

*Present : Drieberg J.*

1928.

In the Matter of an Application for a *Mandamus* on the  
Government Agent of the Province of Uva.

MILLER & Co. v. GOVERNMENT AGENT,  
PROVINCE OF UVA.

*Excise Ordinance—Local option poll—Notice of poll—Irregularity—  
Mandamus.*

Where a poll for local option was held without notice being given  
to the public as required by rule 6 of Excise Notification No. 146,—

*Held*, that the poll was invalid.

**A**PPPLICATION for a writ of *mandamus* commanding the  
respondent to hold a fresh poll for local option respecting  
the hotel bar licence held by the petitioners on the ground that  
the poll held on November 7, 1927, was null and void. The  
petitioners, who are the proprietors of the Bandarawela hotel,  
stated that they had no knowledge till November 5 that their  
bar licence was included in the poll. They further complained

<sup>1</sup> (1913) 2 *Matara Cases* 144.

<sup>2</sup> (1920) 2 *C. L. Rec.* 180.

that the voter's list was prepared without notice to the public and that notice of the poll had not been given in conformity with the requirements of rule 6 of Excise Notification No. 176.

1928.

Miller & Co.  
v. Govern-  
ment Agent,  
Province of  
Uva.

*F. A. Hayley, K.C.* (with him *J. R. V. Ferdinands*), for petitioner.  
—The petitioners attack the poll on the following grounds :—

- (1) That the voters' list was prepared without notice to the public.
- (2) That "at least 20 days' notice of the poll"—rule 6 of Excise Notification No. 146—had not been given by publication in "one or more local newspapers."
- (3) That copies of the notice of the poll had not been affixed at the places specified in rule 6 in due time.
- (4) That the poll though required to be open at 8 A.M. did not in fact open till 10 A.M.

The objections arising out of rule 6, namely, objections (2) and (3), vitiate the poll. Rule 6 makes "at least 20 day's notice" imperative. The poll was held on November 7, publication of the notice was made in the issue of the Ceylon Daily News of October 21, and according to the affidavit filed on behalf of the respondent copies of the notice were not affixed at the places mentioned in rule 6 till November 1, 2, and 3. The provisions as to time contained in rule 6 have been ignored; non-observance of the provisions as to time renders the poll null and void. Counsel cited *Mandamus* on the Government Agent, Northern Province.<sup>1</sup>

[DRIEBERG J. indicated that he considered it unnecessary at that stage for Counsel to go into the other grounds of objection.]

*L. M. D. de Silva, Deputy Solicitor-General* (with him *J. E. M. Obeyesekere, C.C.*), *contra*.—There have undoubtedly been irregularities. Irregularities do not necessarily vitiate a poll (*Woodward v. Sarsons*,<sup>2</sup> *Istington*<sup>3</sup>). Want of notice can have no effect other than the non-registration of votes of the voters who had no notice. More than 60 per cent. have registered their votes and the votes remaining unregistered could not have affected the result of the poll. The possibility that the electorate would have been canvassed during the few days by which the notice fell short is too remote for serious consideration.

*Hayley*, in reply.—The cases cited on behalf of the respondent are decisions under the Ballot Act of 1872; that Act expressly provided that mere non-compliance only with the rules relating to elections shall not invalidate an election. There is no similar provision in the Excise Ordinance or in any of the numerous

<sup>1</sup> 28 N. L. R. 323.

<sup>2</sup> (1875) L. R. 10 C. P. 743.

<sup>3</sup> (1901) 5 O'M. & H. 125.

1928.  
 Miller & Co.  
 v. Govern-  
 ment Agent,  
 Province of  
 Uva.

**Excise Notifications.** As to Lord Coleridge's dictum in *Woodward v. Sarsons (supra)*, the Common law of England relating to Parliamentary elections cannot apply in Ceylon.

June 21, 1928. DRIEBERG J.—

The petitioners move for a writ of *mandamus* for a declaration that the local option poll held on November 7, 1927, be declared null and void and that the respondent be commanded to arrange for and hold a poll in conformity with the provisions of Excise Notification No. 146. The petitioners are Messrs. Miller & Co., Ltd., who are the proprietors of the Bandarawela hotel and are the holders of a hotel bar licence for the sale of foreign liquor at the hotel.

The result of the poll was that out of 817 voters on the list 537 voted for abolition and 7 for retention; the result of the poll was to abolish the petitioners' licence with effect from the commencement of the next rent period after November 7, 1927.

The petitioners state that they had no knowledge until November 5, 1927, that their hotel bar licence was to be included in this poll. The notices stated that the licences for which the poll was to be held were the "Bandarawela foreign liquor taverns, Bandarawela bar licences, Bandarawela beer and porter, Kahatawela toddy tavern." There is no special mention of the Bandarawela hotel, and the manager of the hotel says that he was not aware that the hotel bar licence would be effected by the poll until he was so informed three days before the election by a post card from the Assistant Commissioner of Excise.

The petitioners complain that the poll was irregularly held and that it is null and void for the following reasons:—(1) That the voters' list was prepared without any notice to the public who had no means of knowing of its existence and that in the result the names of many eligible voters were omitted from it; (2) That the notice of the poll as required by section 6 of the rules had not been duly given; (3) That the notices required by rule 6 to be fixed at the Police Court of Bandarawela, the Village Tribunal, and other places were not fixed within the time required; (4) That the poll though required and advertised to be open from 8 A.M. to 7 P.M. did not in fact open till 10 A.M.

The rules regulating local option polls are contained in Excise Notification No. 146 published in the *Government Gazette* of August 14, 1925. Rule 6 which provides for notice of a holding of a poll is as follows:—

"The poll shall be held at such place and on such date between October 1 and December 15, as the Government Agent shall determine. At least 20 days' notice of the poll

shall be given by publication in one or more local newspapers by fixing copies of the notice at the Kachcheri, the local Police Court, and the Village Tribunal, within the jurisdiction of which the area is situated, and at prominent places within the said area, and by beat of tom-tom or such other method as the Government Agent shall direct. The notice shall state the names of the villages comprised in the said area."

1928.

DRIEBERG  
J.Miller & Co.  
v. Govern-  
ment Agent,  
Province of  
Uva.

It is clear from the affidavit of Mr. Bond, the Office Assistant of the 1st respondent, that there was a complete disregard of the provisions of this rule as to time. In computing the period of notice of "at least 20 days" the day of the notice and the day of the poll should be excluded and the notice should therefore have been published not later than October 17. Mr. Bond, however, admits that the notice in the Ceylon Daily News was published on October 21, that the notices were posted at the Village Tribunal and the Police Court on November 1, and at other prominent places as required by the rules on November 2 and 3. The peon of the Police Court says that the notice was posted at the Court-house on the morning of the election.

It is not necessary to consider the other grounds of objection, for this complete failure to comply with the requirements of rule 6 makes the poll null and void. It has been so held in the case of an application for a *writ of mandamus on the Government Agent of the Northern Province*,<sup>1</sup> where the question arose regarding an election held under the Village Communities Ordinance, No. 9 of 1924. The Deputy Solicitor-General referred me to the cases of *Woodward v. Sarsons*<sup>2</sup> and *Islington*<sup>3</sup> and to the general rule stated in references to these cases in *Rogers on Elections, 19th ed., p. 254*, that to whatever extent the provisions of an Act of Parliament are violated, even wilfully, which does not enact that the consequences of those acts avoid the election, the election will not be invalidated. These cases, however, deal with the actual conduct of an election as regulated by the rules in the first and second schedules to the Ballot Act of 1872 (35 & 36 Vict. c. 33), section 13 of which is as follows :—

"No election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

<sup>1</sup> (1927) 28 N. L. R. 323.<sup>2</sup> (1875) L. R. 10 C. P. 743.<sup>3</sup> (1901) 5 O'M & H. 125.

1928.  
DREIBERG  
J.  
Miller, & Co.  
v. Govern-  
ment Agent,  
Province of  
Uva.

It was stated by Lord Coleridge C.J. in *Woodward v. Sarsons* (*supra*) that section 13 was "an enactment of extreme caution stating as law what was equally law before," the earlier law being what is known as "the Common law of Parliament," *i.e.*, the Common law applicable to Parliamentary elections.

We have not in Ceylon, so far as I am aware, any Common law governing public elections in such matters as this or in elections for representative bodies, for all such elections have their origin in legislative enactment.

The question is therefore simply one of the effect of non-compliance with a statutory requirement which cannot be regarded as other than essential. The Deputy Solicitor-General contended that there would be no purpose in holding another election poll as out of a total of 817 voters 537 voted for abolition and that it was not possible therefore to turn the scale. This, however, cannot affect the validity of the election, but it may be contended that the result would have been different if the petitioners had adequate notice and an opportunity of persuading voters.

In the view I have taken of this matter it is not necessary to consider the objections taken to the regularity of the voters' list. After I reserved judgment I indicated to Counsel the opinion I had formed and heard them on the form the order should take.

The application for the holding of a poll in this case was made on June 29, 1927, under rule 2 of Excise Notification No. 146 and was for the year 1927. Under rule 6 the poll had to be held between November 1 and December 15, 1927, and if successful the licence would be abolished at the end of the then current licensing year, *viz.*, September 30, 1928. If this was a case of an election which was needed to fill an office which could not be allowed to be vacant, the court could set aside the election already held and issue a *mandamus* for the holding of another election regardless of any statutory provisions as to the time when such an election should be held.

The present case is different, for the election can only be held on the demand of certain persons. I am not sure that an election can now be held on the requisition made on June 29, 1927, for a poll for the year 1927, and I cannot therefore direct a *mandamus* in terms of the prayer in the petition. The respondent to this application is Mr. Codrington, who was at the time the Government Agent of Uva, and he has been succeeded by Mr. Walters, whose proxy has been filed. The Deputy Solicitor-General agreed that I should make him a party to this application, and he has been added as the 2nd respondent. The abolition or continuance of a licence does not lie with the Government Agent, whose duties end with holding the poll and reporting the result to the proper authorities.

Order will therefore be made on this petition declaring the poll held on November 7, 1927, to be null and void and commanding the 2nd respondent to report to the proper authority that the said poll has been declared null and void by this Court, and that the hotel bar licence held by the petitioners for the Bandarawela Hotel has not been abolished as the result of the said poll for the rent period commencing next after the date on which the said poll was held.

The 1st respondent will pay to the petitioners the cost of these proceedings.

On the day on which this matter was listed for Counsel to be heard as to the form of the order, Mr. A. B. Cooray desired to be heard on behalf of certain persons who had interested themselves in the abolition of this licence. They were voters and had, I was told, represented their party at the election. Mr. Cooray said that one matter which he wished to urge was that a *mandamus* could not issue, because rule 15 gave the presiding officer a statutory power to decide all questions arising in connection with the ballot. It was not possible to allow these persons to intervene at that stage, and I refused the application.

*Rule absolute.*

1928.

DRIEBERG  
J.

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