

1949

Present : **Windham J.**

MOHAMEDU, Petitioner, and DE SILVA, Respondent

S. C. 50—APPLICATION FOR A WRIT OF MANDAMUS ON  
 D. R. DE SILVA, CHAIRMAN, URBAN COUNCIL,  
 PANADURA

*Writ of Mandamus—Available only to compel the doing of a duty which has not been done—Not available to undo an act already done, though irregularly—Butchers Ordinance (Cap. 201), s. 7 (1) (2).*

The first respondent, who was the Chairman of an Urban Council, issued a butcher's licence to the second respondent although no formal application for it had been made by the latter. According to section 7 (1) of the Butchers Ordinance, as amended by Ordinance No. 44 of 1947, every person who desires to obtain a butcher's licence should make formal application and, thereafter, the licensing authority should, as required by section 7 (2), publish a notice in the *Gazette* calling for objections, if any, to the issue of such licence.

In an application for a writ of *mandamus* upon the first respondent, calling upon him to publish a notice in the *Gazette* in terms of section 7 (2)—

*Held*, that the remedy of *mandamus* is only available to compel the doing of a duty which has not been done. As the second respondent had made no application under section 7 (1) the first respondent was not bound to publish a notice under section 7 (2) in respect of it.

*Held further*, (i) that *mandamus* will not be granted to compel the performance of some duty which may arise in the future. There must be an existing duty, and an existing right in the petitioner to have it performed.

(ii) that the Court will not grant a *mandamus* to undo an act already done, nor will it allow the validity of an act purporting to have been done under a statute to be tried in an action for *mandamus*. Accordingly, an action for *mandamus* was not the proper remedy by which to seek the cancellation of the licence which had been irregularly issued.

THIS was an application for a writ of *mandamius* upon the Chairman of the Urban Council of Panadura.

*Colvin R. de Silva*, with *M. M. Kumarakulasingham*, for the petitioner.

*U. A. Jayasundera, K.C.*, with *H. W. Jayewardene* and *Fernon Wijetunge*, for the first respondent.

*Cur. adv. vult.*

September 30, 1949. WINDHAM J.—

This is an application for a writ of *mandamus* upon the first respondent, the Chairman of the Urban Council of Panadura, calling upon him to publish a notice in the *Gazette* in respect of an application for a licence to carry on the trade of a butcher said to have been made to him by the second respondent under section 7 (1) of the Butchers Ordinance (Cap. 201) as re-enacted with amendments in the Butchers (Amendment) Ordinance, No. 44 of 1947. Sub-section 2 of section 7 requires the "proper authority", who in an Urban Council area is the Chairman of the Council, to publish such a notice upon receipt of the application for a licence, calling upon any residents in the urban area desiring to object to its issue, to submit their objections in writing. Sub-section (3) provides for the hearing of such objections by the Chairman, whereupon an order may be made either granting or refusing the licence. Sub-section (4) provides for the hearing of appeals against such an order.

The petitioner is a resident within the urban area of Panadura, and as such, is a person entitled to lodge an objection under section 7 (2).

Sub-sections (1) and (2) of section 7 are in the following terms:—

"7. (1) Every person who desires to obtain a licence to carry on the trade of a butcher shall make an application in writing in that behalf to the proper authority. The application shall be signed by the applicant and shall state his name and the premises at which he intends to carry on such trade.

(2) Upon the receipt of an application for a licence, the proper authority shall publish a notice in the *Gazette*—

(a) stating that the application has been made and specifying the name of the applicant and the premises at which he intends to carry on the trade; and

(b) calling upon every person residing within the limits of the area of such authority, who desires to object to the issue of such licence, to furnish to the proper authority in duplicate, within such time as may be specified in the notice, a written statement of the grounds of his objection."

The Panadura Urban Council maintains in the town for the sale of meat one public market consisting of four stalls, and the practice for a number of years has been for these stalls to be leased out annually, from

1st January to 31st December each year, on tenders called for in November of the preceding year. This practice was followed in respect of 1949, and in November, 1948, the Panadura Urban Council accepted the tender of the second respondent, who duly entered into a year's lease for all four stalls as from 1st January, 1949. In respect, however, of a licence to carry on the trade of a butcher, no application was made by the second respondent under section 7 (1) of the Butchers Ordinance as amended by Ordinance No. 44 of 1947, nor were any of the provisions of that section complied with. All that was done was that, in accordance with a practice which appears to have been followed since 1923, a licence to carry on the trade of the butcher, purporting to be issued under the Butchers Ordinance, was formally and automatically issued by the Council to the lessee of the stalls, who for 1949 was the second respondent, upon the payment of Rs. 5, without any further application from him.

This procedure clearly constituted a non-compliance with the provisions of section 7 of the Butchers Ordinance as amended in 1947, and the first respondent admits as much, giving as his excuse that he was ignorant of the amended law. Be that as it may—and the excuse comes strangely from the first respondent who is a proctor—the question for determination is whether this is a proper case for the issue of a writ of *mandamus* as prayed, that is to say, requiring the first respondent to publish the requisite notice under section 7 (2) of the Ordinance. Admittedly he never did publish such a notice. But, illegal as his action was in issuing or purporting to issue to the second respondent a licence to sell meat without the latter having made any application for such a licence under section 7 (1), the very absence of such an application makes the remedy by way of *Mandamus* inappropriate. For that remedy will only be available to compel the doing of a duty which has not been done. And unless the second respondent made an application under section 7 (1) the first respondent was under no duty to publish a notice under section 7 (2) in respect of it, and would indeed be unable to do so: *Shortt on Mandamus* at page 250.

It has been urged that this court ought not to allow the first respondent to take advantage of his own illegal acts by setting them up as a defence, and that rather than allow him to do so this court ought to grant a *mandamus* of a conditional nature, by ordering that in the event of the second respondent making an application under section 7 (1) the first respondent shall thereupon publish the notice under section 7 (2) in respect of it. But quite apart from the fact, that such was not the relief prayed for in the petition, I know of no authority for the granting of a *mandamus* to compel the performance of some duty which may arise in the future. There must be existing duty, and an existing right in the petitioner to have it performed.

It has been alternatively argued for the petitioner that the tender form submitted by the second respondent for the grant to him of the annual lease for 1949 of the four meat stalls in the public market must itself be deemed to have constituted the necessary application under section 7 (1) for a butcher's licence. But this contention cannot prevail.

Not only is the holding of a lease of the stalls a thing quite distinct from the right to sell meat at them, but the tender form does not purport to be an application for a butcher's licence, and itself recognizes the distinction; for paragraph 7 of the tender form provides that "the successful tenderer must obtain a licence as a butcher under the Butchers Ordinance".

It has been further urged for the petitioner that, since the licence or purported licence issued to the second respondent to trade as a butcher was issued illegally, this court ought either to declare it to be cancelled or order the first respondent to cancel it. But while it may be that such an order could be made by this court in a proper case in an action where such relief was prayed for, I do not think it can be made here. In the first place the second respondent, who would be primarily concerned in the cancellation, has not appeared to argue the case, as he well might have done if the relief prayed for had included the cancellation of a licence which has, rightly or wrongly, been issued to him. Nor, in view of his absence, do I think it would be proper to consider whether the cancellation might fall within the prayer for "other and further relief".

Secondly, the court will not grant a *mandamus* to undo an act already done, nor will it allow the validity of an act purporting to have been done under a statute (as the licence in the present case purported to be issued under the Butchers Ordinance) to be tried in an action for *mandamus*. In *Ex parte Nash* (1850) 15 Q. B. 95, Lord Campbell, C.J., in refusing to grant a *mandamus* commanding a railway company to remove its seal from the register of shareholders on the ground that it has been irregularly affixed, said:—"The writ of *mandamus* is most beneficial; but we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done; but not for the purpose of undoing what has been done. We may, upon an application for a *mandamus*, entertain the question whether a corporation, not having affixed its seal, be bound to do so; but not the question whether, when they have affixed it, they have been right in doing so. I cannot give countenance to the practice of trying in this form questions whether an act professedly done in pursuance of a statute was really justified by the statute". In the present case the licence purported to be issued under the Butchers Ordinance. Accordingly an action for *mandamus* is not the proper remedy by which to seek its cancellation.

For all these reasons the application fails and must be dismissed. Since, however, the first respondent was made aware by the petitioner by repeated letters before the application was filed of his irregularity in issuing the licence to the second respondent, and did nothing to remedy the position whether by cancelling the licence or otherwise, and since it was this failure which occasioned the present application, I do not think he is entitled to his costs. There will accordingly be no order for costs.

*Application dismissed.*