

1939

Present : Soertsz S.P.J.

WIJEYKOON v. RAJAPAKSE.

S. C. 323.

In re APPLICATION FOR A WRIT OF *quo warranto*.

Village committee—Election of chairman—Disqualified members of committee—Validity of election—Writ of *quo warranto*—Village Communities Ordinance, No. 9 of 1924, s. 18 (a).

Where the applicant impeached the right of the respondent to the office of Chairman of Village Committee on the ground that the Committee that elected him was not properly constituted inasmuch as three persons on it were disqualified by virtue of section 18 (a) of Ordinance No. 9 of 1924,—

Held, that as the respondent was elected by a *de facto* committee, it was for the applicant to establish that the votes of the disqualified members were cast for the respondent.

Where voting is by secret ballot the manner in which the votes were cast must be regarded as undiscoverable in law, even if, in fact, it is discoverable, unless there is provision for a scrutiny of the ballot.

THIS was an application for a writ of *quo warranto* on the respondent requiring him to show by what authority he claims and exercises the office of Chairman of the Village Committee of Walasmulla.

N. E. Weerasooria, K.C. (with him E. B. Wikramanayake), for petitioner. Three members of the Committee which sat to appoint a Chairman have been disqualified. Their votes were therefore void. See *Bland v. Buchanan*¹ and *Nell v. Longbottom*². If these three members had not voted there would not have been a tie and a drawing of lots would have been unnecessary. The Ordinance requires that notice should be given to all the members of the Committee. Since the three disqualified members were disqualified *ab initio* all the members have not been noticed.

S. J. C. Schokman, C.C., as *amicus curiae*.—The Supreme Court has not declared the election of the three members in question void, but that they are not qualified to be members of the Committee. See *Cumarasinghe v. Abeyratne*³. It does not necessarily follow that all decisions arrived at meetings of the Committee at which these members were present prior to such declaration must be invalid.

The Committee has been elected in accordance with the provisions of the Village Communities Ordinance and the quorum required by section 16 (5) for the election of the Chairman was present, not counting these three members. Assuming that the votes of the three members are bad, the burden is on the petitioner to prove that they were given for the respondent. The latter cannot be expected to prove that no person under a disqualification voted for him. See *Rex v. Jefferson*⁴.

In the present case all the petitioner says is that one of the disqualified members was a "supporter" of the respondent.

¹ (1901) 2 K. B. 75.³ 39 N. L. R. 150.² (1894) 1 Q. B. 767.⁴ 5 B. & Ad. 855; 110 English Rep. 1007.

The cases cited by the petitioner's Counsel would not apply to this case as—

- (a) it was known in those cases for whom the votes were given ;
- (b) there was express provision in the statute referred to for the election being questioned on the ground that a majority of lawful votes was not given to the successful candidate.

Cur. adv. vult.

April 17, 1939. SOERTSZ S.P.J.—

This is an application made by an inhabitant of the Subdivision of Walasmulla who describes himself as a qualified and registered voter for that Subdivision, for a writ of *quo warranto* on the respondent requiring him to show by what authority he claims and exercises the office of Chairman of the Village Committee of Walasmulla.

The applicant impeaches the right of the respondent to this office on the ground that the Committee that elected him to that office was not a properly elected committee inasmuch as there were on it three persons who were disqualified to be elected or to be members of the Committee by virtue of section 18 (a) of Ordinance No. 9 of 1924.

The applicant also alleges that the respondent and another were candidates for the office of Chairman, that there were twenty-four members of the committee present at the meeting held for the purpose of electing a chairman, that the voting resulted in a tie, twelve votes being cast for each candidate, and that the respondent became chairman as a result of the "drawing" which took place in consequence of the equality of votes. He states that one of the three disqualified persons "was a supporter of the respondent and voted at the meeting", and that if his vote or the votes of the two other disqualified persons "had been rejected by the chairman as invalid in law, the result of the voting would not have been a tie and there would have been no necessity for a drawing".

The case put forward by the applicant raises two questions: first, was the committee that met to elect a Chairman a properly elected Committee; second, what was the effect of the three disqualified persons taking part in the voting for a Chairman.

In regard to the first question, it is clear that twenty-one of the twenty-four members were duly qualified and duly elected, and therefore, in my opinion, it cannot be said that there was no Committee that had been properly elected. For instance, on his own showing, the applicant must concede that if the three persons he complained against, had refrained from voting, the election of a Chairman at that meeting would have been a valid election. It is not necessary to consider what the position would have been if the majority of those present were not qualified to be elected or to be members. The second objection would, therefore, appear to be the real question for decision. I think it is clear law that in a matter of this kind it is sufficient, so far as the respondent is concerned, that he was elected at least by a *de facto* committee. The applicant must establish, if he can, his case that the votes of the disqualified persons or of any of them were cast for the respondent. It would be manifestly unfair to require the respondent to show that those votes or any of them were not given in his favour. He is not, and can never be in a position to show that, for the voting was by secret ballot.

Where voting is by secret ballot, the proper view to take is, I think, the view that the manner in which the votes were cast, must be regarded as undiscoverable in law, even if in fact, it is discoverable unless, of course, there is provision for a scrutiny of the ballot, and a scrutiny is practicable. In this case there is no such provision. Indeed, as far as I am aware, no scrutiny will reveal how the voting went on this occasion. All we have here is the statement that one of the three persons was a supporter of the respondent, and the inference drawn therefore that he gave his vote for the respondent. This is, probably, a good guess, but none the less it is a guess. It is notorious that there are last minute 'conversions' in matters pertaining to elections, and it would be extremely dangerous to assume that even the most vigorous supporter, as far as appearances went, cast his vote for the candidate he professed to support. I, therefore, am of opinion that it has not been established that the respondent's election was the result of the participation of any of these voters.

I desire to add that, in my opinion, the matter would hardly have been different if these three persons now came forward to say that they voted for the respondent. It would be against the principle of the ballot to admit such statements. Even if they could be and were admitted, their probative value would be very questionable. I would here refer to the decision in, and to the remarks made in the course of the argument in, *The King v. Jefferson*¹.

For these reasons, I hold that the applicant has not made out a case for the writ to be enforced, and I dismiss his application.

I wish to express my thanks to the Attorney-General and to the Crown Counsel who appeared as *amicus curiae*.

Rule discharged.

