1946 *Present :* **Dias J.**

ALBERT PEIRIS, Petitioner, *and* GUNARATNE, Respondent.

APPLICATION FOR A WRIT OF *Mandamus* ON THE ASSISTANT GOVERNMENT AGENT, KALUTARA.

Writ of mandamus—*Town Council—Preparation of list of voters—Failure of Government Agent to perform statutory duties—Town Councils Ordinance, No. 3 of 1946, ss. 8 (1) (b), 9 —Power of Court to issue writ after statutory time has passed.*

Where a person duly made his claim, in terms of section 9 (3) of the Town Councils Ordinance, to have his name inserted with the " double qualification mark ", but there was a failure on the part of the Government Agent to perform his statutory duties—

Held, that *mandamus* would lie.

Held, further, that the Court has jurisdiction to issue the writ of *mandamus* for the performance of a public duty even when the prescribed statutory time has passed.

THIS was an application for a writ of *mandamus* against the Assistant Government Agent, Kalutara. The petitioner submitted that, in consequence of some defective procedure in the Kachcheri, the respondent failed to perform his statutory duties of deciding his claim to have his name placed with a " double qualification mark " on the list of voters of the Town Council of Alutgama and, thereafter, of revising the preliminary list of voters and publishing the revised list.

N. E. Weerasooria, K.C. (with him *E. D. Cosme*), for the petitioner.

H. W. R. Weerasooriya, C.C., for the respondent.

Cur. adv. vult.

November 8, 1946. DIAS J.—

It is common ground that the petitioner L. Albert Peiris of Alutgama possesses the qualifications necessary to entitle him to have his name placed on the list of voters of the Town Council of Alutgama by having the " double qualification mark " placed against his name in terms of section 8 (1) (*b*) of the Town Councils Ordinance, No. 3 of 1946, to show that he is a person qualified to be a candidate for election to the Town Council. Admittedly, his name has not been so distinguished, although the names of his wife and servant have been.

Before a general election can be held, it is the duty of the Government Agent to prepare for each electoral division a list containing the names of persons qualified to vote under section 7. It is his duty to mark in this list with the " double qualification mark " the names of every person who is entitled under section 8 (2) to have his name so marked.

This preliminary list is prepared by the Government Agent. Having done so, it is his duty to exhibit a notice in the three languages at specified places indicating that the lists are open for inspection and that at a time and date specified in the notice he will attend at a specified place to hear all claims for the insertion of any name or " double qualification mark " in the list and to hear objections—section 9 (1) (*a*), (*b*).

Section 9 (2) provides that when the Government Agent attends to hear claims or objections, he is to decide them in a summary manner after such inquiry as he may deem necessary either on that date or within the period of seven days next succeeding that date. Every such decision shall be final and conclusive.

Section 9 (3) provides that no claim for the insertion of any name or double qualification mark in any of the lists shall be entertained " unless the claimant shall have submitted the claim in writing not less than fourteen days before the date specified in the notice exhibited under sub-section (1) of section 9 ". When such claim is received, it is to be posted up on the notice board of the Council not less than ten days before that date.

After the determination of all claims and objections, the Government Agent or a person deputed by him shall revise the lists ; and copies thereof certified by the Government Agent are to be exhibited at the office of the Town Council.—Section 9 (6).

The lists, so certified under section 9 (6), shall be final and conclusive of the question whether or not a person is qualified to vote or to be a candidate for election either at a general or by-election.—Section 9 (7).

In this case the respondent published the notice marked X on July 8, 1946. He intimated that the lists were open for inspection in terms of section 9 (1) (*a*). He further intimated that on August 21, 1946, either he or his deputy would attend at the Town Council to hear claims and objections in terms of section 9 (1) (*b*). The public were especially warned of the requirement in section 9 (3) for submitting claims in writing to him not less than fourteen days previous to August 21, 1946, *i.e.*, to reach him on or before August 6.

The petitioner's name appears in the list, but he has not been awarded the double qualification mark. The duty was therefore cast on him to make his claim and to make it in time.

It is common ground that neither the respondent nor his deputy attended at the Town Council on August 21, 1946, as specified in the notice. The respondent in his affidavit, Y 2, has stated that he did not do so " as no claims or objections had been received by him in writing from any person whomsoever in terms of the said section ".

It is obvious from the affidavit (Y 1) filed by the Kachcheri Mudaliyar of the respondent that the latter had deputed to him " the duties of attending to the papers " relating to the election work in the District of Kalutara. Therefore when the respondent says he did not attend at the specified place because no claims had been received, he is merely going on what his Kachcheri Mudaliyar reported to him. Therefore if the Kachcheri Mudaliyar or his subordinates had been negligent or dishonest, the Government Agent would not necessarily know about it.

This application for a *mandamus* was filed in this Court on October 11, 1946. Notice was served on the respondent on October 19. Therefore on that date the respondent knew what the petitioner's case was. This Court ordered the matter to be listed for argument on November 4, and the Attorney-General was informed. The respondent therefore had sixteen days in which to contact the Law Officers and the Crown Proctor, place his case before them and have his affidavits in this simple case prepared by November 4. The case however could not be taken up on that day. It was taken up for argument on November 7 and the respondent's affidavits Y 1 and Y 2 bearing date November 7 were only served on the petitioner's lawyers on the morning of the day fixed for argument. Mr. Weerasooria, K.C., has complained that Y 1 and Y 2 should be rejected out of hand because of their lateness. He complains that this delay has prevented him from submitting supplementary affidavits.

I decided to admit Y 1 and Y 2 leaving the question of the credit to be attached to them for subsequent decision.

The petitioner's case is that he made his claim in writing by his letter P 2 dated July 20, 1946, to which he got no reply. He then wrote letter P 3 inviting attention to P 2 and reiterating his claim. It will be remembered that in terms of the notice, claims received after August 6 would be shut out. The petitioner says he received no reply to P 3. He says he then wrote P 4 dated August 20, 1946, and invited attention to P 2 and P 3.

Now if this evidence is true, the respondent had received not one claim but two claims from the petitioner. If so, it was his statutory duty to have attended at the Town Council on August 21 to decide those claims.

To the petitioner's letter P 4 dated August 20, 1946, he received the reply P 5 from the respondent. If the copy of the letter P 5 attached to the petitioner's affidavit is a true copy, and there is no evidence that it is not, it is a curious circumstance that this official letter contains neither a date nor a number. In P 5 the reference to the earlier letters is ignored. The respondent does not even condescend to state that the petitioner's references in P 4 to two earlier letters is not understood as no such letters had been received at the Kachcheri. All that P 5 says is that no action can be taken " as your claim has been received too late " .

The Kachcheri Mudaliyar's affidavit is unsatisfactory. In paragraph 5 he says that he did not receive any letter dated July 20, 1946, or August 4, 1946. He adds " had the said letters. . been received at the Office of the Assistant Government Agent I should have received them and have dealt with them ". He does not say whose duty it is to receive letters coming by post or brought by messenger, and whether a register is maintained, as is done in most Government Departments, of all letters received. There is no affidavit from the Subject Clerk in charge of this particular matter, who should be in a position to give more direct evidence than the Kachcheri Mudaliyar as to whether such letters were in fact received.

I am entitled to make this comment because there is the suggestion in the Kachcheri Mudaliyar's affidavit in paragraph 10 that the letter P 4 " had been placed in the Office file and appears to have been fraudulently extracted therefrom ". The best person to give evidence of that fact is the Subject Clerk in charge of that file or the Record Keeper, from neither of whom has an affidavit been filed.

In paragraph 8 the Kachcheri Mudaliyar says that a letter dated August 20, 1946, " was received and dealt with by me and according to the best of my recollection the letter was to the effect that the petitioner was entitled to be a candidate and that his name did not appear in the list as a person entitled to be a candidate " He continues " *I am definite* that the said letter contained no reference to any letters dated July 20, 1946, and August 4, 1946, alleged to have been written by the petitioner to the Assistant Government Agent, Kalutara. I verily believe that if the said letter dated August 20, 1946, contained reference to two previous letters I should have caused an investigation to be made as to the receipt or otherwise of the said letters ". The Kachcheri Mudaliyar does not explain why the letter P 5 is undated. Surely it is most improbable that letters from a Kachcheri or any Government Department should be undated. The suggestion underlying the Kachcheri Mudaliyar's affidavit seems to be that the petitioner having made no claim until August 20, 1946, caused that letter to be fraudulently extracted from the official file, because if it was allowed to remain, it could be produced in Court, when it would be manifest that it contained no reference to two earlier letters.

The petitioner, on the other hand, submits that the Kachcheri authorities suppressed that letter because, if produced, it would prove

the truth of the petitioner's case and a serious irregularity in the performance of his statutory duties by the respondent or gross negligence on the part of his subordinates would be disclosed.

I have anxiously considered this matter and after weighing all the circumstances, I feel bound to hold against the respondent on this point. The delay in filing the affidavits, the failure to tender affidavits from the Subject Clerk or the Record Keeper, who had custody of the file, the undated and un-numbered letter P 5, all indicate that the respondent's case is improbable. I doubt the accuracy of the Kachcheri Mudaliyar's statement in the affidavit that the petitioner saw him and admitted "that he had not sent any application earlier than the letter dated August 20 as he had not scrutinized the notice dated July 8, 1946, and was unaware of its contents"

It seems highly improbable that if the petitioner had actually caused a Kachcheri official to abstract documents from an official file in order to support a false application for a *mandamus*, he would at the same time admit to the Kachcheri Mudaliyar that he only thought of making his claim after the due date had passed. The lateness in filing this affidavit precluded the petitioner from meeting this allegation by filing a counter affidavit.

I hold that the petitioner did, in fact, make his claim in time and that owing to some defective procedure, the claim did not reach the Assistant Government Agent. There has been a failure therefore on the part of the respondent to perform his statutory duties. The case of *De Soysa v. Dyson* [1] has been cited to me by Crown Counsel. I do not think that case applies. As pointed out by the Acting Chief Justice, the writ of *mandamus* is not issued on the ground that a duty has been performed *erroneously*. It is issued to compel the performance of a *neglected* or *disregarded* public duty imposed by law. That is what has happened here.

Crown Counsel argued that even if it is held that the allegations made by the petitioner are correct, nevertheless *mandamus* will not lie because under section 9 (2) and section 9 (7) the statutory time has passed and the lists are now final and conclusive. I do not think that argument is sound. For the lists to be held to be final and conclusive the preceding steps should have been regularly taken. This has not been done and the presumption does not arise.

I therefore hold that *mandamus* will lie and I direct that the writ should issue. The respondent will pay to the petitioner the costs of these proceedings.

P. S.—Since this judgment was written, Mr. Weerasooriya, C.C., has brought to my notice the case of *R. v. Hanley Revising Barrister* [2] which shows that this Court has jurisdiction to issue the writ for the performance of a public duty even when the prescribed statutory time has passed.

Rule made absolute.

[1] *(1945) 46 N. L. R. 351.*

[2] *(1912) 3 K. B. at p. 531.*