

1947

Present : Windham J.

RODRIGO, Petitioner, and THE MUNICIPAL COUNCIL,
GALLE, *et al.*, Respondents.

S. C. 443—Application for a Writ of Mandamus on Galle Municipal Council and on Local Government Service Commission.

Writ of mandamus—Officer in Local Government Service—Refusal by Municipal Council to give him work—Right to mandamus—Statutory duty—Alternative remedy—Ordinance No. 43 of 1945—Ordinance No. 29 of 1947, section 41 (1) (e).

Petitioner who was a member of the Local Government Service and a Senior Revenue Inspector in the Moratuwa Urban Council was transferred to the Galle Municipal Council by the Local Government Service Commission with effect from July 1, 1947. The Municipal Council refused to give him work and thereafter passed a resolution in terms of section 41 (1) (e) of the Municipal Councils Ordinance, suppressing the post to which the petitioner had been appointed as from October 31, 1947. The Council paid the petitioner his salary up to October 31, 1947. The petitioner applied for a *mandamus* on the respondents to give him work and to pay his salary.

Held, that a writ of *mandamus* did not lie because the petitioner's office was not one which conferred on him a statutory right to the performance of his duties and functions and his claim to reinstatement was merely a dispute about a private right.

Held, further, that the writ would not lie for the reason also that the petitioner had an equally effective remedy by civil action.

APPPLICATION for a writ of *mandamus*.

C. S. Barr Kumarakulasingham, with *S. P. C. Fernando*, for the petitioner.

H. V. Perera, K.C., with *U. A. Jayasundere*, for the first respondent (the Galle Municipal Council).

E. F. N. Gratiaen, K.C., with *E. B. Wikramanajake*, for the second respondent (the Local Government Service Commission).

Cus. adv. vult.

December 19, 1947. WINDHAM J.—

The petitioner, until July 1, 1947, was for some eight years a Senior Revenue Inspector in the Moratuwa Urban Council. From April, 1946, he was a member of the Local Government Service. On March 17, 1947, the first respondents, the Galle Municipal Council, adopted a resolution that a new post in the Galle Municipal Council should be created on a stated salary scale, and, pursuant to their resolution, they wrote to the Chairman of the second respondents, the Local Government Service Commission, requesting him to fill the new post. On June 14, 1947, the second respondents, in pursuance of this request, wrote to the Moratuwa Urban Council ordering the transfer of the petitioner from

their employ into that of the first respondents, with effect from July 1, at a salary of Rs. 1,520 per annum with certain allowances, this salary being the maximum in the scale resolved upon for the post by the first respondents. The latter, when the appointment was intimated to them, resolved to request the second respondents to cancel the appointment, on the ground that the salary was too high and that in view of recent amendments to the Local Government Service Ordinance they wished to consider the position *de novo*. The second respondents were informed accordingly, but they refused to cancel the appointment. Meanwhile, on July 1, the petitioner reported for work in his new appointment at the offices of the first respondent, but the latter refused to give him work or to pay him any salary. Further correspondence between all the parties ensued, but this three-cornered *impasse* persisted and still persists.

The only further action of legal relevance to the present petition was that upon September 22, 1947, the first respondents passed a resolution to "suppress" their new post of Revenue Inspector with effect from October 31, 1947, and they duly intimated this resolution to the second respondents. In further pursuance of their resolution they paid to the petitioner, and the latter accepted, his salary and allowances, at the rate fixed by the second respondents, for the period July 1 to October 31, 1947, while at the same time they reserved their contention that they had never given him employment and never accepted him as their duly appointed Revenue Inspector. Their resolution to "suppress" the post was made in exercise, or purported exercise, of their powers under section 41 (1) (2) of the Municipal Councils Ordinance, No. 29 of 1947, which empowers them "save as otherwise provided in sub-section (3), to abolish any post or office in the service of the Council, whether or not such post or office is a scheduled post within the meaning of the Local Government Service Ordinance". Sub-section (3) excludes from the above provisions the power to abolish the office of Mayor, Deputy Mayor, Municipal Commissioner or Municipal Magistrate, and is therefore irrelevant.

Upon the above facts the petitioner seeks a writ of *mandamus* from this Court ordering the respondents "to give the petitioner work and to pay his salary as from July 1, 1947, together with travelling, lodging and subsistence allowances in accordance with the Government Financial Regulations". The petition was filed on September 30, 1947, on which date the first respondents allege and the petitioner denies (in their respective affidavits) that the petitioner was aware of the first respondents' resolution to abolish the post and to pay him his salary up to October 31, 1947, but before they had in fact so paid the salary to him. So far as that resolution is concerned, the petitioner's contention now is that it was made in bad faith, and that for this reason alone the purported "suppression" of the post was void.

Is this a proper case for the grant of a writ of *mandamus*? If the "suppression" of the post to which the petitioner had been appointed was lawful, then I think there can be no doubt that the writ could not be granted. For the petitioner has been paid his full salary for the whole period during which the post was in existence and, quite apart from the

question whether in such a case *mandamus* would be the proper remedy, the petitioner would have no grievance, since it would be now too late to order the first respondents to give him work for the period July 1. to October 31, 1947 ; and any right which he might have to the recovery of travelling, lodging and subsistence allowances would be the proper subject of an ordinary action in the appropriate court.

But even if the petitioner was right in contending that the "suppression" of the post with effect from October 31 was an act done in bad faith and was therefore void, would the remedy by *mandamus* lie? I think it would not. Before granting the writ in such a case, this court will require to be satisfied of two things. First, it must be satisfied that the petitioner is being prevented from exercising a right to perform certain duties and functions legally conferred upon him by virtue of his holding an office carrying with it such a right. Secondly, there must be no other adequate legal remedy available to him. In *Marcelin Perera v. Sockalingam Chettiar*¹, the necessity for this first requirement was made clear. There the petitioner was a Secretary to an Urban Council (of which respondent was Chairman) and the powers and duties attaching to that office were prescribed by Statute, namely, section 39A of the Urban Councils Ordinance, No. 61 of 1939. It was on these grounds held that the petitioner in that case satisfied this first requirement for the grant of a writ of *mandamus* that he be restored to his office. But in the present case the petitioner has no powers or duties statutorily vested in him. It may well be that he is a public servant and in the employ of a public body (*i.e.*, the first respondent) and indeed sections 15 and 21 of the Local Government Service Ordinance, No. 43 of 1945, would seem to make that clear. But that is not the test. The question is whether he has public duties and powers vested in him by statute, so that he can be said to be statutorily entitled to exercise them. In *Perera v. Municipal Council of Colombo*² where the petitioner was a dispensary Medical Officer in the employ of the respondent council, *mandamus* was refused because it was held that the petitioner did not satisfy the requirement that he "must have a legal right to the performance of some duty of a public and not merely of a private character". There, as here, though the petitioner was performing duties of a public character in the employ of a public body, his duties and powers were not statutorily prescribed, and his claim to reinstatement was held to be merely a dispute about a private right, and as such not the subject for a writ of *mandamus*. I am unable to distinguish that case from the present one. It is contended that it should be distinguished because in that case there appears from the judgment to have been a contract of service between the petitioner and the respondent council, whereas in the present case such rights as the petitioner has against the respondents, or either of them, are conferred not by private contract but by the provisions of the Local Government Service Ordinance, No. 43 of 1945, and by regulations made thereunder. But that does not prevent the rights of the petitioner from being private rights. His right (if any) to reinstatement would only be a public right, and the act of the first respondents in suppressing his office would only be the breach of a public

¹ (1946) 47 N. L. R. 265.

² (1947) 48 N. L. R. 66.

duty, if he was the holder of an office to which specified duties and powers had been statutorily attached. And his right (if any) to salary and allowances is a private and not a public right for the same reasons.

On these grounds alone this application for a writ of *mandamus* cannot be entertained. But it would have to be dismissed for a further reason, namely, that the petitioner has another and equally effective remedy, by civil action. If in such an action he can show that the suppression of the office to which he claims to have been appointed was illegal, then he can sue for consequent damages until reinstatement, and for his travelling, lodging and subsistence allowances, in the appropriate civil court. The question whether he has any legal right against the respondents to "work" in the abstract, or any right to perform any specific work where no specific powers or duties have been statutorily attached to the office to which he claims to have been lawfully appointed is one which would have to be raised in such an action, and I therefore refrain from deciding the point here.

For these reasons the application must be dismissed. The second respondent does not ask for costs, and having in view all the circumstances of this case, and to the fact that the underlying dispute which precipitated it was between the two respondents, I make no order for costs.

Application refused.
