

1933

Present : Garvin S.P.J. and Maartensz A.J.

JAYAWICKREME v. CASSIM.

IN THE MATTER OF AN APPLICATION UNDER SECTION 31 OF THE
MUNICIPAL COUNCILS ORDINANCE, No. 6 OF 1910.

Municipal Councils Ordinance—Erasure of name of elected Councillor—Ceasing to possess qualification—Uncertificated bankrupt—Ordinance No. 6 of 1910, ss. 31-42.

Section 31 of the Municipal Councils Ordinance empowers the Chairman to erase from the list of persons duly qualified to be elected the name of a Councillor, who after election is proved to have been under a disqualification at the date of his election, whether that disqualification arose subsequent to the time his name was entered on the list or whether it existed at the time the list was prepared.

A person who has been adjudicated an insolvent and who has not obtained a certificate at the date of the preparation of the list is an uncertificated bankrupt within the meaning of section 10 (4) (c) of the Ordinance.

A PPEAL from an order of the Chairman of the Municipal Council, Galle, under section 31 of the Municipal Councils Ordinance, No. 6 of 1910, erasing the name of the appellant from the list of persons qualified to be elected. The appellant was elected a Councillor of the Municipal Council of Galle on December 7, 1932. The election proceeded upon the revised lists certified on December 31, on October 31, 1932, and the appellant's name appeared on the list of persons qualified to be elected. On December 19, 1932, a petition was addressed to the Chairman in which it was alleged that the appellant had not the property qualification which was necessary before a person's name can be placed on the list of qualified persons. After inquiry, the Chairman ordered the erasure of his name from the list.

F. A. Hayley, K.C. (with him *B. F. de Silva*), for appellant.—Section 42 is conclusive for all purposes. The legislature recognized in sections 28 and 32 the finality given by section 42. The strong language of section 42 is unnecessary unless the legislature meant the list to be final for all purposes.

In *Usuf Ismail v. Mohamed Zair*¹ the two sections 31 and 42 have been reconciled.

The appellant was elected to be a Councillor as from January 1, 1933. Between the date of election and the date of taking up duties as a Councillor, a person may rid himself of a disqualification.

The Chairman must adjudicate on the position as it stood on the day that the proceedings were initiated.

H. V. Perera, for respondent.—A distinction is made by sections 10 and 42, between "qualified to be elected" and a "qualification to be entitled to have a name on the list".

¹ 32 N. L. R. 10.

The certification of the list (in accordance with section 42) is an executive act. The doctrine of *res judicata* is not applicable to an executive act. Section 31 presupposes the validity of an election as a Councillor, but not the right to remain as a Councillor.

F: A. Hayley, K.C., in reply.

February 14, 1933. GARVIN S.P.J.—

The appellant was elected a Councillor for the Third Division of the Municipal Council of Galle, on December 7, 1932, for the period January 1, 1933, to December 31, 1935. The election proceeded upon the revised lists certified on October 31, 1932, and the appellant's name appeared upon the list of persons qualified to be elected. Shortly after the election a petition dated December 19, 1932, was addressed to the Chairman in which it was alleged that the appellant had not the necessary property qualification which is necessary before a person's name can be placed upon the list of those entitled to be elected Councillors. An inquiry was then held in the course of which a further allegation was made to the effect that the appellant was an adjudicated insolvent and had not yet received a certificate and whose adjudication has not been annulled. In due course, the Chairman on January 13, 1933, recorded that he was satisfied that at the date of his election the appellant had not the necessary property qualification and also that he was at that date disqualified in that he was an insolvent who had not obtained a certificate of conformity. He, thereupon, after notice to the appellant, ordered the erasure of his name from the list of persons entitled to be elected. The effect given to such an erasure by section 31 of the Municipal Councils Ordinance is that the Councillor whose name is erased ceases to be a Councillor.

It was not necessary to enter into the question of the value of the property in respect of which this Councillor's name was placed upon the list of persons qualified to be elected, nor were we invited to revise the Chairman's finding upon that point, for it is quite clear that at the date of his election the appellant was suffering under a disqualification by reason of his insolvency. Section 10 (4) (c) enumerates among the persons disqualified to have their names entered upon the list of persons qualified to be elected a person who "is an uncertificated bankrupt or undischarged insolvent". The phraseology is not happy since, in Ceylon, the expressions "uncertificated bankrupt" and "undischarged insolvent" do not occur in the Ordinance in which our law of insolvency is to be found. There can, however, be no question that the language plainly indicates the intention of the legislature that a person who falls within the description of an uncertificated bankrupt is disqualified. The term "uncertificated bankrupt" may, of course, mean an insolvent who has not obtained a certificate in fact either because his certificate has been refused or because the insolvency proceedings have not yet reached the stage of the certificate meeting. If is, I think, in this latter and wider sense that the expression is used in the Municipal Councils Ordinance. This conclusion is supported by the language of section 29

in which are enumerated a number of cases in which a Councillor becomes disqualified from continuing to be a Councillor, one of these being when he "becomes bankrupt or insolvent". Further support is lent to this view by the provisions of section 30 by which it is declared that any Councillor who becomes "bankrupt or insolvent" *ipso facto* ceases to be a Councillor. Since a Councillor who has been duly elected ceases *ipso facto* to be a Councillor immediately he becomes insolvent or bankrupt, there could be no purpose in placing upon the list of persons entitled to be elected Councillors persons who at that date are bankrupt or insolvent. There is, therefore, ample indication that a person adjudicated an insolvent and who has not obtained a certificate at the date of the preparation of the list is an uncertificated bankrupt within the meaning of section 10 (4) (c) and is disqualified.

It is provided by section 31 that "if at any time it is proved to the satisfaction of the Chairman that any Councillor was at the date of his election not possessed of all the qualifications required by this Ordinance in respect of persons entitled to have their names placed on the list of persons qualified to be elected, or at such date was under any of the disqualifications specified in this Ordinance or that such Councillor has since his election ceased to possess such qualifications or become subject to any one of such disqualifications, the Chairman is (hereby) required after notice to such Councillor to order the erasure of the name of such person from the list of persons entitled to be elected, and the Chairman shall erase such name from such list, and the Councillor whose name is erased shall thereupon cease to be a Councillor". Inasmuch as the appellant was suffering from the disqualification of being an insolvent at the date of his election his case would seem to come within the provisions of this section. The appellant having been adjudicated an insolvent as far back as June 24, 1921, he was suffering from this disqualification at the time at which his name was placed upon the list of persons qualified to be elected. It was then urged that inasmuch as the lists upon which his name appeared are by section 42 made "final and conclusive and the only evidence of the qualification of the persons and companies whose names appear therein to be elected or to vote respectively", section 31 must be given a restricted interpretation limiting the powers created by section 31 to the case of a disqualification which arose subsequent to the certification of the lists but before the date of election. The language of section 31 is too clear to admit of such a construction being placed upon it in accordance with the ordinary rules of interpretation. The condition which must exist to entitle the Chairman to exercise this power to erase the name of a Councillor from the list of persons entitled to be elected is that at the date of the election he was not possessed of all the qualifications required by the Ordinance in respect of persons entitled to have their names placed upon the list of persons qualified to be elected or at such date was under any of the disqualifications specified in the Ordinance. The appellant clearly was under a disqualification at the date of his election and there is nothing in the section which says that the powers conferred upon the Chairman were not to be exercised unless such disqualification arose subsequent to the preparation of the lists.

It was argued to us that unless section 31 be given the restricted meaning contended for there would be a conflict between the provisions of section 31 and those of section 42. But if the provisions of section 42 be interpreted as debarring all inquiry into the qualifications of a Councillor to have his name upon the lists at any time after his election then it seems to me that it would apply with equal force to the case of a disqualification which occurs between the preparation and certification of the lists and the election. But I cannot accept the contention that the provisions of section 31 and of section 42 are necessarily at conflict or that they are irreconcilable. Section 42 does undoubtedly make the lists final and conclusive and the only evidence of the qualifications of a person to be elected. Its effect and, I think, the only effect intended by the legislature was that any question as to the right of a person to be elected was to be determined by the simple test, is his name upon the lists or is it not. It definitely excludes evidence which is directed to show that notwithstanding the presence of his name on the lists he was a person who in fact had not the qualifications required by the Ordinance before a person is entitled to have his name placed upon such lists. It is not inconsistent either with the terms of that section or with its purpose and effect that a power should be vested in the Chairman to erase from the lists the name of a Councillor who after election was proved to his satisfaction to have been under a disqualification at the date of his election, whether that disqualification arose subsequent to the time his name was entered upon the lists or whether it existed at the time when the lists were being prepared. Section 42 does not say that the lists shall be final and conclusive and the only evidence in the case of a Councillor of the possession by him of the qualifications required to have his name entered in such lists or of the presence or absence of circumstances which the law declares to be a disqualification to his name being entered upon such lists. All it does say is that the lists shall be conclusive of his right to be elected. Indeed, section 31 assumes that he has been lawfully elected for throughout the section a language is used which implies that the person concerned is a Councillor duly elected and hence it is that the section specially provides that "the Councillor whose name is erased shall thereupon cease to be a Councillor". No question of his right or "qualification to be elected" arises, the question for determination being whether or not such a Councillor was at the date of his election possessed of all the qualifications required in respect of persons entitled to have their names placed upon the list of persons qualified to be elected or at such date was under any of the disqualifications specified in the Ordinance. The provision vesting in the Chairman the right to remove from the list of persons entitled to be elected the name of a Councillor who at the date of his election is shown to his satisfaction to have been a person who was not entitled to have his name upon such list is not in my opinion inconsistent with the other provision which makes the list the sole evidence of his qualification to be elected. His election remains a good election. The mere erasure of his name from the list of those entitled to be elected does not involve a declaration that his election was

bad or unlawful. The consequence which the law attaches to the erasure is that he ceases to be a Councillor. It is impossible to give section 31 any other meaning than that which is implicit in the plain language employed by the legislature.

The appellant has been clearly shown to have been suffering from a disqualification at the date of his election. The Chairman was therefore right in erasing his name from the list. The consequence which the law attaches to such erasure is that the appellant ceases to be a Councillor.

It seems hardly necessary to refer to a subsidiary point taken by Counsel for the appellant. It was urged that the appellant though elected to be a Councillor did not become a Councillor till January 1 and not being a Councillor at the time this inquiry commenced it is said that the proceedings were irregularly taken. It must, I think, be conceded that there is to be found in the language of section 31 some support for the contention that the word "Councillor" is used in the sense of a person who having been elected a Councillor has become one by the commencement of the period for which he is elected to be a Councillor, in particular, the provision which declares that upon the erasure of his name he ceases to be a Councillor; but there is also much to be said for the opposite view. The section does not lay down any strict rules of procedure. All that it says is that the Chairman may exercise the power vested in him if it is proved to his satisfaction that at the date of his election the Councillor had not the qualifications required by the Ordinance or laboured under any of the disqualifications specified therein. The inquiry was held shortly before January 1, 1933, and the Chairman's order and act of erasure were not made till January 13, 1933. It is not suggested that the fact that this inquiry commenced a few days before January 1 has in any way prejudiced the appellant. I am not prepared to hold that in the circumstances of this case there has been such an irregularity as vitiates the proceedings or the act of the Chairman.

The appeal is dismissed with costs.

MAARTENSZ, A.J.—I agree.

Appeal dismissed.

