1943 *Present* : **de Kretser J.**

WIJESEKARA *v.* ASSISTANT GOVERNMENT AGENT, MATARA.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF *Mandamus.*

Urban Council—Preparation of lists of voters—Discretion of Government Abent—Ministerial duties—Urban Councils Ordinance, No. 61 of 1939, s. 9 (1)—Writ of Mandamus.

When the Assistant Government Agent has once fixed a date for the commencement of preparation of the list of voters under section 9 (1) of the Urban Councils Ordinance, he is not entitled to alter the date.

When he causes a list to be prepared under section 9 (1) he is acting as administrative officer in charge and is performing purely ministerial duties.

In such a case a writ of *mandamus* would lie against the Assistant Government Agent.

Section 42 of the Courts Ordinance, which gives the Supreme Court power to grant and issue mandates in the nature of writs (stated therein) "*according to law*", means that the writs would issue in the circumstances and under the conditions known to the English law ; these would include the persons against whom the writs would issue.

THIS was an application for a writ of *Mandamus* on the Assistant Government Agent of Matara. The facts are stated in the judgment.

H. V. Perera, K.C. (with him *Cyril E. S. Perera*), for petitioner.

Crosette-Thambiah, C.C., for respondent.

Cur. adv. vult.

October 13 & 20, 1943. DE KRETSER J.—

This is an application for a *Mandamus* on the Assistant Government Agent of Matara and arises in the following circumstances. By section 7 of the Urban Councils Ordinance, No. 61 of 1939, the qualification of voters is fixed, and that qualification must exist on the date of the commencement of the preparation of the list of voters which section 9 requires to be prepared. No person is qualified to vote unless his name appears in such list. The date on which the preparation is commenced is one, therefore, of the utmost importance, and the list prepared confers or takes away legal rights on or from possible voters. It would be more satisfactory if such an important date were definitely fixed by the Ordinance itself, but though it is not so fixed it is a date of which the public ought to be aware and necessarily must be aware, for such a list can hardly be prepared in secrecy or in the privacy of some office.

The Ordinance contemplates that the preparation of such a list will have a commencement and that it will not be ended as soon as it is begun. No provision is made in the Ordinance for any notice to be given to the public of this important date but the Government Agent, who is a responsible officer, is presumably expected to do things in a fair and proper manner.

The respondent in this case did publish a notice in the *Government Gazette* of March 13, 1943, notifying "for general information that the preparation of the electoral rolls for the forthcoming Matara Urban Council Elections, 1943, will be commenced on April 12, 1943". Whether any further notices were posted up or not is not known, but it is admitted by Crown Counsel appearing for him that the respondent caused instructions to be sent to the Vidane Arachchi of Matara some time before April 12, ordering him to get the headmen within his peruwa to start the making of the electoral lists, and that the Vidane Arachchi caused a notice to be published by beat of tom-tom on April 10 and 11, 1943, that the preparation of lists of qualified voters would commence on April 12. Accordingly the lists were prepared by the headmen. It is further admitted that it came to the notice of the respondent thereafter that only a comparatively small number of voters would be entitled to vote, the others being disqualified by reason of their not having paid all rates and taxes due from them by April 12.

On this statement of facts it would appear that, however unfortunate the consequences may be, it was the respondent's plain duty to proceed in the manner indicated in the Ordinance.

I was informed that in two other Urban Councils the same situation had arisen, and, on appeal to the authorities, remedial legislation had followed with regard to those Councils. To judge by the affidavit and from statements of Counsel, the respondent seems to have thought he could deal with the situation himself. What he did was, by a fresh notification in the *Gazette,* to cancel the previous notification and to fix June 15 as the date on which the preparation of the electoral list would be commenced. The later list was dealt with, and some persons seem to have objected to the inclusion of fresh names on the ground that the proper date to be considered was April 12. The proceedings are not

before me but I understood from Crown Counsel that the respondent ruled that he was justified in taking the course he did and that the fresh names were properly on the list.

Crown Counsel suggested that as no *Mandamus* would lie if the respondent has exercised judicial functions, therefore no *Mandamus* should issue. In my opinion the Government Agent does not exercise judicial functions until the stage indicated in section 9 (2) is reached. When he causes a list to be prepared under section 9 (1) he is acting as the administrative officer in charge and is performing purely ministerial duties. He gave instructions to his headmen, who presumably were told what they had to do and who, no doubt, would have with them the list already in existence and would proceed to revise it. They would ascertain whether the candidates possessed the qualifications mentioned in section 7 and were much better qualified to do that in the first instance than the Government Agent himself.

Crown Counsel next submitted that no *Mandamus* would lie where the Ordinance itself provided a sufficient remedy, and his position was that the remedy lay by way of objection under section 9 (2) and that such objection had in fact been taken and dealt with.

Section 9 assumes that the list had been properly prepared and that such list contains the names of persons possessing the qualifications specified in section 7. For such list to be in order, therefore, the date when a commencement was made with the preparation of the list is all important. Section 9 (2) contemplates objections to a list which has been prepared in terms of the Ordinance. I do not think, therefore the second objection is sound.

His third objection was that section 9 (1) requires the Government Agent to prepare the list and that during the stage when his agents are collecting the material he is not preparing the list and that he does so only when he applies his mind to the information so gathered. Crown Counsel did not say so but what his objection really amounts to is that the Government Agent must perform the manual task of compiling the list, for quite clearly he cannot have the means of checking the information supplied to him until interested members of the public have made claims or objections. Besides, at what time would he apply his mind ? Would that depend on whether he was well or ill, busy or at leisure, inclined to take up the matter or not ? How would the public know the crucial time at which rights were being established or taken away? It is not only the matter of payment of taxes, but a person who was not of age on a particular day may be of age on another day ; and a person who had not been resident long enough may have his term of residence lengthened, and equally a person who had been resident long enough within the 18 months preceding might find himself disqualified, all these serious consequences depending on when the Government Agent decided to apply his mind to the list. As a matter of fact Crown Counsel's statement amounts to an admission that the respondent did apply his mind to it and because he found that an unfortunate situation would result he adopted other measures.

Crown Counsel next pointed out that the Ordinance fixes certain dates either expressly or by necessary implication, and argued that with

regard to other dates the Government Agent had a discretion. Undoubtedly he had a discretion as to the date he would fix for the commencement of the preparation of the list, but once he had exercised that discretion certain legal rights flowed from the Ordinance and it was not within his discretion to interfere with the rights or disqualifications so created. Crown Counsel's submission amounts to saying that he could keep on fixing different dates in the exercise of his discretion until a stage was reached when he could not do so because his list had to be posted for claims and objections not later than three months before the elections. I do not think the Ordinance contemplated that the date of the commencement of the preparation of the list could be varied in this manner.

In my opinion quite clearly that date was April 12 with regard to the particular Urban Council now being dealt with, and the respondent had no right to alter that date. No objection was taken on the ground of delay or of the consequences that might result from the issuing of a *Mandamus*, but I put both positions before Counsel. It seems to me that neither the delay nor the consequences that may ensue ought to influence the Court in the circumstances of this case. To refuse a *Mandamus* will mean that any election held on a list illegally prepared might well have its legality questioned and involve both the Government and candidates and voters in needless inconvenience and expense. The latest day for holding an election is apparently December 15, and it may be that legislation will be required postponing the date of the elections, if no other remedy exists ; but that course is preferable to the holding of an election on a list illegally prepared.

I accordingly direct that a *Mandate* do issue on the respondent requiring him to exhibit the list the preparation of which was commenced on April 12, and to proceed thereon in the manner provided in the Ordinance. I shall make order as to costs after hearing Counsel.

October 20, 1943.

This matter was set down for to-day in order that I may hear Counsel on the question of costs, regarding which I thought that it was possible that they may arrive at some agreement. Crown Counsel has nothing to say on the matter of costs and there seems to be no reason why costs should not follow the event. The petitioner will, therefore, be entitled to his costs.

Crown Counsel, however, invites me to reserve my finding on the ground that I have made an error in holding that a writ of *Mandamus* may issue on this occasion. I have grave doubts as to my power to revise my judgment except it be to correct some clerical or typing error without affecting the substance of the judgment or, perhaps, as Mr. Perera concedes, in a case in which a judgment has preceeded *per incuriam*, for instance, on some enactment which, it was subsequently discovered, had been repealed. It is, no doubt, convenient and advisable to correct an error rather than let it mislead any person, especially a subordinate Court, but, on the other hand, if such a power were exercised except in the most exceptional circumstances, I think the most embarrasing consequences would result. There would be no limit of time during which the Court may not be invited to reverse its findings. On the

analogy of "staircase wit", we should have Counsel indulging in staircase arguments. I have heard Crown Counsel on the point he wishes to urge and, far from being convinced that there is an obvious error in my judgment, I am inclined to think that there is none, for at least it appears that there are conflicting *obiter dicta* of this Court which, in themselves, prove that the error is not so obvious. In fact, if I were inclinded to accede to his request, I should have to set this matter down for argument before a Fuller Bench, which will lead to delay in a matter in which already too much time has elapsed.

His argument is based on section 42 of the Courts Ordinance and on certain *dicta* in judgments of this Court. The first one referred to by him, was the case of "An application for a Writ of Prohibition to be directed to the Members of a Field General Court Material" (*18 N. L. R. p. 334*) where the then Full Bench dealing with section 46 (which corresponds with section 42 of our present enactment) came to the conclusion that the Writ of Prohibition could not issue to a Court Martial in view of the proviso to section 4 (which corresponds to the present section 3). De Sampayo A.J., in the course of that judgment, drew attention to the fact that section 42 confers "not separate powers, but one power to do several things, which are all mentioned *unoflatu;* namely, to inspect records, issue mandates, and transfer cases". In the same case, Wood Renton C. J. stated "in the next place, the use of the word 'person' in that section may find its explanation in the circumstance that a writ of *Mandamus,* for which also the section provides, is issuable to individuals as well as to tribunals". The case is really therefore, against Crown Counsel's contention.

He also referred me to the case of an application for a mandate in the nature of a *Writ of certiorari,* in the case of the *Dankotuwa Estates Co., Ltd. v. Tea Controller*[1]. That case dealt with an application for a writ of *ceritorari* which could issue only to a judicial officer. The application concerned a person who was not a judicial officer, and Soertsz J., after quoting copiously from the English law, referred to section 42, and certainly did use expressions which were general enough to cover all the writs mentioned therein, but he was only concerned with the particular type of writ applied for and his interpretation of section 42 with reference to that particular type of writ is, if I may say so with all respect, quite in accordance with my own view. I do not think he ought to be taken to have intended more. He did hold that the rule *ejusdem generis* applied. With all due respect, I venture to disagree with him. To begin with, that rule must give way to a more urgent rule which insists on the object of the Legislature being first given effect to. It is a rule that may have been applied to the section if it were dealing with only one type of writ, but section 42 deals with a variety of writs. I do not think the judgment in the matter of an application for a writ of *certiorari In re Goonesinghe*[2] compels me to come to another conclusion. The Chief Justice was there rather dealing with the expression "other tribunal" and he came to the conclusion that "other tribunal" meant an inferior Court and not the Supreme Court.

[1] *42 N. L. R. 197.*

[2] *43 N. L. R. 337.*

In *de Silva v. de Silva*[1] which was an application for a writ of *quo warranto,* Wijeyewardene J. doubted the correctness of the interpretation put on the word " other person " by Soertsz J. A writ of *quo warranto* does not issue to a person acting judicially but is used to question the validity of an election, for instance. In such a case, it is the private person who is affected and against him the writ goes. In the case of a writ of prohibition, the writ may go against a judge or a party to a suit. If one applied the rule *ejusdem generis,* one would be driven to the conclusion that the Legislature had made useless provision for cases which would never arise. It seems to me that section 42 is drafted compendiously, and was intended to give the fullest powers to this Court and not to limit its powers. The writs mentioned were writs known to the English law, and we have hitherto gone to that law for direction and guidance. The section seems, in the first part, to give this Court (1) authority to inspect and examine the records of any Court and (2) to grant and issue, according to law, mandates in the nature of writs of *mandamus, quo warranto, certiorari, procedendo* and prohibition. What did the Ordinance mean by the phrase " according to law "? It must only mean, in the circumstances, the English law ; that means that the writs would issue in the circumstances and under the conditions known to the English law. These would include the persons against whom the writs would issue. The section might well have stopped at the word " prohibition ", and the mere fact that it does enumerate certain persons need not force one to the conclusion either that there has been an alteration in the law or that the provision is nugatory. This Court is empowered to grant and issue a *Mandamus* according to law ; against whom it would issue would be governed by the English law and I think the expression " other person or tribunal " was advisedly used to catch up all the different persons to whom the various writs might apply according to the circumstances in each case prescribed by law. Crown Counsel's argument is based on the statement in my judgment that the Assistant Government Agent at a certain stage was acting administratively. The statement was made with reference to the particular argument raised ; namely, that he was acting in a judicial capacity and had already pronounced his judgment after hearing certain parties and that, therefore this Court should not allow the writ which would, in effect reverse his judgment declared by section 9 (2) to be final and conclusive. When a judicial officer makes an error in his judgment, after considering the matters urged before him, then, clearly, a writ of *Mandamus* will not lie. But the judicial officer is not always giving judgments. He is quite frequently acting administratively and may sometimes said to be acting even mechanically. The distinction was well brought out by Channel J. in the case of Hanley Election (*3 Q. B. D., 518*) which I had occasion to refer to only yesterday with regard to another application. In that particular case, the revising Barrister, having acted judicially, had failed to perform what Channel J. called " the mechanical part of his duty " namely, to see that the final list conformed with his judgment. In the present case, it is not clear that the Assistant Government Agent was not

[1] *21 C. L. W. p. 41.*

acting in a judicial capacity even at the stage which he ordered the preparation of the list. The Government Agent comes into the picture only for the purpose of preparing and settling the electoral list and, perhaps, for certain other limited purposes. To settle that list, he has to act judicially and to act judicially he must have the list before him, much in the same way as any judge has before him the cause list. Each name in the list before him may potentially be objected to and he may then have to exercise his judgment. It is possible that there may be no objections whatever, in which case he may act almost mechanically in certifying the list; but merely because he acts administratively or mechanically it does not follow that the Ordinance does not bring him in purely to exercise judicial function.

For the reasons which I have given, I cannot reopen the argument any further in this matter. I have already indicated that costs will follow the event.

Rule made absolute.