

1946

Present : Howard C.J.

MARCELIN PERERA, Petitioner, and SOCKALINGAM
CHETTIAR, Respondent.

Application for a Writ of Mandamus (55).

*Writ of Mandamus—Interdiction of Secretary of Urban Council by Chairman—
No previous resolution by Council—Legality of interdiction—Urban
Councils Ordinance, No. 61 of 1939, ss. 39A, 239A.*

Where the Chairman of an Urban Council interdicted the Secretary of the Council without the authority of a previous resolution passed by the members of the Council—

Held, that a writ of *mandamus* would lie to restore the Secretary to his office.

APPPLICATION for a writ of *mandamus* on the Chairman of the Urban Council of Anuradhapura by the petitioner who was the Secretary of the Council.

N. Nadarajah, K.C. (with him *E. B. Wikramanayake* and *H. Wanigatunge*), for the respondent, claims the right to begin as he is noticed to show cause why the rule should not be made absolute :—The respondent denies he interdicted the petitioner from duty ; he has only taken disciplinary action under the bye-laws. The petitioner has, therefore, misconceived his remedy. The Chairman is the executive officer of the Council—See section 34 (2) of Urban Councils Ordinance (No. 61 of 1939). Section 39A makes provision for the appointment of a Secretary and by section 48 only the Council has the power to appoint and remove any officer—See also section 239 (A).

Even assuming it is an interdiction or suspension from duty a writ of *mandamus* will not lie to restore a person irregularly removed from office.—See Shortt on *Mandamus* (1887 ed.) at p. 289 ; *K v. Mayor, Aldermen and Common Council of London* ¹. There is an action for wrongful dismissal available to the petitioner, and where another remedy is available a *mandamus* will be refused—See Shortt on *Mandamus* at pp. 233 and 234 ; *Mohamed Sahib v. Principal Collector of Customs* ² and *Samynathan v. Whitehorn* ³.

H. V. Perera, K.C. (with him *H. W. Jayawardene*), for the petitioner.—The rule of law that where there is another remedy *mandamus* will not lie applies only to a case where a person who had the power to do so irregularly suspended or interdicted an officer. Where the Chairman is under no contractual obligation to the Secretary no action can be brought against him by the Secretary for damages. No action lies for tort as the Chairman has asked the Secretary to refrain from doing certain things. Provision is made in the Urban Councils Ordinance for the dismissal of officers on a resolution passed in Council.—See section 239A.

[HOWARD C.J.—You say that the Chairman has no right to frame charges ?]

¹ 100 *English Reports*, 96.

² (1933) 2 *C. L. W.* 330.

³ (1934) 35 *N. L. R.* 325 at p. 230.

The Chairman could frame charges, but he must place them before the Council; he cannot ask the Secretary for an explanation. Refusal to answer charges is therefore not insubordination. The Secretary has certain statutory duties to perform and no one can take away a statutory duty imposed on an officer.

[HOWARD C.J.—What are the Secretary's statutory duties?]

The Secretary has the powers referred to in sections 39A (1) and 39A (2) of the Urban Councils Ordinance. Those powers conferred on him in the event of an interregnum are not the only powers given to the Secretary; his powers and duties extend to those conferred on him by rules framed under section 205 of the Ordinance. A distinction should not be drawn between the duties imposed by the Ordinance and those imposed by the rules framed under the Ordinance—See section 39A (2) of Urban Councils Ordinance and section 14 (1) (e) of the Interpretation Ordinance. Further, sections 33 (5), 34A (6), 40 and 228 of the Urban Councils Ordinance itself confer statutory powers and duties on the Secretary. By section 248 of the Urban Councils Ordinance rules and regulations framed under the repealed Ordinance (Cap. 195) are retained. These rules are contained in *Gazette* No. 8,458 of June 16, 1939, and they impose several duties on the Secretary.

Where there is no other adequate legal remedy the Court is bound to interpose by way of *mandamus*—See Shortt on *Mandamus* (1887 Edn.) at pp. 224 and 225, and *King v. Speyer and Cassel* ¹

N. Nadarajah, K.C., in reply.—The petitioner has other remedies. Suspension is not equivalent to removal from office and therefore no *mandamus* should be granted—*The King v. The Company of Free Fishers and Dredgers of Whitstable* ².

Cur. adv. vult.

May 30, 1946. HOWARD C.J.—

The petitioner prays that the Court may be pleased to issue a writ of *mandamus* on the respondent directing him:—

- (a) to restore the petitioner to his office in the Urban Council of Anuradhapura;
- (b) to withdraw the orders made without authority;
- (c) to countermand the orders of November 12, 1945, and February 12, 1946, referred to in paragraphs 6 and 19 of his petition and to cause all official documents necessary for the performance of the petitioner's functions and duties to be handed to the petitioner and to allow the petitioner access to all official documents and files;
- (d) to permit the petitioner to carry out his functions and duties as Secretary of the said Council.

The petitioner is the Secretary and the respondent is the Chairman of the Urban Council of Anuradhapura. On October 30, 1945, the respondent by letter P1 called upon the petitioner to show cause within 7 days why he should not be punished on various charges which were specified.

¹ (1916) *I K. B.* 595 at p. 612.

² (1806) *7 East* 353.

Copies of the correspondence (13 annexures) in support of these charges were attached to P1. By letter of November 5, 1945 (P2) the petitioner replied by saying that he did not wish to submit a formal explanation as the procedure adopted was irregular. After the exchange of some further letters the respondent on November 12, 1945, wrote P5 which is worded as follows :—

“ SECRETARY,—Please note that from today you shall not receive any papers of this office and have access to any of the official documents and, &c., until you hear from me to the contrary.

Please hand over forthwith to the Chief Clerk, Mr. K. B. Kulatunga, all official documents and other articles in your charge, and await further orders.

(Sgd.) SOCKALINGAM CHETTIAR,
Chairman, U. C.,
12.11.45.”

There was a further exchange of letters between the petitioner and the respondent in which the former endeavoured to elucidate from the latter as to whether he was interdicted from duty. On November 13, 1945, the petitioner by P6 informed the respondent that he took it he was interdicted from duty and was handing over and leaving the office. On November 14, 1945, the respondent by P9 called for an explanation from the petitioner as to why he was not in office. On November 14 and 19, 1945, the respondent by P12 and P13 informed the petitioner that he was not interdicted or suspended from duty. The petitioner was also told by P12 that he must be in the office during office hours. On January 31, 1946, the respondent resigned his office of Chairmanship of the Council. On the same day the Chief Clerk wrote the following letter (P18) to the petitioner :—

“ Mr. PERERA, Secretary,—I have fully considered your order of even date. You will appreciate that I am under orders of the previous Chairman to do certain work and perform functions of the Secretary. All this comes under office arrangements which will hold good till a new Chairman is elected. I regret therefore that I am compelled to carry out all duties I was hitherto doing.

Under the circumstances I regret I cannot comply with your request for keys, &c., of which I have temporary custodianship.

If C. L. G. orders me to hand over everything to you I shall be only too pleased to do so.

(Sgd.) KULATUNGA,
Chief Clerk.

Anuradhapura, 31.1.46.

The Chief Clerk also instructed all officers to comply with the previous Chairman's order of November 12, 1945. Also on the same day the Chief Clerk by letter P19 consulted the Commissioner of Local Government with regard to his position. By P20 dated February 1, 1946, the Commissioner of Local Government informed the Chief Clerk that the petitioner was still the Secretary of the Council and that the Chief Clerk should hand over to the petitioner what he took over from him and

resume his former duties under him. On February 12, 1946, the respondent was re-elected Chairman of the Council. On the same day by P21 he directed that the petitioner should hand over all official papers to the Chief Clerk.

Mr. Nadarajah on behalf of the respondent has contended that the latter's actions have been within the ambit of the powers vested in him by the Urban Councils Ordinance, No. 61 of 1939, as amended. He further argues that the petitioner has not been either interdicted or suspended by the respondent. I will first consider whether this argument can be maintained. I find from the dictionary that the word "interdict" means "prohibit" or "forbid". The office of Secretary to an Urban Council is created by section 39A which is worded as follows:—

- " (1) Every Urban Council shall appoint a fit and proper person to be the Secretary of the Council.
- (2) The Secretary of an Urban Council shall exercise, perform and discharge such powers, duties and functions as are conferred or imposed upon him by this Ordinance or by rules made under section 205 or by any other written law for the time being in force.
- (3) During the period intervening between the expiry of the term of office of the members of an Urban Council under section 16 and the election of a Chairman after the ensuing general election of members to that Council, and, in the event of the vacation of the office of both the Chairman and the Vice-Chairman by the death, resignation, removal or disqualification of the holders thereof, then, during the period intervening between the vacation of the office of the Vice-Chairman and the election of a new Chairman, the Secretary of the Council shall, in addition to the powers referred to in sub-section (2), have authority, subject to the approval of the Commissioner and subject to such limitations and conditions as may be prescribed by rules under section 205, to incur expenditure on behalf of the Council, to make payments out of the local fund, and to exercise and perform such of the powers, duties and functions of the Chairman as may be specified by the Commissioner or prescribed by rules as aforesaid."

Sub-section (2), it will be observed, provides that the Secretary shall not only perform and discharge the powers, duties and functions conferred on him by the Ordinance but also those conferred on him by rules made under section 205. A perusal of the provisions of the Ordinance indicates that duties are conferred on the Secretary by sections 34 (6), 40 and 228 of the Ordinance. Under section 248 of the Ordinance it is provided that the rules made under the repealed Ordinance (Cap. 195) shall continue in force. Those rules are contained in *Ceylon Government Gazette* No. 8,458 of June 16, 1939, and provide for the vesting of various duties and powers in the Secretary. Rule 19 provides that all counterfoiled books shall be in his charge. Rule 24 for the initialling of entries in the Register of Cheques. Regulations 28A, 43, 57, 83, 91, 94, 95, 96, 166,

173, 191, 221, and 233 make provision for other duties. By virtue of section 14 (1) (e) of the Interpretation Ordinance (Cap. 2) all rules shall have the force of law as fully as if they had been enacted in the Ordinance. The Secretary was therefore vested with numerous duties vested in him by Statute. In this letter of November 12, 1945, the respondent has informed the petitioner that he shall not receive any papers or have access to any of the official documents and that he is to hand over forthwith to the Chief Clerk, Mr. K. B. Kulatunga, all official and other documents in his charge and await further orders. In his letter of February 12, 1946 (P21) the petitioner is informed that the orders of the respondent of November 12, 1945, stand and he is to hand all official papers to the Chief Clerk. In my opinion those directions of November 12, 1945, and February 12, 1946, by the respondent prohibited the petitioner from performing the duties and functions vested in him by Statute. They amount to an interdiction or suspension of the petitioner.

The next question is whether the respondent in interdicting or suspending the petitioner was acting within his powers. In my opinion he was not. It is true that by section 34 (2) it is provided that the Chairman shall be the executive officer of the Council and all executive acts and responsibilities which are by the Ordinance directed or empowered to be done or discharged by the Council may unless a contrary intention appears from the context be done or discharged by the Chairman. The duties and responsibilities of the Chairman are also elaborated and defined by Rules 1 and 2 of the Rules to which reference has been made. But neither in the Ordinance nor the rules is there any provision empowering the Chairman to interfere with the statutory duties imposed on the Secretary by law. Nor is there any power permitting the Chairman to interdict or suspend the Secretary from the performance of those statutory duties. In fact it is clear from the provisions of section 239A that no such power is vested in the Chairman. This section is worded as follows :—

- “(1) No executive officer shall be removed or dismissed from his office except for misconduct or for neglect of, or incapacity for, his duties, and except on a resolution passed by not less than two-thirds of the total number of members of the Council.
- (2) No executive officer shall be suspended or fined or reduced in status nor shall the increments to his salary be withheld for any breach of departmental rules or discipline or for carelessness, incompetence, neglect of duty or other misconduct except on a resolution passed by not less than two-thirds of the total number of members of the Council.
- (3) In this section “ executive officer ” means any officer appointed to be or to act as the Secretary, the Electrical Superintendent or the Superintendent of Works of an Urban Council and includes any officer declared by the Executive Committee, by rule made under section 205, to be an executive officer for the purposes of this section.”

The Secretary of the Council can only be suspended by virtue of a resolution passed by not less than two-thirds of the total number of members of the Council. It is clear therefore that in suspending the petitioner the respondent was not acting within the scope of the authority vested in him by law.

It only remains to consider whether in the circumstances a writ of *Mandamus* will lie. In Shortt on *Mandamus*, p. 224 it is stated as follows :—

“ A *mandamus* is certainly a prerogative writ, flowing from the King himself, sitting in this Court, superintending the police and preserving the peace of this country, and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it.” But the Court ought to be satisfied that they have ground to grant a *mandamus*, “ it is not a writ that is to issue of course, or to be granted merely for asking.”

Can it be said in this case that there is no other remedy ? No other remedy can be suggested. In the case of *The King v. The Company of Free Fishers and Dredgers of Whitstable in the County of Kent*¹ the applicant for a writ of *Mandamus* was left in possession of his office and only excluded from participating in the profits. A *mandamus* was refused on the ground that he had his action for the tort against those who disturbed him in his participation of them. In this case no ordinary action is open to the petitioner against the respondent for prohibiting him from performing his duties. In *The King v. Speyer and Cassel*² the question arose as to the issue of a *quo warranto*. At p. 612 Lord Reading C.J., stated as follows :—

“ No case has been cited of a refusal by the Court of an information where the re-appointment to an office held at pleasure would be illegal. It would seem strange that the Court by refusing the remedy should perpetuate illegality. I cannot conceive why the Court should refuse to interfere if the appointing body persisted in retaining in office a person disqualified in law and no remedy other than the information is available. In the present case the information sought is the only means of testing the legality of the appointment, and if, as contended, it is contrary to law, *quo warranto* would seem in principle a convenient and proper way to obtain a judicial decision to that effect. If the irregularity in the appointment of an office held at pleasure could be cured by immediate re-appointment, the Court in the exercise of its discretion would doubtless refuse the information, but if, as in this case, any re-appointment would be illegal, I cannot see any sound reason why the Court should not permit the matter to be brought before it.”

Applying this reasoning to the present case which is an application for a writ of *Mandamus*, the petitioner is legally entitled to the office and to perform the duties of such office. If after the issue of the writ the respondent again suspends the petitioner such action would be illegal. The application for the writ is the only means of testing the

¹ (1806) 7 East 353.

² (1916) I. K. B. 595.

legality of the respondent's actions and if such actions are contrary to law, *mandamus* would seem in principle a convenient and in fact the only way to obtain a judicial opinion to that effect. In the cases of *The King v. Mayor of London*¹, *Samynathan v. Whitehorn*², and *Mohamed Sahib v. The Principal Collector of Customs*³ a writ of *mandamus* was refused in each case because another remedy was available to the applicant. In the present case no other remedy is available. The application is therefore granted with costs and a writ of *mandamus* will issue, but will be limited to paragraphs (a), (c) and (d) of the application.

Application allowed.
