

1937

Present : Maartensz J.

## NUGAWELA v. RATWATTE et al.

*In re* APPLICATION FOR A WRIT OF *Quo warranto*.

*Buddhist Temporalities—Election for the office of Diyawadana Nilame—Requirement to summon a meeting within two months only directory—Extension of time not irregular—Right of person summoned in several capacities to more than one vote—Atamasthana Committee entitled to one vote—Jurisdiction of Court—Ordinance No. 19 of 1931, ss. 7 (2), 9 (1), and 33.*

The provision in section 7 (2) of the Buddhist Temporalities Ordinance that when a vacancy occurs in the office of Diyawadana Nilame the Public Trustee shall within two months of such occurrence summon a meeting to fill the vacancy is merely directory and a meeting held after such period is not invalid.

Where a person summoned to such a meeting is present in more than one capacity he is entitled to one vote only.

The Atamasthana Committee which is the trustee for the Atamasthana is entitled only to one vote for the purpose of the election of a Diyawadana Nilame.

*Semble.*—The provisions of the Civil Procedure Code with regard to the jurisdiction of the District Court are not applicable to applications under section 33 the Buddhist Temporalities Ordinance.

**I**N terms of section 7 of the Buddhist Temporalities Ordinance, 1931, the Public Trustee issued notices on April 19 to the electors entitled to vote at the election for the office of the Diyawadana Nilame which became vacant on March 25, 1937, to attend a meeting to be held in Kandy on May 22. Since May 22 was proclaimed a public holiday, the Public Trustee thought it necessary to postpone the meeting fixed for that day. He moved the District Court of Colombo on May 18 to extend the time within which the meeting for the election was to take place and informed the electors that the election was postponed for July 3. He further issued fresh notices on May 31 to the electors summoning them to a meeting on July 3.

At the meeting held on July 3, the petitioner and the first respondent were proposed and seconded for appointment to the office of Diyawadana Nilame. At the ballot the first respondent had 45 votes and the petitioner 42 votes. Five ballot papers were at first rejected, but on a scrutiny it was found that three of them were for the petitioner and one for the first respondent. Hence the first respondent was declared elected. The petitioner prayed for a mandate in the nature of a *quo warranto* to test the validity of the election of the first respondent to the office of Diyawadana Nilame.

*Hayley, K.C.* (with him *E. B. Wikramanayake* and *B. H. Aluwihare*), for the petitioner.—Under section 7 of the Buddhist Temporalities Ordinance, 1931, on the death of the Diyawadana Nilame, the Public Trustee must summon the persons indicated in section 7 (2) to elect a Diyawadana Nilame. He must summon them within two months.

[**MAARTENSZ J.**—Should the meeting be held within two months or the summons be issued within that time?]

The meeting must be held within that time.

The Public Trustee summoned a meeting for May 22. Because the Government declared that day to be a holiday, he postponed the meeting. Section 33 of the Ordinance empowers a Court to extend the time fixed for the holding of the election.

Now Court is defined in section 2.

The District Courts have no jurisdiction with regard to elections. The Supreme Court exercises jurisdiction by way of *Mandamus* or Writs.

[MAARTENSZ J.—Does not section 33 imply that the District Courts have jurisdiction?]

There are various duties imposed on the Public Trustee. Section 64 of the Courts Ordinance, 1889, defines the jurisdiction of the District Courts.

There is no authority in this case to postpone the meeting. The District Court of Colombo has no jurisdiction where the office is to be held in Kandy.

On May 31 he issued notice that a meeting would be held on July 2.

Regulations relating to elections must be strictly adhered to. He may have made an application to the proper Court. No one can extend the time.

There is no provision in the Ordinance for the closing of the voting. In Municipal Council and State Council elections the voting takes place within a specified interval of time. In the absence of any limitation, as long as the voters are present, they must be given a chance to vote. The counting takes place immediately after the voting.

Section 7 (3) (a) of the Ordinance provides that “every person” duly summoned and present at the meeting shall have a vote. Now according to the definition of “every person” in *The Pharmaceutical Society v. The London and Provincial Supply Association*<sup>1</sup>, and section 3 of the Interpretation Ordinance, 1901, a person who is summoned as trustee of two temples have two votes. Different bodies may elect the same trustee, but they may require the votes to be given differently. It is inconceivable to think that each body should have a fraction of a vote. If there was any intention to prevent plural votes, it must be definitely stated. We find that a person is qualified to vote for several electorates in a Municipal election. At by-elections he can vote at every by-election, but at a general election he can vote for one electorate only. (*Knill v. Towse*<sup>2</sup>.)

Section 9 (1) of the Ordinance says that there shall be three trustees for the Atamasthana Committee. It is not proper for the Public Trustee, as Chairman, to say that some need not vote as others had voted for them.

[MAARTENSZ J.—The three persons form one trustee, all cannot vote. They must decide who should vote.]

The secret ballot disappears then.

[MAARTENSZ J.—No, elect a person to vote. That person can vote in favour of any candidate he prefers.]

The general principles applicable in case of irregularities are given in *12 Halsbury (1st ed.)*, p. 322, para. 624; *12 Hals. (Hailsham ed.)*, p. 304, para. 592.

<sup>1</sup> (1880) 5 A. C. 857 at 861; 49 L. J. Q. B. 732 at p. 738.

<sup>2</sup> (1890) 24 Q. B. D. 186; 59 L. J. Q. B. 455.

*H. V. Perera, K.C.* (with him *R. C. Fonseka* and *J. R. Jayewardene*), for the first respondent.—The remedy asked for is an extraordinary one and the Courts must look into all the attending circumstances before allowing it. (*Short on Mandamus* (1887 ed.) pp. 122, 149-150.)

The application for the writ of *quo warranto* is limited. (9 *Halsbury* (*Hailsham* ed.) p. 805.) The office of *Diyawadana Nilame* is not created by statute. The position of the *Diyawadana Nilame* is the same as that of any other trustee. In incumbency matters, no *quo warranto* lies, but there is a regular action. (*In re Adam's Peak case*, D. C. Ratnapura, 9,353, *Vand.*, p. 215). The Crown reserved the right of removal to prevent abuse. The Ordinances regulate the election only. Sections 17 and 18 of Ordinance No. 3 of 1889 regulated the election of Trustees of District Committees. *Dalada Maligawa* was not a temple within the meaning given therein. That Ordinance was replaced by Ordinance No. 17 of 1895 and No. 8 of 1905, and now by the present one. The office in question is not created by law. The statutes merely regulate the election.

[MAARTENSZ J.—The Municipal Offices are created by statute.]

So are the offices in the Tea and Rubber Control Departments. There is no usurpation of any right of the Crown. No *quo warranto* lies against a church trustee or warden.

*Quo Warranto* applies where there was a direct usurpation. (*Darley v. The Queen*<sup>1</sup>; *The King v. Speyer*, *The King v. Cassel*<sup>2</sup>.)

The time "two months" in section 7 (2) is merely directory—*Stroud's Judicial Dictionary*. The notice sent on May 31 is superfluous.

[MAARTENSZ J.—If without a notice from the Public Trustee, the electors meet and elect. What happens then?]

The election is perfectly valid. There is an Ordinance with regard to the *Maradana Mosque*, but no *quo warranto* lies. In England it lies in the case where there is an usurpation of the royal functions. If the position of the petitioner is correct a *quo warranto* lies in the case of all *Basnayakes*.

[MAARTENSZ J. referred to *Encyclopedia of the Laws of England*, vol. XII., p. 191.]

Every charitable trust is a public matter. In that sense a trustee is a public officer. Those trusts are created by private individuals, but the King is the protector. This is nothing but a religious trust. It was held under the Crown during the times of the Ceylon Kings.

[MAARTENSZ J.—As there was no one to appoint the trustee, an Ordinance was passed?]

Merely because an Ordinance was passed to regulate the election, it does not mean that the office was created by the Legislature.

Section 33 of the Ordinance presupposes a District Court having jurisdiction. There must be a conferment of jurisdiction. The Ordinance is silent as to the powers to be exercised by the District Court.

Now the electors are persons holding certain offices. If the holders of these offices are Christians, they have no vote—section 40. If any of the persons mentioned in section 7 (2) is a tenant, lessee, or servant of the *Dalada Maligawa*, he cannot vote—section 43A. This shows that the

<sup>1</sup> (1845) 12 *Clerk and Finnelly* 520.

<sup>2</sup> (1916) 1 *K. B.* 595.

election is done by the persons and not by institutions. It may be that one person may hold more than one office, but he will be entitled for one vote only, unless plural votes are given by the Ordinance.

[MAARTENSZ J.—Why could not they have two votes? They were summoned as different persons?]

Section 7 (3) (a) is clear. A committee of electors is formally elected. The committee must have certain qualifications. The disqualifications are personal. If the elector is merely the holder of an office, it is immaterial whether he is a Christian. The section says that a person present votes. The institutions cannot vote.

The Public Trustee acting quite honestly proceeded to the election. A person having acquiesced cannot ask for another vote. He cannot now object to the election. (*Short on Mandamus*, p. 151.)

Where the Public Trustee acted in a quasi-judicial capacity, a Court must not interfere with his decision by a *quo warranto*.

His decision is final in the absence of any provision as to appeals—*Short on Mandamus*, p. 133.

*E. A. L. Wijeyewardene, Solicitor-General* (with him *R. R. Crossette Thambyah, C. C.*), for the second respondent.—The office of Diyawadana Nilame was an office under the Crown during the times of the Sinhalese Kings. When Ceylon was ceded all the rights of the ancient Kings passed to the Kings of England. The Queen did not waive her rights. She merely did not exercise them. The Supreme Court held in *Adam's Peak case*<sup>1</sup> that the Queen could remove a person from office. The 1889 Ordinance was then passed. As there was a doubt whether the Dalada Maligawa was a temple, the amending Ordinance No. 7 of 1895 was passed. The 1905 and the 1931 Ordinances followed.

The present Ordinance says that the property is vested in the trustee. It is an office newly created, but the ancient name is retained. The Diyawadana Nilame is merely the trustee—section 7 (1).

With regard to the interpretation of section 7, it must be analysed to find out whether the vote is given to the institution or the person. The Ratemahatmaya represents the villages. If they are entitled to vote as an holder of an office, why should the villagers' right be deprived when the Ratemahatmaya, who is appointed by Government, is a Christian.

[MAARTENSZ J.—In sections 7 (2) (a) and (b), they are institutions?]

Consider the case of section 7 (2) (d), for example the Basnayake Nilame of Saman Devale. He may be a lessee of lands belonging to Dalada Maligawa. He is not entitled to a vote then. In that case the Devale has no vote. What the Legislature intended to do is to give the right to prominent Buddhists among the Kandyans. It is not that the temple was represented.

The Maha Nayakes do not represent any temple. They are two persons. So are the Adigars and Dissawes and the Ratemahatmayas: They do not represent institutions. If we treat these persons as representatives of institutions, then there is a mixture of two things; but if we take the view that it is only the person who votes, it is applicable to every one.

<sup>1</sup> *Vand.*, p. 215.

*Hayley K. C.*, in reply.—Although the Solicitor-General had conceded that the Diyawadana Nilame is an office created by the Crown, the fallacy of respondent's Counsel's argument is based on the word "created". Originally he was a servant of the king.

The history of *quo warranto* is given in *Encyclopedia of the Laws of England*, vol. XII.; *Darley v. King*<sup>1</sup>. This Court can issue mandates in the nature of *quo warranto*. *Van Leeuwen* (Kotze's trans., 2nd ed.), vol. II., pp. 423 and 424.

Acquiescence does not exist in statutory elections—*Rogers on Elections*, vol. II., p. 69 19th ed.).

There was no opportunity to take objections. The Public Trustee is not given any judicial jurisdiction. All he is expected to do is to preside at the meeting.

There is no provision as to the close of the poll—*Rogers on Elections*, vol. II., p. 108.

The Public Trustee has no right to close till all have voted; at least he should have declared that the poll will be closed a few minutes before the close of the poll. The Court can order a new election on the ground of irregularity.

*Cur. adv. vult.*

September 21, 1937. MAARTENSZ J.—

This is an application for a mandate in the nature of a writ of *quo warranto* to test the validity of the election of the first respondent to the office of Diyawadana Nilame. The second respondent is the Public Trustee who presided at the meeting at which the first respondent was elected to the office.

The matter comes before me upon cause being shown by the respondents against the order nisi issued upon them being made absolute.

The main facts are not in dispute and are as follows:—

The last holder of the office of Diyawadana Nilame died on March 25, 1937.

The procedure for the election of a Diyawadana Nilame when a vacancy occurs is prescribed by the Buddhist Temporalities Ordinance, 1931. In terms of section 7 of that Ordinance the Public Trustee issued notices on April 19, to the persons mentioned in section 7 (2), (a), (b), (c), (d), and (e) to attend a meeting to be held in Kandy on May 22, 1937.

The 22nd of May was proclaimed a public holiday and the Public Trustee thought it necessary to postpone the meeting fixed for May 22, and to issue notices summoning another meeting.

Section 7 of the Ordinance provides that the Public Trustee shall summon a meeting within two months of a vacancy occurring in the office, and as it was not possible to hold the meeting within that period he moved the District Court of Colombo on May 18, 1937, under the provisions of section 33 (b) of the Ordinance to extend the time for holding the meeting. He was granted four months time from March 25, 1937. On the same date (May 18, 1937) he issued notices to the persons summoned for May 22, that the meeting was postponed for July 3, 1937. On May 31 he issued further notices to the same persons summoning them to a meeting at Kandy on July 3.

<sup>1</sup> (1845) 12 Clerk and Finnelly 520.

At the meeting held on July 3, the petitioner and the first respondent were proposed and seconded for appointment to the office of Diyawadana Nilame. A ballot was held, and, on a count being taken, it was found that the first respondent had 45 votes and the petitioner 42 votes. Five ballot papers were at first regarded as spoilt as the number of the candidate was not written on the face of the paper. On further examination the number was found written on the backs of four of the papers. Three of these were in favour of the petitioner, and the other in favour of the first respondent. The first respondent had one vote more than his opponent, and was declared appointed Diyawadana Nilame.

The first objection taken to the appointment was as regards the date of the meeting. It was contended that the election was bad as the meeting was held more than two months after the death of the late Diyawadana Nilame. It was urged in support of this contention that a District Court had no jurisdiction under section 33 of the Ordinance to extend the time fixed by section 7, and that at all events the District Court of Colombo had no jurisdiction to make the order; the Court, if any, which had jurisdiction being the District Court of Kandy.

The objection is based on the terms of section 7 of the Buddhist Temporalities Ordinance, 1931, which enacts—I quote the relevant passage—that “Whenever a vacancy occurs in the office of the Diyawadana Nilame the Public Trustee shall within two months of such occurrence summon to a meeting at Kandy—”.

I do not propose to discuss the objection, which was not strongly pressed, at length, as I am of opinion that the words relied on are merely directory and that a meeting held after the prescribed time is not invalid. The cases on this point are collected on page 321 of the 7th edition of *Maxwell on the Interpretation of Statutes*.

I think I should point out with reference to section 33 that the Ordinance, though it defines Court as meaning the District Court having jurisdiction in the matter in question, does not define the term jurisdiction, and it is impossible to say what is meant by the definition of the term Court.

The provisions of the Civil Procedure Code with regard to the jurisdiction of a District Court are obviously inapplicable to the applications which are contemplated by the provisions of section 33.

The next objection to the election was that certain electors who were entitled to more than one vote were only allowed one vote. The question which arises from this objection is whether a person summoned to a meeting under the provisions of section 7 is only entitled to one vote although he may be present in two capacities. The determination of this question depends on a construction of the terms of section 7.

By section 7 the right of electing a Diyawadana Nilame is vested in—

- (a) the Mahanayaka Theras of Malwatte Vihare and Asgiriya Vihare;
- (b) the Adigars and Dissawes being Kandyans;
- (c) the Ratemahatmayas holding office within the Kandyan Provinces;
- (d) the Basnayaka Nilames of all Dewales situated within the Kandyan Provinces; and
- (e) the trustees of all temples within the Kandyan Provinces of which the annual income during the three preceding years is estimated by the Public Trustee at over one thousand rupees;

to each of whom must be sent a written notice addressed to the last known place of abode of such person.

The petitioner affirms that eight of the persons present at the meeting were summoned there in two capacities. Their names and offices are set out in paragraph 10 of his affidavit.

As the election was by a majority of one, I need only refer to two of them who actually claimed to have a right to two votes. They are: (1) Mr. P. B. Bulankulame who claimed to have two votes, one in the capacity of Dissawa and the other as Ratemahatmaya of Nuwaragam palata; and (2) Mr. J. C. Ratwatte who claimed two votes, one as Adigar and the other as Basnayake Nilame of the Maha Dewala.

These claims were put forward after the Public Trustee had declared the poll closed.

The Public Trustee did not reject the claims on the ground that the poll was closed, but ruled that under sub-section 3 of section 7 they had only one vote each.

Sub-section (3) (a) provides as follows:—"The Public Trustee shall preside at such meeting and every person duly summoned and present thereat shall have a vote at every ballot to fill the said vacancy. Such ballot shall always be secret."

It was contended on behalf of the petitioner that the ruling of the Public Trustee was incorrect. It was argued in support of this contention that sub-section (3) of section 7 contemplates two classes of voters, namely, the institutions mentioned in sub-clauses (a), (d), and (e), and the holders of the offices mentioned in sub-clauses (b) and (c). Accordingly where a person was entitled to vote as representative of an institution and in his own right as the holder of one of the offices mentioned in the sub-section, he was entitled to two votes. The result of the Public Trustee's ruling, it was submitted, was to deprive either the institution or the holder of the office of a vote.

There is some force in this contention. But an institution cannot vote; the vote must be cast by an officer of the institution. Now the person or persons responsible for the enactment of section 7 must have been aware of the possibility of the person representing the institution being also entitled to vote as the holder of one of the offices specified in sub-clauses (b) and (c), and if it was the intention of the legislature to give that person the right to cast two votes, I should have expected provision to that effect in the Ordinance. So far from such provision being made, sub-section (3) enacts that every person duly summoned and present shall have a vote, that is to say, one vote and no more. I am of opinion, in view of the terms of the sub-section, that the ruling of the Public Trustee was right and must be upheld.

The next objection is based on the terms of this sub-section. The petitioner states in his affidavit that the Public Trustee refused to allow two members of the Atamasthana Committee, who were present, to vote.

The term "Atamasthana" means "the eight sacred sites of Anuradhapura. These according to the decision of the Atamasthana

Committee in 1909, are: (1) Bomaluwa, (2) Lowa Māha Paya, (3) Ruwanweli Seya, (4) Abhayagiri Vehera, (5) Thuparama, (6) Jetawanarama, (7) Lankarama, and (8) Mirisawetiya"—I quote from the Glossary of Native, Foreign, and Anglicized Words, compiled by H. W. Codrington of the Ceylon Civil Service, page 5.

The definition of the term "Temple" in section 2 of the Ordinance includes the Atamasthana of Anuradhapura, and the term "Trustee" includes the Atamasthana Committee.

This committee is composed of three persons nominated (under the provisions of section 9 (2) ) by (a) the Nayaka Thera for the time being of the Bomaluwa; (b) the head of the Nuwarawewa family for the time being; and (c) the Mahanayaka Theras of Malwatte Vihare and Asgiriya Vihare and the Nayaka Thera of Sripadasthana by a majority, respectively.

Section 9 (1) provides that "the trustee for the Atamasthana shall be the Atamasthana Committee—."

The Public Trustee in his affidavit denies that he refused to allow the other two members of the Atamasthana Committee to vote at the election.

His statement of what took place is set out in paragraph 11 as follows:—  
"Referring to paragraphs 11 and 14 of the petitioner's affidavit I admit that the Atamasthana Committee which is the trustee for the Atamasthana consists of three persons. The said committee by a writing dated July 2, 1937, and handed to me at the said meeting, authorised and deputed one P. B. Bulankulame, member and chairman of the said committee, to cast the committee's vote on behalf of the said committee at the said election. A copy of the said writing is annexed hereto and marked 2R4. The said P. B. Bulankulame was accordingly given a ballot paper. I specifically deny that I refused to allow the other two members of the Atamasthana Committee to vote at the said election. It is, however, correct that whilst the voting was in progress, one of the bhikkhu members of the said committee approached the officer issuing the ballot papers and produced the copy (sent to him for his information) of the notice issued to the Atamasthana Committee, the trustee for the Atamasthana. I explained to him at this stage that it was not necessary for him to put himself to the trouble of voting as he had given the chairman of his committee written authority to cast the vote on behalf of the Atamasthana Committee. He agreed and did not ask for a ballot paper or claim a right to vote at the election. I affirm that when this incident occurred the chairman of the Atamasthana Committee had already voted."

This statement was not challenged and clearly no formal claim to vote was made by the two members of the committee who, the petitioner alleges, were not allowed to vote.

According to this statement it would appear that the Atamasthana Committee was summoned to the meeting and a copy of the notice was sent to each member of the committee for his information.



The document 2R4, which is as follows :—

Anuradhapura, July 2, 1937.

Mr. P. B. Bulankulame, member and chairman of the Atamasthana Committee, is hereby authorised and deputed to cast the committee's vote on behalf of the said Atamasthana Committee at the meeting for the election of a Diyawadana Nilame to be held at Kandy on Saturday, July 3, 1937.

(1) Sgd. H. DEWAMITTA,

(2) Sgd. H. REWATA,

Members, Atamasthana Committee.

Received to-day.

Sgd. A. G. RANASINGHA,

Public Trustee.

July 3, 1937.

shows that the members of the committee took the view that they were not each entitled to vote and authorised the chairman to cast the vote of the committee. I am of opinion that so far as the election of a Diyawadana Nilame was concerned, they were right.

It was argued that if a person appoints A, B, and C his *trustee*, it is the same as saying that he appoints them his *trustees*. But that is not the phraseology of section 9 which says that the trustee shall be the committee, and then goes on to provide that "the said committee shall elect one of their number as chairman, its quorum shall be two and in the case of an equal division of votes at a meeting the chairman shall have a second or casting vote".

The Buddhist Temporalities Ordinance, No. 8 of 1905, section 5, provided that the Atamasthana Committee shall consist of six members, and by section 17 the trustee was appointed by this committee. In the case of other temples the trustees were appointed by the District Committees created by the Ordinance.

The Ordinance of 1931 substituted the Committee as trustee instead of vesting the committee with the right of electing a trustee, which confirms my view that the trustee was the committee and not each member of it. I repeat, for the sake of emphasizing what I have already said, that this opinion is limited to the question I have to decide, namely, whether this committee had one vote or three votes for the purposes of the election of a Diyawadana Nilame.

I think accordingly that this objection must be overruled on two grounds: (1) because the Public Trustee did not in fact refuse to allow the two members of the committee to vote, and (2) because the committee had only one vote for the purpose of the election in question.

In view of my rulings on the objections raised by the petitioner to the validity of the election, it is unnecessary for me to discuss Mr. Perera's contention that the remedy by *quo warranto* was not available to the petitioner because (a) the office of Diyawadana Nilame was not created by charter from the Crown or by Statute, (b) the Public Trustee was exercising a judicial function which he was appointed by law to discharge.

I discharge the rule with costs.

*Rule discharged.*