible for election under section 16 (1) of the Ordinance. The respondent denied the allegation.

H. V. Perera, K. C. (with him *E. F. N. Gratiaen* and *S. Nadesan*), for the petitioner.—The respondent lived at Brandiyewatta which was just outside the Urban District Council limits. In December, 1935, in contemplation of his election he adopted an additional residence at No. K 1, Jahena road, which was within the limits. The respondent in his affidavit stated that his family lived at the former place while he himself ate, drank, and slept at the latter place. The mere statement that he ate, drank, and slept at Jahena road would not qualify him as “ordinary resident” there.

[MAARTENSZ J.—Suppose a man is elected and subsequently changes his residence.]

Section 16 implies a continuous residence. The words “ordinarily resident” has been interpreted in *Soysa v. Perera*¹.

A man's residence was his home. There is the Latin maxim *ubi uxor ubi domus*. It cannot be said that the respondent had the *animus residendi* when he rented out the house in Jahena road.

N. E. Weerasooria (with him *D. D. Athulathmudali*), for the respondent.—The respondent had sworn that he lived at Jahena road, but that his wife and children lived at Brandiyewatta, but that did not mean that his residence was at Brandiyewatta. The Chairman, being the chief executive officer, has to reside within the administrative limits. The question where he resided is one of fact and must be decided on the affidavits.

S. Nadesan, in reply.—The residence is not merely a question of fact, but one of law as well.

Cur. adv. vult.

¹ (1921) 22 N. L. R. 464.

March 18, 1938. MAARTENSZ J.—

This matter of an application for a writ of *quo warranto* came up before me on the respondent showing cause against his election as Chairman of the Urban District Council of Kolonnawa (hereafter referred to as "the Council") being set aside on the ground of its being an invalid election.

The respondent was elected on December 11, 1937, at a meeting held under the provisions of section 16 (1) of the Local Government Ordinance, No. 11 of 1920, Chairman of the Council for the year 1938.

Sub-section (1) of section 16 of the Ordinance enacts as follows:—

"The members of each District Council shall from time to time elect any member of such Council, ordinarily resident within the administrative limits thereof, and not being the Government Agent or Assistant Government Agent, as Chairman."

The petitioner alleges that the election was invalid as the respondent was not ordinarily resident within the administrative limits of the Council and thus ineligible for election as Chairman.

In support of this objection the petitioner filed his own and the affidavits of four other persons in which he and they declared that the respondent is and has been residing with his wife and family at a place called Brandiyewatta which is admittedly outside the administrative limits of the Council.

The petitioner further declared that he is personally aware that the respondent never had his meals cooked at No. K 1, Jahena road and did not sleep there except on two or three occasions in 1936, when an application was made to have his election as Chairman void.

The respondent in reply filed his own and affidavits from seven other persons that he has since December, 1935, resided, that is to say, been eating and sleeping in house No. K 1 in Jahena road.

It appears from the affidavits filed by the petitioner and the respondent that the respondent has since 1933 been from time to time nominated a member of the Council and that he was elected Chairman in December, 1934, for the year 1935, and elected again in January, 1936, for the year 1936, and, I think, 1937. A Chairman ordinarily holds office for two years from the date of his election.

The respondent was living in Brandiyewatta with his wife and family when he was elected Chairman in 1934. Brandiyewatta was then within the administrative limits of the Council. It was excluded from the limits in 1935. The respondent alleges that to retain his residential qualification he then took on rent and went and resided in No. K 1, Jahena road. He admits that he did not take his wife and family with him.

The question of fact which falls for decision is whether the respondent actually resided in No. K 1, Jahena road or whether he continued to reside in Brandiyewatta and his renting of the premises in Jahena road was a mere sham or pretence.

It was stated at the hearing that the house in Brandiyewatta in which the respondent's wife and family reside is only about a mile away from the house in Jahena road and as there wasn't some system of espionage, definite evidence as to where the respondent resided could not be produced

by the petitioner. The statements in the affidavits filed by him that the respondent lived with his wife and family in Brandiyewatta amount to no more than assertions, as the grounds upon which the statements are made are not set out in the affidavits. In one of the affidavits filed by the petitioner on February 18, 1938, in reply to the respondent's affidavits, the affirmant, being a resident of Jahena road, was perhaps in a position to say whether the respondent resided in premises No. K 1 or not; but his affidavit does not go far enough, for he does not say that his statement that the respondent does not eat, sleep or dwell in No. K 1 is the result of his having had the premises under observation. The affidavit of Bagdad that he saw a notice served on the respondent at Brandiyewatta is of no value. There is in the file a return sworn to by the process server that he served notice of the application for this writ on the respondent at 7.45 A.M. on January 21, 1938, at Jahena road No. 1.

The petitioner's affidavit that the supporters of the respondent are persons who would be likely to make false statements as to his place of residence is of no avail in the absence of affidavits to the contrary from persons who kept premises No. K 1 under observation and others who kept the house in Brandiyewatta under observation that the respondent did not reside in house No. K 1 and that he resided in Brandiyewatta.

The respondent affirms that he has since December, 1935, resided in premises No. K 1 and that he eats, drinks, and sleeps in that house. The affidavits in support are with one exception from persons who actually met him in that house on various occasions. The exception is the affidavit of the occupant of premises K 3, Jahena road.

Now apart from the defects which I have pointed out in the affidavits filed by the petitioner, he, to my mind, would have found it very difficult to produce convincing evidence that the respondent did not reside in No. K 1, Jahena road, for the respondent's residence at that house had been challenged in 1936, and it is in the highest degree improbable that he would not, while looking upon his house in Brandiyewatta as his real home, have resided (that is, ate, drank, and slept), in No. K 1, Jahena road on a number of occasions sufficient to establish that he regularly resided there, and that his renting of the house was not a pretence or sham.

I find on the question of fact that the respondent resided and is still residing at the premises No. K 1, Jahena road.

It was contended however on the authority of the case of *Soysa v. Perera*¹, that even if the respondent resided in Jahena road he must be deemed to be ordinarily resident at Brandiyewatta where he previously resided and where his wife and family are still residing, as he was under no legal obligation to stay in Jahena road and was free to return to Brandiyewatta at any time.

The authority cited was a ruling given in an inquiry into an election petition as regards the construction of section 13 of the Ceylon (Legislative Council) Order in Council, 1920, which enacts as follows:—"No person shall be capable of being elected a Member of Council . . . who has not been ordinarily resident within the area . . . for a period of three years immediately preceding the date of nomination as a candidate for election".

¹ (1921) 22 N. L. R. 464.

The head note reads as follows :—

“The usual and customary residence of the respondent, who was elected as a Member of Council for Western Province (B) Division, was Cotta (within the division), and he was nominated as a candidate on March 31. He was absent in England from July, 1915, to May, 1919, but he was under no legal obligation to stay there during that period, and was free to return at any time.

“Held, that he was ordinarily resident within the area, and that he was qualified to be a candidate for election.

“Actual inhabitancy during every one of the days is not necessary. It is sufficient if the claimant can make out a constructive inhabitancy. In order to make out a constructive inhabitancy there must be an intention of returning after a temporary absence and a power of returning at any time without breach of any legal obligation.”

The authority is in my opinion not applicable to this case. There was no evidence in the case cited that Mr. Perera had left his Cotta residence with the objection of acquiring a residential qualification elsewhere; whereas the respondent in this case himself states that he went to live in Jahena road with the object of acquiring the residential qualification necessary for election as a Chairman of the Council. Again the respondent is under a legal obligation to remain within the administrative limits of the Council and is not free to return to Brandiyewatta at any time.

I know of no law which prevents a man from acquiring a residential qualification elsewhere than where his wife and family reside if the object of his change of residence is to enable him to acquire that residential qualification.

The contention of law therefore also fails and the rule must be discharged with costs.

Rule discharged.

