

1953

Present : Swan J.

**S. J. V. CHELVANAYAKAM, Petitioner, and S. NATESAN,
Respondent**

Election Petition No. 17 of 1952, Kankesanthurai

*Election Petition—Summons to produce a document—Date when witness should appear
—Civil Procedure Code, ss. 121, 126, 127—Ceylon (Parliamentary Elections)
Order in Council, 1946, s. 78 (3).*

The power conferred by section 78 (3) of the Parliamentary Elections Order in Council on an Election Judge to summon or compel the attendance of witnesses is not greater than that of a District Judge. Section 121 of the Civil Procedure Code is, therefore, applicable. Accordingly, an Election Judge has no power to summon a witness to produce a document on any date other than at the hearing of the election petition.

APPPLICATION for summons on a witness to produce a document in Election Petition No. 17 of 1952, Kankesanthurai.

*C. S. Barr Kumarakulasinghe, with A. Vythilingam and Ananda de Silva,
for the petitioner.*

*H. V. Perera, Q.C., with G. E. Chitty, C. C. Rasaratnam and N.
Nadarasa, for the respondent.*

*E. B. Wikramanayake, Q.C., with S. Sharvananda, for the proprietors
and manager of Thirumakal Press.*

Cur. adv. vult.

March 31, 1953. SWAN J.—

This inquiry was occasioned as the result of an application made by the petitioner's proctor on February 16, 1953, for summons on the Proprietors and Manager of the Thirumakal Press, Chunnakam, to produce certain documents said to be now in their hands on a date to be fixed by Court.

Mr. Wikramanayake appearing for the parties on whom summons was asked said that he had cause to show. I intimated to him that he would be heard after I decided (1) whether I had the power to summon a witness to produce a document at any date other than at the hearing, and (2) if I had the power or the discretion to do so whether I should grant the present application or not.

Mr. Perera's contention in brief is that I have no power or authority whatsoever to issue summons on a witness to appear or to produce a document except at the trial.

Sectior 78 (3) of the Order in Council sets out that

"For the purpose of summoning or compelling the attendance of witnesses at the trial of an election petition, the election judge shall have the same power, jurisdiction, and authority as are possessed and exercised by the judge of a District Court in the trial of a civil action and witnesses shall be sworn in the same manner, as near as circumstances will admit, as in the trial of such an action, and shall be subject to the same penalties for the giving of false evidence."

Mr. Kumarakulasinghe for the petitioner supports the application on two grounds, namely,

(1) that my being appointed election judge to dispose of this petition does not in any way detract from my powers as a judge of the Supreme Court and that one of my inherent powers in that capacity is to make any order that would ensure or promote the ends of justice. It is, he submits, in the interests of justice that an order such as the one asked for should be made.

(2) that even if my "power, jurisdiction and authority" in this behalf were no more than those of a District Judge I should still grant the application because a District Judge could do so under the provisions of the Civil Procedure Code.

I shall first deal with the so called inherent powers of the Supreme Court. What exactly those powers are nobody can say with any degree of exactitude; but that the judges of the Supreme Court have from time to time stated that they were doing a certain thing in the exercise of the inherent powers invested in them there can be no doubt. Section 78 (3) of the Order in Council, however, does not seem to suggest that an election judge has in the matter of summoning or compelling the attendance of witnesses at the trial of an election petition any greater power, jurisdiction or authority than possessed and exercised by a District Judge in the trial of a civil action.

I shall now examine the second submission put forward on behalf of the petitioner, namely, that a District Judge can summon a witness to attend or to produce a document on any date other than a date of trial. This contention is based upon Section 121 of the Civil Procedure Code which provides:—

"The parties may, after the summons has been delivered for service on the defendant, obtain, on application to the court or to such officer as the court appoints in that behalf, before the day fixed for the hearing,

summonses to persons whose attendance is required either to give evidence or to produce documents. A list of witnesses shall be filed in court by the party applying for such summonses, after notice to the other side, and within such time before the trial as the Judge shall consider reasonable, or at any time before the trial with the consent of the other side appearing on the face of such list."

Mr. Kumarakulasinghe contends that inasmuch as this Section does not specify the date on which the witness is required to attend or to produce documents a District Judge has a discretion in the matter—he can summon a witness to attend or produce a document at any time his presence is necessary or desirable. I do not think that one can reasonably draw this inference from the omission to state in Section 121 to give evidence or to produce documents *at the hearing*. Apparently the compilers of the Civil Procedure Code thought it unnecessary to use the words "at the hearing". To me it seems inconceivable that a witness could be required to give evidence or to produce a document except at the hearing. Nor is there anything in Sections 126 and 127 or in the form of summons (Schedule II, No. 16) that would warrant the construction which Mr. Kumarakulasinghe seeks to put on Section 121.

Undoubtedly a District Judge has power to make order for discovery, inspection, production, impounding and return of documents. There is special provision in the Civil Procedure Code for that purpose. But those sections only apply to parties to the action. There is also provision for evidence to be taken *de bene esse* and in the course of such evidence a witness may produce or be required to produce a document in his possession. But none of these sections has any bearing on the present application.

I hold that under Section 78 (3) of the Order in Council I have no power, jurisdiction or authority to allow the petitioner's application.

I will now consider the application in the light of the provision made in Section 86 (2) of the Order in Council which sets out that

"If any matter of procedure or practice on an election petition shall arise which is not provided for by this Order or by such rules or by any Act of Parliament, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with this Order or any such rules or Act of Parliament and is suitable for application to the Island, be followed and shall have effect."

No case or instance has been cited of a similar application having been made and allowed in England.

The application is refused. The petitioner will pay the respondent the costs of this inquiry but those costs will not be taxed nor will execution be levied in respect thereof till the final determination of the election trial.

Application refused.