

1941

Present : Soertsz J.

PIYADASA v. GOONESINHA.

In re APPLICATION FOR A WRIT OF QUO WARRANTO.

Municipal Election—Election questioned on grounds of general undue influence and general bribery—Failure of authorities to provide adequate machinery for taking votes—Partiality of presiding officer—Colombo Municipal Council (Constitution) Ordinance, s. 39 (1 and 2) (Cap. 194).

A writ of *quo warranto* lies to question the election of a member to the Municipal Council on the grounds of general undue influence or general bribery.

A Municipal election cannot be questioned on the ground that the responsible authorities failed to provide adequate machinery for the proper taking of the votes of the electors. Such an election cannot be questioned on the ground that the presiding officers were partial to the members elected unless the alleged partiality could be brought within the scope of undue influence or bribery.

THIS was an application for a writ of *quo warranto* to question the election of the respondent as member of the Maradana Ward (South) of the Colombo Municipality.

H. V. Perera, K.C. (with him C. V. Ranawaka, Dodwell Gunawardana, and V. F. Gunaratne), for respondent, raised the preliminary objection that the writ of *quo warranto* does not lie.

Municipal bodies are mere creatures of statutes and statutes are creatures of Parliament itself.

In England prior to 1872 no writ of *quo warranto* was available. After 35 and 36 Statutes Victoria Chapter 60, section (6), *quo warranto* would lie. Under section 44 *quo warranto* would lie against the presiding officer.

The common law of Parliament must not be confused with common law as opposed to equity.

No common law is applicable to bodies created by statute. The law applicable to such bodies is the statute law.

Where the statute is silent you cannot engraft the common law much less the common law of Parliament.

In 1872 for the first time elections became voidable.

Where the Legislature provides for an election petition, no writ is available, vide *Rogers on Elections*, p. 270. After 1872 *Woodwards v. Sarsons*¹ was decided.

Municipal elections in Ceylon are governed by the Colombo Municipal Council (Constitution) Ordinance, Chapter 194. Petitioner may not go outside this Ordinance to question an election. Sections 16 and 17 sets out grounds on which members vacate office.

Section 18 deals with persons ousted from office who refuse to vacate their seats. The Ordinance is silent regarding general bribery and general corruption. Hence Legislature did not intend elections to be impeached on these grounds. You cannot apply the common law of Parliament in Ceylon. The provisions of the penal law could be enforced in case of bribery and corruption. The Legislature has no intention in minor elections to make provision for an election petition. In these elections there should be finality. In the *Application for mandamus on the Chairman, Municipal Council*², the writ was refused.

(2) An election cannot be questioned on the grounds that the authorities had failed to provide adequate machinery for voting. Section 39 (1) provides that "it shall be the duty of the returning officer to provide at each polling station reasonable facilities for voting."

(3) The third ground on which the writ should be refused is that there is unreasonable delay in applying for the writ *Wijeyratne v. Obeysekera*³.

(4) The application for the writ is not made *bona fide*. The defeated candidate has put forward a man of straw to come forward and ask for a writ. At least as a salutary measure an order for security for costs should be made.

C. S. Barr Kumarakulasingham (with him *H. Wanigatunga, S. Saravanamuttu, and H. W. Jayawardene*) for applicant.—The writ is asked on the following grounds:—(a) General undue influence, (b) general bribery, (c) inadequate machinery for the taking of votes, (d) partiality of presiding officers.

In England by the Common law writ of *quo warranto* would lie. *Rogers on Elections*, 18th edition, p. 269.

In re Chairman of the Municipal Council (*supra*) it was held that where an election was merely colourable, a writ would lie.

The position is that no election has taken place.

See *In Salkedos Reports*, p. 373. In this case there was usurpation of public office and writ was available. Vide *Short on Mandamus*, p. 112.

The history of *quo warranto* is fully discussed in *Rex. v. Speyer*⁴. This case discussed whether Privy Councillors were qualified to sit though appointed by the King.

¹ 32 LT. 867.

² 18 N.L.R. 97.

³ 30 N. L. R. 153.

⁴ (1916) 1 K B 595.

Drogheda's case 1 O'M. & H., p. 257 was decided before 1872. No local authority is available exactly in point.

In India the English principles regarding *quo warranto* are applicable. *Indian Election Petition Vol.* (1).

It was held that (*In re the Jaffna Local Board Elections*¹ the Supreme Court has the powers which are expressly or impliedly given to it by statute.

In re Guildford 1869 1, O.M. & H. 15, Willes J. held that the policy and the theory of the law is that a man upon whom the elective franchise is conferred should judge for himself which is the best and preferable candidate and give his vote accordingly.

In *South Meath* 4 O'M. & H., at pp. 142 and 147 Andrews J. stated "freedom of election is absolutely essential to the validity of election".

There has been no undue delay. The oath of office must be taken before writ becomes available *Madanayake v. Schrader*². The Municipal Councils Ordinance is silent regarding bribery and corruption. By applying the common law of Parliament the writ becomes available to the Ceylon Municipal Council. If no writ is available a candidate could resort to the worst type of bribery and corruption and intimidation and thus get elected.

Cur. adv. vult.

May 19, 1941. SOERTSZ J.—

This is an application for a mandate in the nature of a writ of *quo warranto* to oust the respondent who is the *de facto* holder of the office of Municipal Member for the Maradana South Ward of the Colombo Municipality, from that office on the ground that he is not entitled *de jure* to it because, it is alleged, his election was procured (a) by general undue influence; (b) by general bribery; and also because (c) the responsible authorities failed to provide adequate machinery for the proper taking of the votes of the electors; and (d) the presiding officers in many instances were partial to the respondent. These were the grounds to which petitioner's counsel stated he proposed to confine himself.

It is conceded that if the writ lies, the petitioner is competent to ask for it. Nor can it be denied that the office in question is one in respect of which *quo warranto* lies. It is a public office of a substantive character. But counsel appearing on behalf of the respondent to show cause against the *Rule Nisi* granted by Hearne J. has taken certain preliminary objections on which he asks that the *Rule* be discharged. He contends firstly that *quo warranto* does not lie to question a Municipal election on the ground either of general undue influence or general bribery. He submits that the whole matter of Municipal elections and their avoidance is to be found in the Colombo Municipal Council (Constitution) Ordinance (Cap. 194) and in the Enactments referred to therein and that the petitioner may not go beyond them to question an election. In support of this submission, counsel points out that sections 16 and 17 of the Ordinance set forth certain matters by reason of which a member vacates his office,

¹ 1 A. C. R. 128.

² 29 N. L. R. 389.

and that section 55 penalizes, *inter alia*, bribery and undue influence and provides for a member vacating his office on being convicted of these offences. Section 18 provides machinery for ousting from office a member who has vacated his seat but refuses to surrender it. He argues, and in my opinion rightly argues, that *quo warranto* will not lie in respect of those matters for it lies only when there is no other remedy. But he goes on to contend that the Ordinance is silent in regard to general bribery and general undue influence and that it must be assumed that the legislature did not intend that an election should be impeached on such grounds, and only intended to unseat members whose own hands were tainted with bribery and undue influence. I cannot agree with him there. It is true that English Parliamentary law and Practice have no application here unless they have been expressly or impliedly adopted by us. It is also true that English Common law and our Common law are two different things, but it is a law common to all civilized societies that elections of this kind should be pure and of free choice, that it should be a reality and not a sham. If I may adopt the language of Willes J. in *Guildford 1869—1, O & H. 15* "The policy and the theory of the law is that a man upon whom the elective franchise is conferred should judge for himself which is the best and preferable candidate and give his vote accordingly"; and the language of Andrews J. in *South Meath 4, O & H. 142 at 157* "Freedom of election is at common law absolutely essential to the validity of an election. If this freedom be prevented generally the election is void at Common law, and in my opinion it matters not by what means the freedom of election may have been destroyed. This is wholly independent of Statute law. It would be absurd and unnatural to contend that there could be a valid election which was not a free election. The Statute law not only leaves the Common law principle intact but supplements it by stringent enactments." It is upon that principle that our Ordinance bases itself when it penalizes individual acts of bribery and of undue influence and that presupposes that we here abhor an election procured by general bribery and general undue influence and regard it as obnoxious to the law just as much as the inhabitants of England and other countries, although we have not yet framed for ourselves anything in the nature of a Corrupt Practices Act in regard to Municipal Elections as they did in England as far back as 1872 by Victoria, Cap. 60. That Act was passed expressly for "the better prevention of Corrupt Practices at Municipal Elections". Once that Act was passed, *quo warranto* ceased to lie, as pointed out by Short on *Mandamus* at page 158, to question an election on the grounds on which it was possible to question it under that Act, but by clear implication *quo warranto* still lies to question it on other grounds on which the Common law of England allowed it to be question. Similarly, in Ceylon *quo warranto* will not lie to impeach an election, *e.g.*, on the grounds set for in sections 16, 17, and 55 of our Ordinance because there is special provision in the Ordinance itself in regard to these matters but, I am of opinion that it does lie for general bribery and general undue influence for there is no other way of dealing with them. I am fortified in this view by the history of our writ of *quo warranto*. It is a writ the issue of which was put into our hands only a few years ago and only

after the Judges had repeatedly deplored the fact that it was not competent to them to grant the writ and so question disputed Municipal Elections. (See (a) *Abeywardane v. Chairman, M. C., Galle*¹; (b) *Application for a Mandamus on the Chairman, Municipal Council*²; (c) *In re Jaffna Local Board Elections*³.)

Counsel for the respondent contended secondly that objection (c) was not a matter for which *quo warranto* would lie for the reason that subsection (2) of section 39 of the Ordinance says that "an election shall not be questioned by reason of non-compliance with section 39 (1) which provides that it shall be the duty of the Returning Officer to provide at each polling station reasonable facilities for the voters . . . to enable them to vote in accordance with the provisions of this Ordinance". I agree with the contention. Besides, so far as I was able to gather from the affidavits referred to and from petitioner's counsel's submissions the objections are so vague that it would be a waste of time to enter upon them. In regard to ground (d) too, the allegations appear to be extremely vague. If the petitioner can bring the alleged partiality within the scope of undue influence or bribery he is entitled to do that, but partiality in the sense of sympathy with the respondent's candidature begotten of the relationship between the respondent and some of the Presiding Officers as between the then Mayor of the Municipal Council and employees of that Council cannot be entertained. That is a matter in regard to which there may be legitimate criticism, but again that is a matter on which public opinion should assert itself and seek the intervention of the Legislature.

Respondent's counsel also asked that the rule be discharged on the ground of the delay there has been in making this application. I do not think there has been any undue delay. The election was held in January and the petitioner had to await the occupation of his seat by the respondent before he came into Court, and he made his application in February. Lastly, Counsel for the respondent asked that the petitioner be required to give security for the respondent's costs. After careful consideration of this request, I think that in all the circumstances, it is a reasonable request. In the result I direct that this matter be fixed for inquiry on objections (a) and (b) on as early a date as possible, not necessarily before me, on the petitioner depositing Rs. 500 in cash or giving sufficient security to cover that sum on account of costs, within three weeks of this order being pronounced. At the inquiry those persons from whom affidavits have been filed will have to be called and tendered for cross-examination by the petitioner or the respondent as the case may be if they are so required to be tendered by either party. The affidavits of any person required to be tendered and not tendered will not be considered. In addition to persons who have supplied affidavits, the petitioner and the respondent will be entitled to call witnesses to testify on matters relevant to the allegations of general undue influence and general bribery.

If I may, I would take this opportunity to say that it is desirable that the State Council Order in Council in regard to Elections to the State Council be adopted *mutatis mutandis* to govern Municipal elections.

¹ 9 N. L. R. 304.

² 1 A. C. R. 128.

³ 18 N. L. R. 97.