1936 *Present* : Koch J.

In re APPLICATION FOR AN AUTHORIZED EXCUSE UNDER ARTICLE 72 OF THE CEYLON (STATE COUNCIL ELECTIONS) ORDER IN COUNCIL, 1931.

In re DE ZOYSA.

State Council elections—Failure to send return of election expenses—Application for relief—Meaning of "inadvertence"—Ceylon (State Council Elections) Order in Council, 1931, ss. 67 and 72.

Where a candidate for election to the State Council in making a return of his election expenses within time forgot to include vouchers for items over Rs. 20 and particulars and dates of payments regarding items less than Rs. 20 and applied to the Supreme Court for an authorized excuse under section 72 of the Ceylon (State Council Elections) Order in Council, 1931,—

***Held,* that he was entitled to relief under the section on condition that he furnished within one month the details and particulars omitted by him to the best of his recollection, knowledge, and belief.**

THIS was an application by a candidate at a by-election for a seat in the State Council under section 72 of the Ceylon (State Council Elections) Order in Council, 1931, to obtain an authorized excuse for his failure to transmit a return and declaration of his election expenses to the Returning Officer within the due period. The applicant, who was his own election agent forwarded to the Returning Officer a return of his expenses within time but he failed to annex to it vouchers in support of items of Rs. 20 and over. When his attention was drawn to this omission, the applicant forwarded the vouchers which were received by the Returning Officer after the time limit had expired.

H. V. Perera (with him *M. T. de S. Amerasekera* and *T. S. Fernando*), for applicant.—What the Order in Council intended to penalize was the intentional evasion of the provisions therein. The objects of the provisions are denoted in *12 Halsbury* (*Hailsham ed.*), *p.* 325, and also at p. 380 (note *u*). Authorized excuses and exceptions are peculiar to the law of elections, see *12 Halsbury, p. 373.* The Order in Council makes provision for excuses " with the very object of relieving candidates from the entirely unjust and disproportioned consequences of trifling defaults "[1].

[1] *Clare, Eastern Division case, (1892) 4 O'M. & H. 162, and note (o) in 12 Hals. p. 376*

"Inadvertence" means negligence or carelessness, where the circumstances show an absence of bad faith. In *Fernando v. Fernando* [1], "inadvertence" was taken to mean the opposite of deliberate election; see also *In re Phears* [2].

The consulting of an inaccurate text book, when county elections were a new thing, furnished matter for an excuse, see *Birley's Case* [3]. Excuses were also allowed on the ground that the Act was new and by no means easy to master [4].

The provisions we have not complied with are contained only in a footnote; and the words themselves are purely directory and not imperative. The Supreme Court is permitted by section 72 of the Order in Council to exercise a discretion, and when doing so every circumstance should be taken into consideration. The applicant here is a defeated candidate. The Court should not ask him to do something which he cannot conscientiously do. The Court should make an order within the spirit of the Order in Council.

Schokman, C.C., for the Attorney-General.—The provisions in the Order in Council requiring candidates to furnish returns of election expenses have been inserted with a view to maintain the purity of elections. Here the applicant is asking for relief in respect of two defaults, and not merely one. He has not only not sent a return within the specified time, but he has failed to send details of payments as required by schedule 5 to the Order in Council. Misconception of the law is not "inadvertence." Relief may be granted to the applicant in a modified from; the excuse may be granted conditional upon the applicant furnishing a proper return within an extended time as provided for by sub-section (3) of Article 72 of the Order in Council. Otherwise, by making this default the applicant would get an advantage over other candidates who have sent in complete returns in time.

Cur. adv. vult.

March 11, 1936. KOCH J.—

This is an application by Mr. Francis de Zoysa, a candidate at the by-election for the Balapitiya seat in the State Council, and has been made under section 72 of the Ceylon (State Council Elections) Order in Council of 1931, for the purpose of obtaining an order of this Court allowing an authorized excuse for his failure to transmit a return and declaration of his election expenses to the Returning Officer within thirty-one days of the publication in the *Government Gazette* of the result of the by-election.

The facts are, that the by-election in question was held on September 21, 1935, that the result was published in the *Government Gazette* No. 8,147 of September 26, 1935, and that the period of 31 days terminated on October 28, 1935. There were three candidates in all, and the applicant was one of the two defeated.

The requirement under section 67 of the Order in Council to transmit a return of the election expenses of a candidate applies to the agents of all candidates, successful and unsuccessful. In pursuance of this requirement the applicant who was his own election agent forwarded

[1] *36 N. L. R. 77.*
[2] *1 Q. B. D. 61.*
[3] *(1889) 5 T. L. R. 220.*
[4] *5 Ex parte Matthews, (1886) 2 T. L. R. 548; and 12 Hals. p. 382 note (r); Stepney's Case (1886) 4 O'M. & H. p. 52.*

to the Returning Officer a return of his expenses. This return was received by the Returning Officer on October 23, 1935, but the applicant had failed to annex to it vouchers in support of items of Rs. 20 and over. Thereupon the Returning Officer, although he was not bound to do so, wrote to the appellant a letter dated October 24, 1935, inviting his attention to the requirements of the fifth schedule of the Ceylon (State Council Elections) Order in Council of 1931, and requested him to be good enough to send to the writer all the documents required by that schedule. It must be noted that this letter of the Returning Officer contains no request for the specific details with dates of payment of the various component sums that contributed to make up the lump sums entered under the different headings appearing in the applicant's return. On receipt of this letter, the applicant forwarded on November 12, 1935, the vouchers asked for, and stated that the other expenses were incurred in small items of under Rs. 20 for which no vouchers were obtained. It would be seen that when the vouchers were sent in by the applicant he was already late by a fortnight, the period of 31 days having expired on October 28, 1935. Finding that the documents he required had not been sent in within the due period, the Returning Officer by his letter of November 1, 1935, informed the applicant that in terms of Article 72 of the Order in Council he should make the necessary application to the Supreme Court. He also informed him, by the same letter, that if he failed to obtain such an order he would render himself liable to a prosecution for illegal practice under Article 69 (1) of the same Order in Council. Mention must also be made of the fact that, on account of the belated receipt of the applicant's vouchers, the Returning Officer by his letter of November 14, 1935, informed the applicant that he was returning them and that he could not accept them without the necessary order of the Supreme Court. Hence the present application. It is supported by an affidavit of the applicant himself dated December 14, 1935. The allegations contained therein were not challenged either by a counter-affidavit or at the argument. In this affidavit the applicant averred *inter alia* that his omission to send the vouchers along with the return of expenses was due entirely to inadvertence and not to any want of good faith on his part.

This application first came up before my brother Soertsz A.J. who expressed himself thus :—" The applicant does not say what the inadvertence was, and I think it is necessary that he should do so. "

The applicant's Counsel thereupon moved to withdraw the application and file a fresh application on an ampler affidavit. The motion was allowed.

Thus a second application was made on February 19, 1936, accompanied by a second affidavit dated the same day. In this second affidavit he amplifies his excuse by stating that at the time he sent the return he " overlooked and forgot the fact that vouchers for items of Rs. 20 and over had to be attached to the said return ". In the same affidavit the applicant explains how the Returning Officer's request of October 24 came to reach him on October 31, *i.e.*, three days after the expiry of the due period. He states that he was out of Colombo at the time and did not return till October 31 and that, his printers being in Ambalangoda, it took him some time to obtain receipts from them.

This second application supported by the second affidavit just referred to was listed before me and came up for consideration on February 26, 1936. After applicant's Counsel was heard I pointed out to him that the prayer in this second application was restricted to relief only in respect of the failure to transmit the necessary vouchers in time, whereas it would be necessary to seek relief in respect of a further omission in view of the fact that Mr. Schokman who appeared as *amicus curiae* maintains that under the notes to the fifth schedule to the Order in Council another requirement had not been complied with by the applicant, namely, that he had failed to set out in detail with dates of payment the items that contributed to make up the lump sums under certain heads required by that schedule. The applicant's Counsel Mr. Amerasekere appreciating the deficiency in the prayer asked leave to amend his application. This I granted, and the application now comes before me in an amended form and with a third affidavit by the applicant dated February 27, 1936. In paragraphs 2 and 3 of this third affidavit the applicant avers that he did not set out in his return the requisite details of the sums under Rs. 20 for which no receipts were attached, not by reason of a want of good faith on his part but by reason of inadvertence in that he overlooked and quite forgot that it was necessary to do so. He further avers that when the Returning Officer by letter requested him to transmit the necessary documents, he (the applicant) considered it sufficient only to send vouchers for items of Rs. 20 and over and that it did not occur to his mind at the time, that it was necessary to set out in detail with dates of payment all sums for which no receipts were available.

On a reference to the fifth schedule it will be found that the substantial requirement there, is that expenses shall be shown under six heads (*a*) to (*f*) which appear in section 2 of the schedule. There is no mention there, expressly or by implication, that receipts or vouchers should be forwarded or that details of payment should be given. It is only the notes (3) and (4) appearing at the foot of the schedule that would appear to require the production of receipts or vouchers in respect of sums of Rs. 20 and over, and of details in respect of sums for which no receipt is attached.

It will also be seen that the substantial requirement, namely, that expenses shall be shown under six particular heads, are called for in language that is imperative. The words are "there *shall be shown*", followed by an enumeration of the six different heads. In the notes to the schedule, however, the words used requiring the production of vouchers are, "have to be attached"; and the words requiring the production of details are, "are to be set out". It is suggested that these words are purely directory and not of an imperative nature. There is some reason in this suggestion but it is not necessary for me to decide whether these words are purely directory as suggested or whether they do really contain within them the element of a command. However, in exercising my discretion as to whether this application should be granted or not, I have to take every circumstance into consideration. When, therefore, it is found that the requirement with regard to vouchers and to details appear in a note—almost a footnote—and not

in the main body of the schedule, the alleged circumstances that the requirement contained in such note had been overlooked and forgotten appear to be a normal and natural possibility even though at some time previous these notes may well have been read by the candidate himself. It has also to be remembered that the applicant was a defeated candidate in the by-election and that he would in all probability not have directed his mind to such a close and scrutinizing investigation of the details of expenditure as might be expected from a successful candidate beset as the latter would naturally be with apprehensions of an election-petition.

Section 72 permits me to grant relief and allow the application if I am satisfied that the requirements of the fifth schedule had not been complied with by reason of inadvertence and not by reason of any want of good faith on the part of the applicant. Inadvertence will not excuse ignorance of the law and it is not claimed for the applicant that he was ignorant of the law. The applicant's case is that he forgot to comply with the provisions of the law. Such forgetting, there can hardly be any doubt, amounts to inadvertence if it does not exactly connote it. The word ' inadvertence " primarily means—not giving one's mind to any matter, and therefore can, rightly be applied to a case of forgetfulness. It is not necessary for me to deal exhaustively with all the authorities on the subject as there is a very recent judgment of Garvin J. in the case of *Fernando v. Fernando*[1]. That was a case under the Money Lending Ordinance, No. 2 of 1918. In the Ordinance there is provision for relief to be granted to the payee of a promissory note with certain requirements. That relief, it is stated in the Ordinance, can be granted when the Court is satisfied that the default was due to inadvertence and not to any intention to evade the provisions of the Ordinance.

It will be appreciated that the grounds for relief arising under the Money Lending Ordinance are for all practical purposes the same as those set out in the Article 72 of the Order in Council, namely, that the Court should be satisfied that the default was due to inadvertence and not to any *mala fides* on the part of the party seeking relief. Garvin J., after considering the authorities on the point and referring in particular to the case of *In re Phears*[2] accepted the finding of Smith L.J., that " inadvertence " meant the opposite of deliberate election. He has also emphasized that the word " inadvertence " was sharply contrasted with the words " and not to any intention to evade the provisions of this Ordinance ". In section 72 of the Order in Council the word " inadvertence " is with equal sharpness contrasted with the words " and not by reason of the want of good faith on the part of the applicant ". This being so, I fail to see any reason why the word " inadvertence " when it appears in the Order in Council should be given a different meaning from what it has been given when it appears in the Money Lending Ordinance. Garvin J. in the case referred to held that the word " inadvertence " read in conjunction with the contrasting words (as in this case) would appear to indicate strongly that the act which the Money Lending Ordinance intended to penalize was the intentional evasion of its provisions. The same view should be held in the case before me.

[1] *36 N. L. R. 77.*

[2] *1 Q. B. D. 1, 61*

It will be further seen that section 72 provides for relief being granted in the case of an error or false statement made in the return. It is true from the context that the false statement referred to in the Article implies an incorrect statement untinged by any element of bad faith, but nevertheless the point to be noted is that the incorrect statement may mislead the Returning Officer or the public whereas the mere absence of details as in this case can mislead none ; it only makes the omission in such return all the more apparent on the face of it.

There is no reason why the explanation of the applicant set out in the different affidavits should not be accepted by me, and as I find that the omission to forward the vouchers in time and supply the necessary details was due to inadvertence and not to any want of good faith on the part of the applicant, I make order under section 72 allowing the authorized excuse prayed for.

There is a further point I have to consider and that is whether I should make this allowance conditional upon the making of a return or declaration in a modified form and within an extended time under sub-section (3) of Article 72. In doing so I must be careful to see that the effect of the relief now granted will not be nullified by prescribing terms which may be found to be difficult of fulfilment and which may tend to create unnecessary hardship on the applicant. It is manifest from the wording of the sub-section just referred to that the intention of the Legislature was to give due weight to such a consideration.

I therefore make the allowance of the relief prayed for conditional upon the applicant's furnishing within one month from the date of the delivery of this order, the omitted details and particulars to the best of his recollection, belief, and knowledge.

Application allowed.