

1946

Present : Dias J.

SIMEON FERNANDO, Petitioner, and GOONESEKERA, Respondent.

APPLICATION FOR WRIT OF *Quo Warranto* AGAINST G. D. G.
GOONESEKERA.

Village Committee election—Disqualification of a member elected—No objection raised on date of nomination—Right of such member to vote in election of Chairman—Affidavit—Declarant must testify to facts known by him—Civil Procedure Code, s. 181—Village Communities Ordinance (Cap. 198), ss. 13, 15.

A person who is disqualified to be elected as a member of a Village Committee but who has been elected without any protest as to his qualification is entitled, unless his election is set aside by subsequent application to the Supreme Court, to vote at all the deliberations of the Committee including that held for the purpose of electing the Chairman.

An affidavit must be confined to a statement of such facts as the declarant is able of his own knowledge and observation to testify to. An exception is made in the case of an interlocutory affidavit, in which statements regarding his belief may be admitted provided reasonable grounds for such belief be set forth in the affidavit.

A PPLICATION for a writ of *quo warranto* to have the election of the Village Committee of Kanuwana declared null and void on the ground that he failed to obtain the majority of the votes of the members legally entitled to vote at the meeting at which he was elected.

H. V. Perera, K.C. (with him *E. B. Wikramanayake* and *E. O. F. de Silva*), for the petitioner.

N. E. Weerasooria, K.C. (with him *H. A. Koattegoda*), for the respondent.

Cur. adv. vult.

October 29, 1946. DIAS J.—

The petitioner, W. Simeon Fernando, prayed for a writ of *quo warranto* to oust the respondent, who is the *de facto* Chairman of the Village Committee of Kanuwana on the ground that his election to that office is null and void on the ground that he failed to obtain the majority of the votes of the members legally entitled to vote at the meeting at which he was elected.

The Village Committee of Kanuwana consists of thirty-one members. The respondent, G. Don Gilbert Goonesekera, and one Norbert Sri Vardhana are both duly elected members. On nomination day one P. Simon Peter Perera, admittedly an ex-convict, who has served a sentence of two years' rigorous imprisonment for attempted murder, was nominated for one of the wards. There being no other candidate, and no

objection having been raised by anybody as to his qualifications for election, he was declared to be duly elected. Section 13 (e) of the Village Communities Ordinance (Chap. 198) disqualifies for election a person who has served a sentence of imprisonment of either description for a period of three months or any longer period, on conviction of any "crime" within the meaning of the Prevention of Crimes Ordinance (Chap. 18). It is common ground that the offence of attempted murder is such a "crime." Obviously, therefore, this ex-convict was disqualified, but nobody appears to have raised any objection, until this trouble arose. See section 15.

After the election of the members, the next thing to be done is to elect the Chairman and the Vice-Chairman. Under the repealed Ordinance (section 20 (7)) the voting had to be by "secret ballot". By section 27 of the existing Ordinance (as amended by Ordinance No. 11 of 1940, section 7) the election of the Chairman and the Vice-Chairman is by ballot. The presiding officer at such election is the Government Agent. Such election is to be conducted, subject to the provisions of section 27 (1), in accordance with such procedure as may be prescribed by rules under section 59 of the Ordinance. These rules of procedure were not cited at the argument. They will be found in Volume III. of the Subsidiary Legislation of Ceylon for 1941 at pages.322-323. I note in passing that section 59 of the principal Ordinance has been successively amended by Ordinance Nos. 11 of 1940, section 12, and 54 of 1942, section 24.

Part III. of the rules provide the procedure to be followed at the election of a Chairman and a Vice-Chairman. I reproduce the relevant rule :—

2 (a) If there are two candidates for election and the names of such candidates are formally proposed and seconded, the Presiding Officer shall proceed to the election of one of the candidates by ballot.

(b) The Presiding Officer shall, thereupon, take a count and declare the candidate who obtains the larger number of votes the duly elected Chairman of the Committee.

(c) In the event of the election being rendered indecisive by reason of an equality of votes, the matter shall be decided by lot, cast or drawn, in such manner as the Presiding Officer may, in his discretion, determine.

I am entitled to presume that the Presiding Officer at this election regularly performed his official duties before declaring the respondent to be the duly elected Chairman of this Village Committee. If as stated in paragraph 14 of the petitioner's affidavit and the one subsequently filed by the defeated candidate, Sri Vardhana, the latter's objection against the ex-convict participating in the ballot was made before the ballot was taken, there are thirty other persons as well as the Presiding Officer who would be aware of that fact, and who would be in a position to testify. If as asserted by the petitioner the Presiding Officer before taking the ballot questioned the ex-convict, and if the latter admitted that he was a disqualified person, it is highly improbable that the Presiding Officer would have allowed him to vote.

In any event I think the Presiding Officer, as a disinterested person, if requested to do so, would have given the petitioner an affidavit to that effect, or at least expressed willingness to testify before this Court whenever required to do so. There is no evidence that any attempt was made to secure that decisive evidence.

The petitioner asserts in paragraph 15 of his affidavit that the respondent was elected by a majority of one vote—Sri Vardhana securing 15 while the respondent obtained 16 votes. This is pure hearsay, because the petitioner, not being a Committee member but only a voter, could not have been present. His evidence is therefore indirect and obtained second-hand. In paragraph 16 the petitioner further says “*I have reason to believe that the said P. Simon Peter Perera (the ex-convict) voted for the respondent at the said election.*” This again is hearsay. The reasons for his belief are not stated in the affidavit.

After notice had been issued and the respondent filed his affidavits denying (a) that Sri Vardhana had taken any objection to the status of the ex-convict to vote before the ballot was held, or (b) that the ex-convict did, in fact, vote for the respondent—the petitioner filed a supplementary affidavit from Sri Vardhana, the defeated candidate. This affidavit asserts that he took objection to the status of the ex-convict before the ballot was taken. He further states that the ex-convict voted for the respondent, but does not disclose the facts on which this statement is made.

The submission made on behalf of the petitioner is that the ex-convict having voted for the respondent, who thereby secured election by a majority of a single vote, the election is rendered indecisive—for, if the vote of the ex-convict is eliminated, there would result an equality of votes between the two candidates. The Presiding Officer not having proceeded to determine the question of chairmanship by lot, the election is bad and therefore the respondent is not the *de jure* Chairman. On the other hand, if it is the fact that the ex-convict voted for Sri Vardhana, then the respondent secured a majority in spite of that disqualifying vote, and his election is good.

The proof tendered by the respondent is equally unsatisfactory.

In paragraph 9 of his affidavit he states “*I verily believe that the said P. Simon Peter Perera . . . voted for the said Norbert Perera Sri Vardhana,*” but the grounds for this belief are not stated. The affidavit of Don Simon Jayasinghe, a Committee member, who should be in a position to give direct evidence merely asserts “*As far as I know, I have cause to believe that the said P. Simon Peter Perera voted for Norbert Perera Sri Vardhana.*” The grounds of his knowledge and belief are withheld from this Court.

Section 181 of the Civil Procedure Code makes it clear that affidavits must be confined to a statement of such facts which the declarant is able of his own knowledge and observation to testify to. An exception is made in the case of an interlocutory affidavit, in which statements regarding his belief may be admitted, “*provided reasonable grounds for such belief be set forth in the affidavit*”—see *David and Co. v. Albert Silva*¹, *Samarakoon v. Ponniah*², and *Rajadurai v. Thanabalsuriya*³.

¹ (1930) 31 N. L. R. 316.

² (1931) 32 N. L. R. 257.

³ 10 T. L. R. 120, 12 C. L. Rec. 233.

It is obvious that the affidavits produced in this case contravene the salutary provisions of section 181 of the Civil Procedure Code. It was suggested, for this reason, and in view of the conflicting nature of the evidence, the Court would feel disposed to allow the parties to lead oral evidence—for example, of the Government Agent and the ex-convict.

I cannot accede to such a request. It is possible that cases may arise where such a course is necessary or desirable ; but this is not such a case. In the first place section 15 of the Ordinance (as amended by Ordinance No. 54 of 1942, section 9) provides that no person shall be a candidate for election as a Committee member unless he is qualified for election within the meaning of section 13. The proper time to object to the election of a candidate on the ground that he is not qualified for election is when the nomination papers are delivered—see section 15 (3) (as amended by Ordinance No. 11 of 1940, section 4). This, however, does not operate as a bar to a subsequent application to this Court to set aside such election—*Mendias Appu v. Hendrick Appu*¹. No such steps have been taken. This ex-convict, therefore, has been declared to have been “duly elected” (section 15 (4)) and continues to serve in the Committee as a “duly elected” member thereof.

If so, he is lawfully entitled to vote at all the deliberations of the Committee including that held for the purpose of electing the Chairman. I doubt whether the Presiding Officer has power under such circumstances to refuse such a person to vote, even if objection had been taken to his status. On this ground alone, this application must fail. In the second place, the burden of proof is on the petitioner. He has, in my opinion, failed to discharge it. For both these reasons, I refuse this application with costs.

Appeal dismissed.
