

1955

*Present : Sansoni, J.*

SAMARAWEERA, Petitioner, and BALASURIYA, Respondent

*S. C. 398—Application for a Writ of Mandamus on the Chairman of the Urban Council, Matara**Urban Councils Ordinance, No. 61 of 1939—Special meeting of Council—Duty of Chairman to convene one—Sections 38 (2) and 166—By-laws—Mandamus—Effect thereon of alternative remedy.*

A writ of *mandamus* lies against the Chairman of an Urban Council if he refuses to convene a special meeting of the Council when required to do so under section 38 (2) of the Urban Councils Ordinance. In view of the provisions of section 166, a Rulo in terms of Rule 9 (c) of the By-laws of the Urban Council of Matara must give way to section 38 (2).

An alternative remedy provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot operate as a bar to the application for *mandamus*.

## A PPLICATION for a writ of *mandamus*.

*N. Nadarasa*, with *S. Sharvananda*, for the petitioner.

*Sir Ukwalte Jayasundera, Q.C.*, with *G. T. Sumerawickreme*, for the respondent.

*Cur. adv. vult.*

April 6, 1955. SANSONI, J.—

This is an application for a Writ of Mandamus made by a member of the Urban Council, Matara, against the Chairman of that Council. The petitioner and five other members of the Council requested the respondent Chairman, by their letter dated 28th July, 1954 to convene a special meeting of the Council forthwith for the purpose of debating seven resolutions in the following terms :—

- (1) That the Chairman U. C. Matara, be surcharged the amount of salaries and allowances paid to all employees appointed by him to the Council without the previous sanction of the Council or whose appointments have not been subsequently confirmed by it.
- (2) This Council calls upon the Auditor-General to send immediately a special officer to investigate cases of unauthorised expenditure and payments made by the Chairman U. C. Matara.
- (3) That the power of appointment of all necessary officers and servants permanent or temporary and of their removal or suspension, be exercised by this Council (and not by the Chairman alone) in all cases where the salary or wages of any such employee does not exceed Rs. 100.
- (4) That on the ground of economy, the appointment of G. P. H. Arthur, of Totamune be forthwith cancelled and his duties delegated to the former occupant of the post, in addition to the duties now discharged by this former occupant.

- (5) That work relating to the maintenance and repair of roads now being done in only ward No. 9, be forthwith stopped and work in all wards be carried out in conformity with a list of priorities decided on by the Council.
- (6) This Council resolves to rescind resolutions No. 26 (2) passed on 23.1.1954, leaving the matter of the issue of licences for temporary picture-halls and carnivals to the Chairman U. C.
- (7) This Council resolves to rescind resolution No. 22 passed on 5.4.1954 adding the words "and to authorise the necessary expenditure" to items (d) and (e) of resolution No. 25 of 23.1.1954.

By his letter dated 29th July 1954 the respondent acknowledged receipt of the letter and informed the petitioner that the Resolutions Nos. 1, 2, 3, 4, 6, and 7 were disallowed while Resolution 5 would be submitted for debate at a meeting to be held on 2nd August 1954 at 3.30 p.m. Apparently such a meeting was held on the appointed date but these resolutions which had been disallowed were not placed on the agenda and this application has been made in order that the respondent may be directed to convene a meeting for the purpose of discussing those resolutions.

The respondent has justified his action by relying on Rule 9 (c) of the By-Laws of the Council which reads :—

" Before any notice of motion is placed on the agenda paper, it shall be submitted to the Chairman, who, if he be of opinion that it is out of order, shall cause the giver of the notice to be so informed. "

He pleads that his decision was made bona fide and in the discharge of a statutory duty devolving on him as Chairman. He also relies on Rule (1) (d) of the By-Laws which reads :—

" No business shall be brought before or transacted at any meeting ordinary or special, other than the business specified in the notices of meetings without the permission of the Council. "

His position is that the petitioner could have moved the resolutions at the special meeting with the permission of the Council.

Mr. Nadarasa for the petitioner referred to the peremptory wording of Section 38 (2) of the Urban Councils Ordinance No. 61 of 1939 which, as amended, reads :—

" The Chairman may convene a special meeting of the Council whenever he may consider it desirable and shall, whenever requested in writing by any two or more members of the Council to convene a special meeting for any purpose specified in such writing, forthwith convene a special meeting for that purpose. Two days' notice of the day appointed for any such special meeting shall be given to, or left at the residence of, each member of the Council. "

He submitted that this provision gave no discretion to the Chairman either in the matter of summoning a special meeting or in the matter of placing the resolutions specified in the requisition before such a meeting. Sir Ukwatte Jayasundera for the respondent conceded that the respondent

was bound to convene a special meeting when required to do so under Section 38 (2). He claimed, however, that the respondent had a discretion in regard to the resolutions which could be put before the meeting, and this Court would not interfere with its exercise.

It seems to me that if Rule 9 (c) applies to this case the petitioner's application must fail, while if it does not apply the petitioner must succeed in view of the imperative provisions of section 38 (2) of the Ordinance which are clear and free from ambiguity. I have dealt at some length with a very similar matter in an order which I delivered on 20 October, 1954,<sup>1</sup> and I do not wish to repeat all I said then. The relevant by-laws and statutory provisions are the same in both cases, although that was a case which arose under the Town Councils Ordinance, No. 3 of 1946. I there decided that a by-law worded similarly to Rule 9 (c) does not apply to a special meeting, because all that section 38 (2) requires, once the Chairman has received a request in writing specifying a purpose, is that two days' notice of the day appointed for the meeting should be given and that the meeting should be convened for the specified purpose. Rule 9 (c) is inconsistent with the peremptory provisions of section 38 (2) because it vests a discretion in the Chairman and confers on him the right to rule out of order a resolution which is specified in a requisition. In view of the provisions of section 166 of the Ordinance the Rule in question must give way to section 38 (2) of the Ordinance; see also *De Silva v. De Silva*<sup>2</sup>.

It cannot be denied that all the resolutions which were ruled out of order by the respondent are relevant to questions affecting the Council administration. It is therefore not necessary to consider what the position would be if the resolutions had no bearing at all on the business of the Council. The words "any purpose" in section 38 (2) must be given a reasonable construction in the light of the other provisions of the Ordinance; they do not include any purpose under the sun, for it must be remembered that they appear in an Ordinance enacted to establish Urban Councils for the purpose of local Government.

With regard to the alternative remedy open to the petitioner under Rule 1 (d), it is no remedy at all unless the petitioner obtains the permission of the Council. Moreover, section 38 (2) of the Ordinance not only gives him a right to have resolutions discussed without such permission but also ensures that all the members of the Council will have due notice of the purpose of the special meeting. The procedure under Rule 1 (d) would place the petitioner at a disadvantage. The alternative remedy should be equally convenient, beneficial and effectual.

It is trite law that *Mandamus* is only available to compel the doing of a duty not done, and not on the ground that a duty had been done erroneously. The cases cited by the respondent's counsel establish this proposition. But the petitioner's complaint is that the respondent has failed to do the duty cast upon him by section 38 (2) and I think it is a just complaint. For these reasons I allow the application of the petitioner with costs.

*Application allowed.*

<sup>1</sup> (1954) 56 N. L. R. 450.

<sup>2</sup> (1943) 44 N. L. R. 337.