1951 *Present :* **Nagalingam S.P.J.**

R. A. PIYASENA, Petitioner, *and* A. J. M. DE SILVA *et al.*, Respondents

S. C. 97.—IN THE MATTER OF AN APPLICATION FOR A WRIT OF QUO WARRANTO ON ANTHONY J. M. DE SILVA, MEMBER FOR WARD NO. 2, HATTON-DICKOYA URBAN COUNCIL.

Quo Warranto—Urban Council—Election to ward—" General personation "—Meaning of expression—Inspection of ballot papers—Power of Court to order it—Voter—" Error in description "—Local Authorities Elections Ordinance, ss. 53, 68.

Where, in an election to a ward of an Urban Council, the majority of the successful candidate was small, and the number of cases of personation was larger than the majority and consisted of votes in favour of the successful candidate—

Held, that the election was void on the ground of general personation.

Held, further, (i) that the Court has power to order an inspection of ballot papers not only during the six months mentioned in the proviso to Clause 4 of section 68 of the Local Authorities Elections Ordinance, but also at any time thereafter whenever it becomes necessary to do so in the interests of justice.

(ii) that the terms of section 53 of the Local Authorities Elections Ordinance do not go so far as to permit a Presiding Officer to allow a man to vote when his name is entered in the electoral lists as that of a woman.

THIS was an application for a writ of *quo warranto* to set aside an election to a ward of the Hatton-Dickoya Urban Council.

H. V. Perera, K.C., with *C. S. Barr Kumarakulasinghe, M. M. Kumarakulasingham* and *G. C. Niles*, for the petitioner.

R. L. Pereira, K.C., with *A. L. Jayasuriya, A. B. Perera, S. P. Wijewickrema* and *W. D. Gunasekera*, for the 1st respondent.

D. Jansze, Crown Counsel, for the 2nd respondent.

Cur. adv. vult.

December 19, 1951. NAGALINGAM S.P.J.—

The election of the 1st respondent, Anthony J. M. de Silva, as member for ward No. 2 of the Hatton-Dickoya Urban Council is being challenged in these proceedings by the petitioner who is a registered voter for the ward.

The ground upon which the election has been challenged is that certain voters who were not entitled to vote were permitted by the Presiding Officer to cast their votes in spite of objection and that in consequence thereof was the alleged majority secured by which the 1st respondent was declared duly elected. There were six voters to whose voting objections were specifically formulated. These six voters are said to

have voted in place of the following, whose names appear on the electoral list: (1) Mrs. V. Ponnammah, (2) V. Veeraputhiram, (3) U. M. Mahamani, (4) R. Gunawardena, (5) Meera Saibo Hyder Ali, and (6) W. Odiris Silva.

[After holding on the evidence that there had been impersonations in respect of Mrs. Ponnammah, Veeraputhiram, Mahamani and Odiris Silva, but not in respect of Meera Saibo Hyder Ali, His Lordship continued:—]

The last voter to whom objection has been taken is R. Gunawardena. In the lists, against the name of R. Gunawardena there is the further description indicating that the name is that of a female by the insertion against the name of the word " Miss " ; and in a column headed " Sex " the letter F also is placed opposite the name indicating again that the voter is a female. The voter who claimed to be R. Gunawardena was a male ; he gave evidence and stated that his sex had been wrongly described but that he himself was the person whose name was registered as a voter. In his evidence, however, he admitted in express words that he had a sister by the name of R. Gunawardena. In order to whittle down this evidence the uncle of the witness, one Munaweera, was called by the 1st respondent, and he denied that the witness R. Gunawardena had a sister by the name of Gunawardena at all, much less one by the name of R. Gunawardena. He categorically stated that there were three children in the family, two males and one female, the female going by the name of Hemawathie and the males going by the names of Gunewardena and Chandrapala. His object was to indicate that Gunawardena was not a surname of the family. Though I should have hesitated if the evidence stood with that of these witnesses to hold that there was a sister by the name of R. Gunawardena—for I must say Munaweera gave his evidence well and inspired confidence—the evidence of the headman Senadipathy who was also called by the 1st respondent so contradicted Munaweera's statements that it left me shaken in regard to the confidence I had placed on Munaweera's evidence ; the headman stated that R. Gunawardena's brother was known by the name of C. Gunawardena. In view of the express statement by R. Gunawardena that he has a sister by the name of R. Gunawardena I would hold that the witness was not the person who was registered as a voter and that in this case too it was a case of personation.

The conduct of the Presiding Officer has been questioned in that he did permit R. Gunawardena, a man, to vote, while the electoral lists indicated that the voter was a woman. While there is great force in the argument that a Presiding Officer is called upon in terms of section 53 of the Ordinance to permit a person who claims to be a voter to vote after making his declaration as prescribed therein, I do not think it is a sound exercise of discretion on the part of a Presiding Officer that he should permit a man to vote for a woman, for that would not be a case of an error in the description of the voter but a complete metamorphosis or transformation of one person into another.

Mr. Jansze contended that so long as R. Gunawardena was the name on the register and the person who came forward claimed to be R. Gunewardena and was prepared to sign a declaration the Presiding Officer

had no further duty but to accept the declaration and to hand him a ballot paper to enable him to vote. Mr. Jansze's contention was based on a submission that the word " Miss " and the letter F placed opposite the name should be treated as futile hieroglyphics meaning nothing in particular, for there is nothing in the Ordinance which requires the indication of the sex of a person to be recorded in an electoral list. But if this contention be sound, I should have imagined that the full names of the voters would at least have been given so as to provide some clue as regards the sex of the voter. But in an electorate where there are persons of various communities whose names the Presiding Officer may not be familiar with and hence afford him not the slightest inkling as to whether the voter is a male or a female, it is not only proper but essential that the electoral list should indicate the sex of the voter if an election is to be conducted in accordance with ordinary rules underlying a proper election. Besides one can imagine cases where a particular name may stand for persons of either sex.

I do not therefore accept the contention that the indication of the sex of the voter on an electoral list is to be treated as a piece of useless information; but on the other hand I should say that it is as much an integral part of the name as the surname itself, especially as in the lists only initials are used with the surname or what would correspond to the surname. I did not understand Mr. Jansze to say, for instance, that where a person who declared that his name was Puniasoma but claimed to vote under a name of Odiris Silva that appeared in the voters' list, the Presiding Officer would have been justified in permitting him so to vote. Hence in permitting R. Gunawardena, a man, to vote in place of R. Gunawardena, a woman, the Presiding Officer did fall into an error.

Mr. A. B. Perera for the 1st respondent developed this argument more fully and contended that so long as the person who claimed the vote was prepared to sign a declaration the Presiding Officer had no further responsibility in the matter. He relied upon certain English decisions which were decided under the provisions of the English election laws. The provision is to be found in the most recent enactment, the Representation of the People Act, 1918, Rule 41 of the Registration Rules in the First Schedule to the Act, which declares:

> " No misnomer or inaccurate description of any person or place on any list or on the register or in any notice shall prejudice the operation of this Act or these rules as respects that person or place provided that the person or place is so designated as to be commonly understood."

Substantially the same provision is to be found in the earlier Statute 5 and 6 William IV Chapter 75 section 142. In the case of *The Queen v. John Thwaites* [1] it was held that, where a man whose true name was Joseph Cowall but whose name had been entered in the electoral list as James Cowall signed the voting paper in the name of James Cowall, the voting was not irregular, as it was held that it was a misnomer within

[1] *(1853) 1 E. & B. 704.*

the meaning of section 142 of the Statute of William IV. It was further held that it was the true voter who did vote and no other. But there is a passage in the judgment of Lord Campbell C.J. which brings out the proper meaning to be attached to the term " misnomer ". The learned Chief Justice said:

> " Suppose a person named James had been put down in the roll as Jem, and had been known as Jem throughout the borough, I do not say that he must have signed the name Jem, but surely he might have done so."

There is no statutory provision under our law which permits of such a course being adopted in our elections but the presence of section 53 in the Ordinance seems to proceed on the footing that where there is an error in the name, so long as the voter was the identical person who was intended to be referred to by the entry in the list, he should be permitted to vote on his subscribing a declaration. But, of course, it cannot be said that one totally different name could be substituted for another. For instance, it is possible to spell some of the Ceylonese names either with a G or a J, or with a V in place of a W. And if these variations appeared I think there can be no doubt but that the voter would be entitled to vote after having subscribed the declaration.

In the cases of R. Gunawardena and Odiris Silva there is no pretence that the names that appeared in the electoral lists had any semblance to the names by which parties were known, and this though R. Gunawardena in the former case happens to be identical.

On the facts, therefore, I hold that there have been five cases of impersonation—all save that of Meera Saibo Hyder Ali.

There is no allegation in the petition or in any of the affidavits filed, nor was there any evidence led to show that the 1st respondent or any of his agents was a party to these impersonations. Mr. A. B. Perera, however, contended, relying upon section 69 of the Ordinance, that the election cannot therefore in any event be avoided. I do not think section 69 has any application to the circumstances of the present case. That is one which deals with an entirely different situation. The question here is whether the impersonation of five voters on the electoral list can be said to amount to general impersonation so as to render the election void. It is obvious that if the five persons who impersonated the five voters did cast their votes in favour of the 1st respondent then it would have a serious repercussion on the election of the 1st respondent. He was elected by a majority of two over the only other candidate. I am also of the view that unless it could be shewn that at least two of these persons did vote for the 1st respondent the result of the election would not be different and no grounds would exist for intervention by this Court. I am fortified in this view by a passage in Rogers [1]:

> " *It is possible, however, that a case might arise in which the majority of the successful candidate was small, and in which there was a large number of cases of personation, larger than the majority and all comprising votes in his favour.* Then if it were desired not to put in issue the

[1] *On Elections, 20th ed., Vol. II, p. 355.*

acts of the unsuccessful candidate and of his agents by claiming the seat on a scrutiny, there seems no reason why a petition should not be filed claiming that the election was void on the ground of *general personation*, and why it should not succeed if the majority could be got rid of."

It therefore seems to me that it is necessary to examine the ballot papers cast by these five persons. Mr. A. B. Perera, however, contends that the Court has no power and in fact that it is not possible to determine this question and that it must be held that as no proof can be adduced to shew that any or all of these five votes were cast in favour of the 1st respondent the petition must be dismissed. The only provision in the Ordinance, he says, that enables the Court to inspect the ballot papers is the proviso to Clause 4 of section 68, which only empowers the Court to inspect the ballot papers within a period of six months of the date of their receipt by the elections officer. More than six months have now expired, and hence his contention that there is no power in the Court.

I do not think that this is a proper construction of the proviso nor do I think that the Court has no power besides that indicated in section 68. I think the section itself is framed on the footing that the Court has an inherent power to order an inspection whenever it becomes necessary in the interests of justice to do so ; section 68 merely indicates to the election officer that while the documents are in his custody *nobody* is to have inspection of them, but, of course, if this enactment stood by itself without any proviso, it would be a complete and effective bar even to the Court inspecting the documents during the time they are in the custody of the elections officer. To remove this anomalous result the proviso has been enacted, so that it may be abundantly clear that even during the period of six months the Court is not debarred from inspecting or ordering an inspection. The very purpose of requiring the documents to be retained for a period of six months, to my mind, is self-explanatory. It is to prevent the destruction of documents that may be essential to the proper adjudication of a matter before the Court.

Mr. A. B. Perera suggested that the documents were to be retained for departmental purposes in the event of any allegation being made against any of the officers who conducted the election. But this cannot be; for no one, even if there was an allegation against the election officers, could inspect them while they were in the custody of the election officer. They can only be inspected once they have been directed to be produced before the Court and by the order of the Court. If, of course, there is an investigation in Court within the six months even as against the election officers, then no doubt that would be a case where a Court could order an inspection. But to say that the retention of the documents is directed by the section with this end in view is to place a too narrow construction on the law of elections. I take it that the period of six months is prescribed in the Ordinance because the Legislature had deemed it a sufficiently long period of time within which any question relating to the election would have been brought before the Court. It

is clear that where within a period of six months a matter relating to the election is brought before the Court and information is given to the elections officer or he receives knowledge of the pendency of proceedings in Court it would be his duty not to destroy the documents till the final disposal of the case. I do not think it could ever have been contemplated that the mere fact that the adjudication by Court takes place six months after the date of the receipt of the documents by the elections officer is to be regarded as the pivot upon which the rights of the parties are to turn and to affect adversely a party who would otherwise have been entitled to succeed. I think, therefore, that the Court has the right to order an inspection even after the lapse of six months from the date of the receipt of the documents by the elections officer.

In view of the foregoing, it would be apparent that no final order can be made till an inspection is made of the five ballot papers of the impersonators referred to above. I therefore direct the Registrar to open the sealed packets in the presence of Counsel for the petitioner and for the 1st respondent with a view to determining how these five ballot papers have been marked.

On scrutiny it is found that four of the five ballot papers have been cast in favour of the 1st respondent and one in favour of the unsuccessful candidate. The four ballot papers cast in favour of the 1st respondent must be rejected and so would the one in favour of the unsuccessful candidate. On this basis the 1st respondent has not a majority.

I therefore hold that the election of the 1st respondent is void. The 1st respondent will pay to the petitioner the costs of these proceedings. In all the circumstances, the 2nd respondent would bear his own costs.

Election declared void.