

1969            *Present: de Kretser, J., and Wijayatillake, J.*

K. ANDIRIS, Petitioner, and D. F. THOMARATNA, Respondent

*S. C. 293/69—Application for a Writ of Quo Warranto*

*Quo warranto—Requirement that application should not be filed until respondent has already assumed office—Person elected as member of a Village Council—Date when he assumes office—Village Councils Ordinance (Cap. 257), s. 11 (1) (2).*

A writ of *quo warranto* does not lie unless the person proceeded against has already assumed office at the time when the application for the writ is filed. Accordingly, where a person is alleged to have been elected as a member of a Village Council when he was disqualified for election, an application for a writ of *quo warranto* to set aside the election on that ground will not lie if objection is taken *in limine* that on the date of the application the respondent, although he had been elected, had not yet assumed office as member in conformity with the requirements of section 11 (2) of the Village Councils Ordinance.

**A**PPPLICATION for a writ of *quo warranto*.

*Nimal Senanayake, with M. W. Amarasinghe, for the petitioner.*

*H. W. Jayewardene, Q.C., with G. M. S. Samaraweera, for the respondent.*

*Cur. adv. vult.*

December 9, 1969. DE KRETZER, J.—

The Petitioner, a Ratepayer of the Weeraketiya Village Council, makes this application dated 19.5.1969 for a Mandate in the nature of a Writ of Quo Warranto seeking to have the Election of the Respondent as the member for Ward 2 Muruthawela of the Weeraketiya Village Council declared null and void.

On Nomination Day the 22nd of March 1969 the Respondent was declared the Member for this Ward, there being no other nomination. The Petitioner claims that the Respondent was disqualified for election in that the Respondent was as from 23.12.1964 an elected member for Ward 21 of the Mideniya Village Council. He submits that as from that date there has been no Election for Members to the Mideniya Village Council nor has such Council been dissolved. He also avers that the Respondent has always lived at Raluwa Medamulana within the Electoral Area of the Mideniya Village Council.

The Respondent has filed his Affidavit denying the correctness of those statements of fact.

It is not necessary at this stage to make a finding on the facts as Counsel for the Respondent has taken the objection *in limine* that the Application for Quo Warranto does not lie in that it was made on 19.5.1969 by which date all that had happened was that on 22.3.1969 the Respondent had been declared duly elected to hold office in terms of Section 11 (1) of Cap. 257 of the Legislative Enactments as from the 1st day of July 1969. He relied on the Case of *De Zoysa v. Kulatilleke*<sup>1</sup> reported in 46 N. L. R. at Page 143 where Wijeyewardene J. held that the Writ of Quo Warranto will not be granted to set aside an Election where at the time the rule Nisi issued the Respondent had not attended any Meeting of the Council or done any act showing that he had acted in or accepted the office.

The averment in the Affidavit of the Respondent that the 1st Meeting of the newly Elected Council took place on 18th July 1969 and that it was at that Meeting that the Respondent sat and voted and was also elected Chairman is not challenged.

<sup>1</sup> (1945) 46 N. L. R. 143.

Counsel for the Petitioner submitted that the fact that immediately after the declaration made by the Presiding Officer that Respondent was elected, the Respondent addressed those present and promised that he would perform his duties as the member of the Ward to the best of his ability and would serve the Ratepayers equally well irrespective of whether they were his supporters or not and also announced his intention to contest the Chairmanship in order to bring honour to them, would suffice to indicate that he had accepted the office.

It appears to me that those words said in the elation of having been elected pointed to no more than a statement of what he intended to do when in due course he took his seat in the Council and that there was plenty of time for him to decide that it was wiser not to use the rights his election gave him between the time he said all this and the earliest time he could take his seat to assume his term of office in July 1969.

As was pointed out in *Re Armstrong*<sup>1</sup> the Writ of Quo Warranto does not lie unless the Court is satisfied that the person proceeded against has been in actual possession and user of the office.

Halsbury Vol. 11 (Simonds Ed.) Page 148 points out that a mere claim to be admitted to office was not sufficient; there had to be a possession or user as well as a claim. In the instant case the Respondent could not be the Member for Ward 2 until July 1969 for Section 11 (2) of Cap. 257 provided that his predecessor continued in office until that time.

Swan J. pointed out in *Dharmaratne v. The Commissioner of Elections et al.*<sup>2</sup> that where a person has been irregularly elected as a member of a local body but had not yet assumed office the proper remedy to have his election set aside is not by Quo Warranto.

I uphold the preliminary objection and dismiss the Application with Costs fixed at 25 Guineas.

WIJAYATLAKE, J.—I agree.

*Application dismissed.*

<sup>1</sup> (1856) 25 L. J. Q. B. 238.

<sup>2</sup> (1950) 52 N. L. R. 429.