

1952

Present : Swan J.

D. W. JAYASINGHE, Petitioner, and D. G. DAYARATNE
(Assistant Government Agent), Respondent

*S. C. 128—Application for a Writ of Mandamus on the
Government Agent, Kegalle*

*Excise Ordinance—Local option poll—Voting area—Procedure for defining its
boundaries—Rules 5, 10, 11, 12, 13—Mandamus.*

By Rule 13 of the Local Option Rules of 1928 :—

“ The Government Agent with the advice of the Advisory Committee shall have the power to define the exact boundaries of any area in accordance with the provisions of Rules 10, 11 and 12. ”

Held, that Rule 13 would have no application if the boundaries of the villages involved are already definite and well known.

APPLICATION for a Writ of *Mandamus*.

H. W. Jayewardene, with *P. Ranasinghe* and *A. de Silva*, for the petitioner.

E. R. de Fonseka, Crown Counsel, for the respondent.

Cur. adv. vult.

December 17, 1952. SWAN J.—

The petitioner who claims to be entitled to vote at any local option poll in the Kegalle Town area complains that the respondent failed to comply with certain statutory rules in connection with a local option poll held on 26.1.52, which resulted in the closing of the Foreign Liquor Tavern in Kegalle Town and Arrack Tavern No. 1 in the village of Olagama which falls within the Kegalle Town areas. The petitioner has applied to this Court for a writ of *mandamus* on the respondent in the following terms :—

- (a) “ declaring the poll held on 26th January, 1952, to be null and void ;
- (b) commanding the respondent to report to the proper authority that the said poll has been declared null and void and that the licences for Arrack Tavern No. 1 Olagama and Foreign Liquor Tavern, Kegalle, in the area administered by the Kegalle Urban Council have not been abolished for the rent period commencing next after the date on which the said poll was held ;
- (c) commanding the respondent to hold a poll only after a fresh application is made and in compliance with law ; ”

Learned Counsel for the respondent contends that the first prayer is for consequential relief, that the second prayer is a meaningless request because there is no “ proper authority ” except the respondent himself

to whom report would have to be made, and that the third prayer envisages a situation that may never arise, because no one can say whether a fresh application for a poll will be made. Mr. Jayewardene submits that the prayer of the petition is based on the order made by Driberg J. in *Miller & Co. v. Government Agent, Province of Uva*¹. It will be necessary to consider what form the writ should take only if the petitioner can satisfy this Court that he is entitled to succeed on his application.

Counsel for the respondent also objected *in limine* that the application should be dismissed because—

- (a) the petitioner has no real interest in the matter, and
- (b) there was undue delay in making the application.

As regards (a) it is not denied that the petitioner was on the list of voters but it was suggested that in the matter of this application he was a mere figure-head having been set up by some person or persons who were financially interested in keeping these taverns open. On the evidence I am unable to come to that conclusion and I would hold that the petitioner has a demonstrable interest in the matter of this application and that he can maintain the application.

As regards the second objection Mr. Fonseka has pointed out that the preliminary list of voters was prepared and made available for inspection before 31.8.51 and the final list published on 30.10.51. The petitioner, he maintains, should therefore have made this application shortly after the publication of the final list. The petitioner in his evidence stated that he became aware of the alleged irregularity only a few days before the poll was held; and Mr. Jayewardene has explained that before the petition could be submitted to Court certified copies of certain documents of a voluminous nature had to be obtained. In the circumstances I would hold that there has not been any unreasonable or undue delay in making the application.

I shall now deal with the application on the merits. The complaint of the petitioner is that the respondent failed to comply with Rule 13 of the Local Option Rules 1928 (Subsidiary Legislation, Volume 1, Cap. 42, page 309). This rule provides that "the Government Agent with the advice of the Advisory Committee shall have the power to define the exact boundaries of any area in accordance with the provisions of Rules 10, 11 and 12". The petitioner's case is that the voting area which had to be determined under Rule 11 could not have been determined without fixing the exact boundaries and, therefore, the requirements of Rule 13 had to be observed. The petitioner filed affidavits from two persons on the Advisory Committee to the effect that they had not been consulted for the purpose of defining the correct area. In each of these affidavits the affirmant states—

"According to the best of my information the voting area as fixed for the poll in January, 1950, is not identical with the voting area for the poll in question."

¹ (1928) 30 N.L.R. 6.

The respondent both in his affidavits and in his evidence in Court admits that he did not seek the advice of the Committee. His position is that he was not acting under Rule 13 because there was no need to define the exact boundaries which were already well known. But learned Crown Counsel in the course of his argument contended that even if the Government Agent were acting under Rule 13 he had a discretion whether to consult the Advisory Committee or not. In other words, the argument was that as the rule did not say that the Government Agent should not, except upon the advice of the Committee, define the exact boundaries of any voting areas it made it optional for him to consult the Committee. With this contention I am unable to agree. The rule as I read it empowers a Government Agent to define the exact boundaries of any voting area, when the need for such definition arises, only with the advice of the Advisory Committee. Any other interpretation of the rule would make nonsense.

The crucial question therefore is whether any need arose before or during the preparation of the voters lists to define the exact boundaries of the voting area laid down by Rule 13. In order to consider this, one has to know what is required to be done when an application is made for a poll. The application itself has to be made under Rule 2 before June 30 in any particular year. Thereupon, the Government Agent has under Rule 5 to prepare a preliminary list of the persons entitled to vote at such poll. That list has to be prepared on or before 31st August, and it must be made available to the public for inspection. Before preparing the preliminary list the Government Agent has to determine the voting area in accordance with the rules. Voting areas fall under two categories—namely, *Urban* and *Rural* and Rules 10 and 11 have to be applied. Rule 10 deals with Urban areas and Rule 11 with Rural areas. But Rule 10A provides that whenever the population of any Urban area according to the latest census report is below 5,000, the voting area is to be determined not according to Rule 10 but according to Rule 11.

It is common ground that the population of the area administered by the Kegalle Urban Council was less than 5000 and so Rule 11 would apply. This rule is worded thus :—

“ *Rural*—In rural areas the voting area shall be, in the case of a single tavern, hotel, or place licensed to sell beer or porter, as nearly as practicable the whole area within a radius of two miles from the licensed premises in question. Where the circumference of the resultant circle cuts a village into two parts, the whole of such village shall be excluded unless more than half of it falls within the said circumference; but where in any area there is more than one tavern, hotel, or place licensed to sell beer or porter, provided no two of them are more than one mile apart from each other, the voting area for all such taverns, hotels, or places shall be one and the same, but the circle comprising such voting area shall have its centre at as central a point as possible. ”

There were two taverns affected by the poll and the Government Agent had therefore to find a point equidistant between them and draw a circle.

with a radius of two miles from that point, and include all those villages the whole of which or more than half of which fell within the circumference of the resultant circle. If the boundaries of the villages were definite and well known it was merely a matter of mathematical calculation. The respondent said he did all that he was required to do under Rule 11 ; that the boundaries of the villages were definite and well known and that acting upon information given him by the District Revenue Officers and the Village Headmen he determined the voting area for the poll and prepared a preliminary list of persons entitled to vote in each of the villages comprising the voting area. This list gave the names of the voters under each village that fell within the voting area as determined by Rule 5. When this list was put up for public inspection any person interested in the poll could have objected on the ground that the names of eligible voters from villages which were wrongly excluded from the voting area should be added to the list or that the names of persons in villages wrongly included should be struck out. The respondent in his evidence has stated that there were no objections and that he prepared and published the final list on 30.10.51 in accordance with the provisions of Rule 5. The concluding part of this rule provides that —

“ No name shall be added to or struck out from such final list after publication, and the local option poll shall be held on such list *which shall be final and conclusive for all the purposes of these rules.* ”

This should conclude the question at issue save for the submission that the voting area could not have been determined except with the advice of the Advisory Committee. As I have already said, Rule 13 would have no application if the boundaries of the villages involved were defined and well known. The respondent was cross-examined on this point and he said that although he did not know the boundaries personally, he was satisfied on the information he received from the Headmen and the District Revenue Officers that there was no doubt about the boundaries. It was argued that the respondent could not and should not have determined the voting area upon such information. I cannot see how an administrative officer like a Government Agent could ascertain the boundaries of villages except in this manner. A point was made of the fact that the village of Kolongolla which was included in the list prepared for the poll held in 1951 for the very same two taverns was omitted from the list for the poll of 1952. The respondent explained that on the earlier occasion the circle was drawn on a small scale map whereas on the second occasion the map used was on a very much larger scale, and that upon a careful examination using graph paper and counting the squares he was satisfied that more than half of the village of Kolongolla fell outside the circle.

I accept the evidence of the respondent that the boundaries of the villages that had to be included in or excluded from the voting were definite and well known. No evidence has been led to satisfy me to the contrary, and it seems to me absurd to suggest that the boundaries of villages cannot be readily ascertained even though a survey map does not show them in detail. In the result I would hold that there was no need to ascertain or fix the exact boundaries of the voting area and that

the respondent, therefore, was entitled to determine the voting area by the application of Rule 5 which does not require him to act upon the advice of the Advisory Committee. Being satisfied that the respondent acted in accordance with Rule 5 and that no occasion arose for the application of Rule 13, I take the view that the list published on 30.10.51 was final and conclusive and that it is not open to the petitioner or any other person to challenge its correctness as regards the poll held on 26.1.52.

The application is dismissed with costs.

Application dismissed.

