1940

Present : **Soertsz J.**

JAYASOORIA *v.* DE SILVA.

In re APPLICATION FOR WRIT OF *Quo warranto.*

Writ of quo warranto—Election of Vice-Chairman of Urban Council—Irregularity in voting—Result not affected—Relator acquiesced in proceedings—Delay in making application.

In an application for a writ of *quo warranto* to have an election to an office set aside, the Court will not, in the absence of bad faith, grant the writ where the irregularity complained of did not really affect the result of the election.

The Court will also not grant the writ where the relator acquiesced in the proceedings or where there has been delay in making the application.

THIS was an application for a writ of *quo warranto* to have the election of the respondent as Vice-Chairman of the Urban Council of Kolonnawa declared null and void.

C. V. Ranawake (with him *M. Swaminathan*), for petitioner.

L. A. Rajapakse, for respondent.

Cur. adv. vult.

July 9, 1940. SOERTSZ J.—

This is an application for a writ of *quo warranto* and its ultimate object is to have the election of the respondent on December 9, 1939, as Vice-Chairman of the Kolonnawa Urban Council, for the year 1940, declared null and void, on the ground that the said election was " not decided upon, and done by the majority of the members present " on that occasion, as required by section 23 of the Local Government Ordinance (*Vol. V, Chap. 195, Legislative Enactments*), read with by-law 14 (*b*) published in the *Government Gazette* No. 7,973.

The admitted facts are that, on the day on which the respondent was elected Vice-Chairman, there were eight members present, including the Chairman. One member, by name W. P. Hendrick Perera, proposed and another, J. D. William, seconded that the member named L. R. Perera, be re-elected Vice-Chairman for the year 1940. Thereupon, the Chairman, D. A. J. Tudugalla, proposed as an amendment that W. A. de Silva, that is the present respondent, be elected as Vice-Chairman for 1940. The member J. D. William, who had seconded the motion, seconded this amendment as well. The amendment was put to the house, and the voting resulted as follows :—*Ayes :* Messrs. D. A. J. Tudugalla, T. P. de S. Munasinghe, W. A. de Silva, and Dr. H. A. Dirckze. *Noes :* Messrs. L. R. Perera and W. Hendrick Perera; Messrs. J. D. William and D. C. Liyanage declining to vote. The motion was then put to the house, and was declared lost, the voting being as follows :—*Ayes :* Messrs. L. R. Perera and W. P. Hendrick Perera. *Noes :* Messrs. D. A. J. Tudugalla, T. P. de S. Munasinghe, W. A. de Silva, and Dr. Dirckze; Messrs. J. D. William and D. C. Liyanage declining to vote. The Chairman declared Mr. W. A. de Silva duly elected as Vice-Chairman for 1940.

The next monthly meeting of the Council took place on January 13, 1940. The minutes of the meeting of December 9, 1939, were read and confirmed in the presence of Mr. L. R. Perera and of his proposer and seconder, and there was no question or dissent in regard to the validity of the election made on December, 9, 1939. The respondent took his oath of office on January 5, 1940, and was from that date, by virtue of his office, a Justice of the Peace and Unofficial Magistrate. On February 9, 1940, the Chairman in the excercise of powers conferred on him by section 35 (2) of the Urban Councils Ordinance, No. 61 of 1939, authorised the respondent to do and perform certain administrative acts, and the affidavit submitted by the respondent shows that he has performed many acts in his capacity of Vice-Chairman, as well as in his capacity of a Justice of the Peace.

The present application was filed in the Registry of this Court, on May 1, 1940, almost five months after the date of the election, and the question that now arises before me is whether I should exercise the discretion that is vested in me to allow the application.

I must say at once that I agree with the contention of the petitioner's Counsel that the method of voting was contrary to the requirement of the Ordinance. The section and the by-law I have already referred to put that fact beyond question. The section enacts that "all acts whatsoever authorised or required by virtue of this or any other Ordinance to be done by any Council may and shall be decided upon and done by the majority of members present . . . ." And the by-law provides that "on any question being put whether in Council or Committee . . . every member present shall record his vote, either for the Ayes or for the Noes".

Now, in this instance, the motion was lost and the amendment was carried by four votes. The members present numbered eight. Four was therefore not a majority of the members present. The words of the section are by the majority of the members present, and not "by the majority of the members present and voting". The majority was, therefore, not a majority in confirmity with section 23, and the voting itself was not in conformity with the by-law, which requires every member present to vote Aye or No. In this instance, two members declined to vote. In that emergency, the Chairman should have invited the attention of the two declining members to the requirement of the by-law, and if they did not wish to vote they could have, or could have been made to withdraw from the meeting. If that had been done there would have been the required majority to support the election of the respondent. Looking at the matter in another way, if the members present had not acquiesced in the way the votes were taken, if for instance, Mr. L. R. Perera and his proposer and seconder had made prompt objection, the worst that could have happened from the respondent's point of view is that the two "declining" members might have voted in support of the motion. That would have resulted in an equality of votes, and in that contingency, the Chairman's casting vote would have come into operation by virtue of the proviso to section 23. In the light of the proceedings of December 9, 1939, it is perfectly obvious that it would have been cast in

favour of the respondent. The result is that in effect and in substance, the majority of the members present were in favour of the respondent and although the letter of the law has not been fulfilled, its spirit has been satisfied. When in that state of things a voter such as the petitioner acting clearly on behalf of parties, who had acquiesced in the procedure adopted, comes forward insisting upon the letter of the law, straining at a gnat so to speak, a Court exercising a discretion vested in it, may well refuse to interfere in this extraordinary manner. It has been repeatedly laid down by the Judges on occasions like this that however clear, in point of law, the objection may be to the respondent's title to office, the Court in exercising its discretion will have regard to, and be influenced by (*a*) the conduct, motives or interest of the petitioner, (*b*) the consequences which may result from the granting of the relief sought. In *Rex v. Ward*[1], Blackburn J., as he then was, said that an irregularity not really affecting the result of the election to an office, would not in the absence of bad faith, induce the Court to grant a *quo warranto*. In the course of his judgment he observed as follows:—"We think that the mistake committed here has produced no result whatsoever; that the same person has been elected who would have been elected if the election had been conducted with the most scrupulous regularity and that the defendant's title, if bad at all, is only bad, as I may say, on special demurrer. We ought, in the exercise of our discretion, to refuse leave to disturb the peace of the District by filing the information". Moreover in this case there has been delay in making the application, and that again is a matter a Court will take into consideration when called upon to exercise its discretionary power. I, therefore, refuse the application with costs.

Application refused.