

1967

Present : **Tennekoon, J.**

C. P. J. SENEVIRATNE, Applicant, and R. M. MUTHUBANDA,
Party Noticed

*Parliamentary Election for Electoral District No. 120 (Mahiyangana)
holden on 22nd March 1965—Application for examination of the
Petitioner under section 219 of the Civil Procedure Code*

*Election petition—Execution proceedings for recovery of costs—Jurisdiction of any
single Judge of the Supreme Court—Civil Procedure Code, ss. 219, 776 (4),
777—Parliamentary Elections Order in Council, ss. 78B, 82A (5), 82B (1) (4)
—Parliamentary Election Petition Rules 2, 33 (1).*

Where the Judge who heard an election petition is *functus officio*, proceedings for the recovery of costs awarded by him, and by the Supreme Court on appeal, in favour of the petitioner may be taken before any single Judge of the Supreme Court notwithstanding that such Judge does not happen to be the Election Judge who was nominated to hear the election petition. Execution proceedings in relation to an order for costs are interlocutory matters within the meaning of section 78B of the Parliamentary Elections Order in Council.

ELECTION petition in respect of election for Electoral District No. 120 (Mahiyangana). Application for examination of the petitioner under section 219 of the Civil Procedure Code.

N. C. J. Rustomjee, with *D. S. Wijewardene*, for the respondent-applicant.

S. S. Sahabandu, for the petitioner (the party noticed).

Cur. adv. vult.

October 21, 1967. TENNEKOON, J.—

The party noticed was the petitioner in an Election Petition in which the applicant was the respondent. A sum of Rs. 5,000 had been deposited by the party noticed as security at the time of filing the Election Petition. That petition was after trial dismissed with costs by the Election Judge. An appeal was taken to the Supreme Court under section 82A of the Ceylon (Parliamentary Elections) Order in Council (Chapter 381); that too was dismissed with costs. Costs of the trial have been taxed by the Registrar of the Supreme Court at Rs. 6,681·64. After setting off the sum of Rs. 5,000 against costs from the security deposited, there is still due a sum of over Rs. 1,681·64 due from the party noticed to the applicant in regard to the costs of the Election Petition prior to the appeal. The costs of appeal have been taxed at Rs. 2,849·00 and the total amount now due as costs is Rs. 4,530·64. The applicant has moved that the party noticed be examined under section 219 of the Civil Procedure Code and when the matter came up before me, Counsel for the party noticed took objection to my dealing with this application on the ground that any proceedings in regard to the execution of an order for

costs in an Election Petition can only be had before the Election Judge who heard the Election Petition upon the nomination made by his Lordship the Chief Justice and cannot be had before a Judge of the Supreme Court who had no other qualification to deal with the matter other than that of being a Judge of the Supreme Court. The Election Judge in this case was Mr. L. B. de Silva who is no longer a Judge of the Supreme Court having retired about 18 months ago.

After hearing Counsel for the party noticed and the applicant I overruled the objection and directed that the examination of the party noticed be done before me on the 19th of October. I now set out my reasons for taking the view that these proceedings can be had before a single Judge of the Supreme Court who is not also the Election Judge nominated to hear the Election Petition.

The submission of Counsel for the party noticed is that while Rule 33 (1) of the Parliamentary Election Petition Rules which reads—

“ Costs when taxed may be recovered in the same manner as costs of an action at law ”

contemplates the application of those provisions of the Civil Procedure Code which relate to the execution of a decree to pay money, any express or implied reference to ‘ the judge ’ or ‘ the court ’ in those provisions can have reference only to the Election Judge. He refers to the definition of the term ‘ Judge ’ in rule 2 of the Election Petition Rules which is to the effect that unless the context otherwise requires the term ‘ Judge ’ when used in the rules means the Election Judge. Counsel further submits that this meaning must be carried across to the provisions of the Civil Procedure Code when applied to election petitions for the purposes of recovery of costs and accordingly the term ‘ court ’ appearing in those sections can only have reference to the Election Judge who heard the Election Petition.

This submission somewhat ignores the fact that there was in this case an appeal to the Supreme Court from the determination of the Election Judge and having regard to the provisions of subsections (1) and (4) of section 82B of the Order in Council, the Supreme Court in dismissing the appeal must be taken to have affirmed both the determination of the Election Judge and also the order for costs made by the latter ; on the principle applied in *Sinno Appu v. Andiris et al.*¹ that a decree of a lower court affirmed in appeal becomes the decree of the Supreme Court, the whole of the costs payable by the party noticed are now referable to an order of the Supreme Court and no part of it is based on the order of the Election Judge.

Sub-section (4) of section 82B of the Order in Council provides that—

“ the provisions of the Third Schedule as to the award, taxation and recovery of costs shall *mutatis mutandis* apply in relation to the award of such costs by the Supreme Court and recovery thereof. ”

¹ (1910) 13 N. L. R. 297.

One is thus again driven back to Rule 33 (1) of the Election Petition Rules (contained in the Third Schedule) which provide for the recovery of taxed costs “in the same manner as costs in an action at law”. It was not contended by Counsel for the party noticed that the decision of the Supreme Court on appeal from an Election Petition must be returned to the court of first instance under section 776 (4) of the Civil Procedure Code or that the provisions of section 777 of that Code have any application here. These provisions though appearing in a Code dealing with procedure, in substance enlarge the power and jurisdiction of original courts so as to enable them to execute decrees of the Supreme Court in appeal from such original courts. The words “in the same manner” in Rule 33 (1) are not apt to invest an Election Judge with the powers given to original courts by section 777 of the Civil Procedure Code.

It seems to me therefore that this is a case in which any proceedings for the execution of the order for costs must be taken before the Supreme Court itself.

It is true that section 82 A (5) provides that any appeal from the determination of an Election Judge shall be heard by three Judges of the Supreme Court. This provision cannot be read as prescribing the number of Judges that would be necessary to constitute a bench of the Supreme Court to deal with matters arising in execution of an order for costs made by the Supreme Court in appeal. There is however section 78B of the Order in Council which reads as follows :—

“Unless otherwise ordered by the Chief Justice all interlocutory matters in connexion with an election petition may be dealt with and decided by any Judge of the Supreme Court.”

The only question that then arises is whether execution proceedings, whether they be in relation to an order for costs by the Supreme Court in appeal or in relation to an order for costs by an Election Judge can be regarded as an ‘interlocutory matter in connexion with an Election Petition’. Counsel for the party noticed conceded that there are many cases in which the term ‘interlocutory’ has been applied to incidental proceedings arising *after* the rights of the parties in the case are finally disposed of in what might be called the main or final judgment or determination. It is sufficient to refer to the cases of *Manchohamy v. Appuhamy*¹, *Egerton v. Shirly*² and *Jau Singho v. Abeywardene*³ in support of that proposition.

I am accordingly of opinion that the examination under section 219 of the Civil Procedure Code of the party noticed is an interlocutory matter in connexion with an Election Petition within the meaning of section 78B of the Ceylon (Parliamentary Elections) Order in Council and may be had before a single Judge of the Supreme Court notwithstanding that such Judge does not happen to be the Election Judge who had been nominated to hear the Election Petition.

Application allowed.

¹ (1905) 8 N. L. R. 307.

³ (1950) 51 N. L. R. 368.

² (1945) 1 K. B. 107.