

1944

Present: de Kretzer J.

A. E. GOONESINGHE v. THE MAYOR OF COLOMBO.

IN the matter of an application for a writ of mandamus on the Mayor of Colombo.

Municipal Council of Colombo—General meeting—Right of member to bring forward resolution although not placed on the agenda—Municipal Councils Ordinance (Cap. 193), s. 85—Writ of mandamus—Must be effectual—Effect of delay or alternative remedy.

Section 85 of the Municipal Councils Ordinance, read with certain rules passed under section 109, gives a member of the Colombo Municipal Council the right to bring forward, at a general meeting, a resolution, of which he has given three clear days' notice to the Secretary, despite the fact that the Chairman has, prior to the date of the meeting, expressed the opinion that the resolution is out of order and directed that it should not be placed on the agenda.

A writ of *mandamus* will not be granted to place a motion on the agenda of a meeting which has already been held.

A *mandamus* will not be issued when another remedy is available or when it appears that it would be futile in its result or when the application for it is belated.

APPPLICATION for a writ of *mandamus* on the Mayor of the Colombo Municipal Council by the petitioner who is a member of the Council.

C. S. B. Kumarakulasingham (with him M. M. Kumarakulasingham) for petitioner.

H. V. Perera, K.C. (with him N. K. Choksy), for the respondent.

Cur. adv. vult.

December 19, 1944. DE KRETZER J.—

This is an application for a *mandamus* on the Mayor of the Colombo Municipal Council and the prayer is that this Court may issue a writ in the nature of a *mandamus* on the respondent "directing him to place the said motion on the agenda for a consideration by the said Council".

Many of the facts leading up to this application are not in dispute, some of them are much in dispute. I propose to confine myself only to such facts as are necessary for the purpose of my order. I do not propose to deal at greater length with this matter than is absolutely necessary.

It would appear that the Municipal Council undertook the collecting of contributions due on the War Damage Ordinance and that they were to be paid 6 per cent. of the collection by way of remuneration. The amount which it received by way of remuneration amounted to Rs. 29,953.41. According to a minute by the Treasurer the expenditure was Rs. 24,688.92. That left a balance of Rs. 5,264.49. The petitioner in his petition states, however, that the sum was Rs. 7,746.37.

By a resolution of the Council at the time they undertook the collection, any surplus, after meeting the expenses, was to be credited to revenue. When, therefore the surplus was found one would imagine it would automatically pass to revenue. However, some question seems to have arisen regarding the use of this surplus that should have been credited to revenue and the Commissioner of War Risk Insurance was of opinion

that it would not be proper for the Council to make a profit on the transaction and proposed that the amount should be distributed among the contributors. The Commissioner of the Municipal Council agreed with this opinion but thought that the distribution of it would involve considerable labour and expense. He accordingly recommended the remuneration suggested by the Treasurer, viz., that the money should be distributed among certain officers and clerks who had done extra work. Apparently there had been a temporary staff who had been employed for the work who did not get the benefit of the largesse.

The matter came up for consideration by the Finance Committee, in which the petitioner seems to form an unfortunate and conspicuous minority. At the meeting a member enquired why the Commissioner of the Municipal Council was not sharing in the money and according to the affidavits—all but the petitioner's—it was agreed that he should have a month's salary. According to the petitioner, however, there was no such suggestion and being unaware of the resolution which credited this money to revenue and finding that the money was to be paid to deserving clerks he made no protest.

On the following day the Treasurer duly minuted to the Secretary who ought to have been present at the Committee meeting, that his previous recommendation had been amended and he forwarded an amended schedule.

Then the recommendation of the Finance Committee came before the whole Council on June 7, and the petitioner was present at the meeting. He states that he was unaware that the Commissioner was also to be remunerated and when the item came up that the Treasurer's suggestion recommended by the Finance Committee should be passed he believed that the money would be distributed among the deserving officers. Five of the gentlemen have sworn to the contrary. The recommendation of the Finance Committee was adopted. The payment was made on that footing.

When that happened the petitioner was quite surprised and he called for the relevant files and thereupon came to the conclusion that there had been manipulation of the documents. He then gave notice on August 31, 1944, of a resolution in the following terms—

“ That the extra payment of Rs. 2,000.06 to the Municipal Commissioner was not contemplated when the Council adopted the Municipal Treasurer's suggestions at the meeting of June 7, for the distribution of the remuneration to the officers of the Council who were engaged in War Risks Insurance and that this sum be collected from him and remitted to revenue ”.

He forwarded his motion with a covering letter giving notice that he would move it at a general meeting to be held on September 6, 1944. He obtained, the signatures of five other members to the motion as he feared, he says, that the resolution may be considered one rescinding the resolution passed on June 7. Quite clearly he did not intend it to have any such effect, and he was only meeting any possible objection that might arise. His complaint was that the Council had not contemplated the payment to the Commissioner.

However, on this resolution reaching the Secretary, in accordance with by-law 10 (c) he placed the matter before the Chairman who was of opinion that the resolution was out of order and he ordered that it should not be placed on the agenda and at the same time in terms of the rule caused the petitioner to be informed of his decision. The first ground given was that the petitioner's motion was not correct in stating the facts, and the second ground was that the motion did not seek to rescind any resolution and that it did not come within the provisions of rule 10 (e).

The letter is dated September 2, 1944, the meeting came on September 6. The petitioner made no attempt to move his resolution at the meeting and in November he filed his present papers.

Now, there is more than one ground on which this application is bound to fail, whatever the facts may be. The petitioner's application refers to his motion not being placed on the agenda paper of the general meeting held on September 6, 1944. That meeting is long passed and cannot be reheld. This Court cannot issue a *mandamus* merely to find it futile. Secondly there has been a delay that has not been explained—at least a delay of two months. Thirdly under the Municipal Councils Ordinance, section 85, the petitioner had the right to bring forward his resolution in Council despite the opinion expressed by the Chairman. He had, therefore, a remedy open to him which he did not avail himself of. It is sought to get over this difficulty by stating that the Chairman had no right to rule out the motion in advance and since he did that it was useless on the petitioner's part to move the resolution which would also be ruled out. I do not agree with this contention.

Section 82 of the Municipal Councils Ordinance requires the Chairman to cause a printed or written notice of every meeting and of the business of the meeting to be served on each member at least 4 days before the meeting. He is, therefore, the person responsible for giving due notice of the agenda. There is, however, provision made in section 85 for matters being considered that do not appear on the agenda. Now by the rules, which have the virtue of law by reason of section 109 of the Ordinance, three clear days' notice of every motion should be given to the Secretary and unless it is given the motion will not be included on the agenda. The agenda has to go out 4 days before the meeting is held. Why notice of a motion should be given three days before the meeting is a mystery which nobody has attempted to solve. The due notice being given, the Secretary is required by rule 10 (b) to date and number each of such notices and to enter them in the order in which they are received. Section 10 (c) requires him to submit notices of motion to the Chairman before they are placed on the agenda. The two rules are not inconsistent as far as I can see. One has to bear in mind they are notices of motions and the motions themselves are moved at a meeting. The Chairman may be of opinion that a motion is out of order and may inform the giver of the notice, but nevertheless the motion should be on the agenda and should come before the meeting. The mover will then have notice of the attitude of the Chairman and he could abandon the motion or successfully meet the Chairman's opposition. As a matter of

fact rule 10 (c) gives the Chairman the right to express an opinion regarding a notice of motion, not regarding the motion itself—whether any distinction is intended I do not know. Nobody was able to tell me how the Chairman guided himself in deciding that a notice of motion was out of order. There is rule 10 (d) which says—“ Every notice of motion shall be relevant to some question affecting the Municipal Council of Colombo ”. That would be one guide. Rule 10 (e) says—“ No motion to rescind any resolution which has been passed, etc.”. That would be another guide. But the Chairman in this particular case chose to order the matter out on the ground that facts were not correctly stated. If the facts were not correctly stated the body who could properly have dealt with it would have been the body to which the appeal was made, namely, the members of the Municipal Council.

However, it is unnecessary to go into these details, except in passing to express an opinion on this matter. As I said before the application must be refused because another remedy is available, because it is belated and because this Court cannot now pass an order which would be futile. In this connection I refer to Halsbury's Laws of England, Vol. 9 (2nd ed.) at para. 1308.

The application is refused. I shall fix the costs tomorrow.

December 20, 1944.

Having heard Counsel I fix the costs to be paid by petitioner to the respondent at a sum of Rs. 1,500.

Rule discharged.
