

## Bhajan Lal-Saran Singh and Company Vs The State of Punjab and Others

**Court:** High Court Of Punjab And Haryana At Chandigarh

**Date of Decision:** Feb. 6, 1967

**Acts Referred:** Administration of Evacuee Property Act, 1950 " Section 48

Constitution of India, 1950 " Article 226

Punjab Excise Act, 1914 " Section 23, 31, 32, 36, 38

Punjab Liquor licence Rules, 1956 " Rule 36(23), 36(23A)

**Citation:** (1967) 2 ILR (P&H) 757

**Hon'ble Judges:** R.S. Narula, J; D.K. Mahajan, J

**Bench:** Division Bench

**Advocate:** Tirath Singh Munjral, M.M. Punchi and Maharaj Baksh Singh, for the Appellant; B.R. Aggarwal, for A.G., for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

R.S. Narula, J.

This judgment will dispose of two writ petitions, namely, C.W. 538 of 1966 and C.W. 1991 of 1966, wherein common questions of law have been argued by the learned Counsel who represents the Petitioners in both the cases.

2. The relevant facts of the case of M/s. Bhajan Lal Saran Singh alone may be stated as the only difference between this case and the other one is

about the name of the different vend, their situation and the licence fee fixed between the parties.

3. On January 20, 1965, a notice for the auction of the relevant vend was issued which was subject to the conditions on which licences for the

retail vend of country spirit were to be granted for the financial year 1965-66. Conditions Nos. 7, 8, 28 and 42 alone are relevant for deciding

these cases and the same are. therefore, quoted below verbatim:

7. There shall be fixed a minimum quota for each vend, which shall be announced at the time of auction. Subject to availability and genuine demand

of the area concerned, the Excise and Taxation Commissioner or an officer authorised by him in this behalf, may, in his discretion, allow

supplementary quota of country spirit (without additional licence fees).

8. The licensee shall lift each month the proportionate quota for the month fixed for his vend(s) or deposit still-head duty realisable thereon. In the

event of any deficiency in the amount of still-head duty realisable from the lifting of the full proportionate quota due to the short lifting of the quota

by the licensee or non-deposit of the amount of still-head duty, the said deficiency may be realised from the amount of security deposited by him at

the time of grant of licence. The resulting deficiency in the amount of security, shall be made good by the licensee within 7 days of such adjustment.

In case the short lifting of proportionate quota or short deposit of still-head duty continues for two consecutive months or the licensee fails to make

up the deficiency in the amount of security within the prescribed period of 7 days, his licence may be cancelled in addition to the recovery of the

deficiency in still-head duty.

28(i) Retail vendors in a district shall, unless otherwise permitted by the Deputy Excise and Taxation Commissioner concerned in exceptional

cases, obtain their requirements of country spirit from wholesale vendors, who shall be granted permits by the Excise and Taxation Officer holding

charge of district to transport country spirit. Wholesale vendors, who will function as stock lists for retail vendors, will charge from the latter fixed

prices of plain and ordinary spiced country spirit as given in paragraph 24 above plus still-head duty paid by them and a surcharge to cover their

transport and godown expenses and profit. Sales tax, if any, paid by wholesalers to distilleries, however, will be chargeable pro rata from retailers.

The surcharge over the fixed ex-distillery issue prices shall be levied at the rates fixed by the Excise and Taxation Commissioner, Punjab.

(ii) The stock of country spirit left unsold at the end of the financial year 1964-65 shall be counted towards the quota of retail vendor for the

financial year 1965-66 and shall not be allowed as additional supply even if any sitting retail vendor succeeds in securing the same licence for the

financial year 1965-66. The outgoing licensee shall have no claim on the amount of still-head duty paid by him on the stock of country spirit left

unsold out of the minimum quota fixed for his vend. The price of such stock to be paid by the incoming licensee to the outgoing licensee shall be

exclusive of the still-head duty leviable thereon, which the former shall pay at the rates in force at the time of his taking over to Government

immediately after the commencement of his business.

42. All licences, wholesale and retail, shall be subject to the provisions of the Punjab Excise Act (1 of 1914) and the rules framed there under from

time to time.

4. The auction was held in February, 1965. The highest bid of Rs. 29,01,000 for five retail country spirit vends was given by the Petitioner. In

terms of the licence Rs. 2,65,850 as 1/12th of licence fee and Rs. 4,68,910 on account of 1/24th of the still-head duty, were deposited by the

Petitioner within time. It is admitted on both sides that the Petitioner was unable to lift the prescribed proportionate periodical quota in accordance

with the terms of condition No. 8 quoted above. Thereupon, the Government made demands on the Petitioner for lifting the quota which had been

short-lifted and in the alternative for payment of the licence fee and still-head duty in respect thereof. The Petitioner represented to the Government

for being relieved of his said liabilities under the licence. He justified his demand on account of labour troubles and international tension on account

of the Kutch dispute followed by ultimate outbreak of hostilities between India and Pakistan which took an active shape in the beginning of

September, 1965. In these circumstances, the Petitioner submitted a detailed representation, dated September 15, 1965 (Annexure A-2), for

remission (of the amount claimed by the Government) under paragraph 3.19 of the Punjab Excise Manual, Volume III. Some meetings were

admittedly held between the Chief Minister and the Excise Minister of the State of Punjab, on the one hand, and the licensees on the other, and it is

alleged by the Petitioner that some oral assurances were given to them for the grant of certain remissions. The Petitioner has referred to the

subsequent representation, dated November 15, 1965 (Annexure A-3), wherein reference has been made to those assurances. Not having

obtained the desired relief, the Petitioner sent a formal notice through his counsel on November 26, 1965 (Annexure A-4). wherein reference was

again made to the alleged oral assurances and it was made out on behalf of the Petitioner that the contract had been frustrated, and the

Government was asked to confirm the assurances in writing or to make other alternative arrangement in the meantime. On the basis of demand

made by the Government, another sum of Rs. 50,000 was paid by the Petitioner on the basis of actual sales effected after the date of the

cancellation of his licence. Certain other payments are stated to have been made by the Petitioner without prejudice to his alleged claim canvassed

in the representation. Having got no relief, the Petitioner filed civil writ 46 of 1966, in this Court on January 6, 1966, praying for refund of the over-

payment on the alleged ground of frustration of the contract entered into by him with the Government, in pursuance of the auction held in February,

1965. On January 7, 1966, Respondent No. 3 issued an order (Annexure A) cancelling the licence of the Petitioner, under Clause (c) of Section

36 of the Punjab Excise Act (hereinafter called the Act), read with Rule 36(23) of the Punjab Liquor licence Rules, 1956, hereinafter referred to as

the licence rules.

5. The Petitioner was further directed to lift the remaining prescribed quota due to him up to December 31, 1965. It is also admitted case of both

sides that in spite of the cancellation, the Petitioner was not stopped from continuing his vendis in question up to the 31st of March, 1966. In the

meantime, on January 31, 1966, Government issued fresh auction notice for the next financial year, i.e., for 1966-67, wherein certain changes

were made as compared with the conditions of the auction in the previous year. Vendis were auctioned in terms of the quotas to be lifted and not in

terms of money, and the strength of the liquor for which licences were to be issued, was lowered. On March 11, 1966, Respondent No. 4 issued

a notice of demand calling upon the Petitioner to pay Rs. 2,65,850 as balance of licence fee and Rs. 4,68,910 on account of balance of still-head

duty under the licence in question.

6. In the above circumstances, the Petitioner made an application on March 19, 1966, to withdraw civil writ 46 of 1966. and on the same day filed

the present writ petition. By order, dated March 21, 1966. the Motion Bench (Mehar Singh and Jindra Lal, JJ.), admitted the fresh writ petition

and by a separate order, dated 23rd March, 1966, another Bench dismissed the previous writ petition (C.W. 46 of 1966) as withdrawn. The

recovery of the amount due was stayed till the hearing of the writ petition and the production of the relevant records by the State. Respondent No.

3 filed written statement, dated April 7, 1966, on behalf of all the four Respondents in reply to the writ petition. Certain objections of preliminary

nature have been raised by Mr. Tirath Singh Munjal, against the validity of the written statement. In the circumstances hereinafter referred to. it is

needless to consider the objections raised by Mr. Munjal. The Petitioner has put in those objections in his civil miscellaneous No. 1083 of 1966,

dated April 14. 1966.

7. During the pendency of the writ petition, Respondent No. 2 has allowed some relief to the Petitioner by order, dated September 17, 1966. The

relief granted is that no licence fee and still-head duty are to be recovered from the Petitioner for the period 6th of September, 1965 to January 31,

1966, beyond the amount due in respect of quantities of liquor actually sold by the Petitioner during the period. On October 20, 1966, the

Petitioner submitted an application (CM. 4095 of 1966) to this Court to take into account the subsequent order of Respondent No. 2 referred to

above, and also take into account the subsequent demand notice marked Exhibit X-I. In this petition, the relief claimed is for directing the

Respondents to remit the entire licence fee and still-head duty in respect of the liquor which has not been lifted by the Petitioner or sold out by it,

and also to direct the Respondents to refund the amount alleged to have been overpaid. The only other claim in the writ petition is for payment to

the Petitioner of the full price of the stock left over by it at the end of the period of licence which stocks have admittedly been handed over by the

Petitioner to the Excise Department.

8. Mr. Tirath Singh Munjral, the learned Counsel for the Petitioners, has argued that condition No. 8 in Annexure A-11 i.e., the stipulation for the

payment of still-head duty for stocks which have not been removed and obtained by the Petitioner and Rule 36(23-A) of the Punjab Liquor

Licence Rules on which the said condition is based, are illegal and void and should be struck down on that ground. He has firstly contended that

Rule 36 (23-A) out steps the delegated legislative authority of the State Government which cannot go beyond the powers conferred upon the State

Legislature under entry 51 of List II of the Seventh schedule of the Constitution. The said entry reads as follows:

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar

goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any

substance included in sub-paragraph (b) of the entry.

9. It has been conceded by Mr. Babu Ram Aggarwal, the learned Counsel for the Respondents that the still-head duty is an excise duty, which has

been levied u/s 31 of the Act. The argument of the learned Counsel for the Petitioners (which is also contained in paragraph 11 of the writ petition)

is that excise-duty is leviable only on the manufacture or production of liquor at the time of its issue from the distillery and inasmuch as Rule 36(23-

A) and condition No. 8 referred to above insist on the payment of the said duty on liquor, which has neither been lifted nor removed from the

distillery by the Petitioner, the said rule and condition make the demand based thereon illegal. Counsel has made specific reference to condition

No. 28(ii) of the conditions of the licence (Annexure A-11). which provides that the outgoing licensee shall have no claim to the amount of still-

head duty paid by him on the country spirit left unsold, out of the minimum quota fixed for his vend, and that the price of such stock to be paid by

the incoming licensee to the outgoing licensee shall be exclusive of the still-head duty leviable thereon, which the former shall pay at the rates in

force at the time of his taking over to Government, immediately after the commencement of his business. Mr. Muniral has relied on a recent

unreported judgment of the Supreme Court in *Shinde Brothers etc. v. The Deputy Commissioner. Raichur and Ors. etc.* Civil Appeals Nos. 1580

etc. of 1966, decided on September 26, 1966. Sikri, J., who delivered the judgment of the majority held that in order to bring any duty within

entry 51 of list II of the Seventh schedule of the Constitution, it has to be shown that it fulfils the essential characteristics of an excise duty, namely,

(i) uniformity of incidence, (ii) that the duty has a close relation to the production or manufacture of goods, and (iii) if a levy is made for the privilege

of selling of excisable article and the article has already borne the duty and the duty has to be paid, there must be clear terms in the charging section

to indicate that what is being levied for the purpose of privilege of sale is in fact a duty of excise. Dealing with the above-mentioned second

condition precedent, which must be satisfied to bring a duty within the relevant entry, the learned Judge observed as follows:

Secondly, the duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of

production or manufacture but at a later stage. If a duty has been levied on an excisable article but this duty is collected from a retailer, it would not

necessarily cease to be an excise duty. Thirdly, if a levy is made for the privilege of selling an excisable article and the excisable article has already

borne the duty and the duty has been paid, there must be clear terms in the charging section to indicate that what is being levied for the purpose of

privilege of sale is in fact a duty of excise.

What is the true character or nature of the levy in this case? First, it is a payment for the exclusive privilege of selling toddy from certain shops. The

licensee pays what he considers to be equivalent to the value of the right. Secondly, it has no close relation to the production or manufacture of

toddy. Thirdly the only relation it has to the production or manufacture of toddy is that it enables the licensee to sell it. But he may sell little less or

more than he anticipated, depending on various factors. Fourthly, toddy has already paid one excise duty in the form of tree tax. If the Petitioner

taps toddy, he pays tree tax, but he need not tap himself. Fifthly, the duty is not uniform in incidence because the amount collected has no relation

to the quantity or quality of the product but has only relation to what the Petitioner thought he could recoup by the sale of the excisable articles.

What he recoups would depend upon the amount of sales and the conditions prevailing during the licensing year. Sixthly, there are no express

words showing that what is being realised from the Petitioner is an excise duty. In fact what Section 16 of the Mysore Excise Act says is that a

privilege has been granted to him for selling by retail. Section 28 refers specifically to an amount due to the Government by any grantee of the

privilege and the legislature apparently did not think that this amount would be covered by the expression "all duties, taxes, fines and fees payable

to the Government" occurring in Section 28. Seventhly, the privilege of selling is auctioned well before the goods come into existence. In this case it

would be noticed that the second notification dated April 27, 1964, was for the sale during the next two years.

In view of these characteristics, can it be said to be an excise duty? In our opinion the answer is in the negative. The taxable event is not the

manufacture or production of goods but the acceptance of the license to sell. In other words, the levy is in respect of the business of carrying on

the sale of toddy. There is no connection of any part of the levy with any manufacture or production of any goods. To accept the contention of the

State would mean expanding the definition of "excise duty" to include a levy which has close relation to the sale of excisable goods. It is now too

late in the day to do so.

10. It appears to us that the third, fifth and the seventh characteristics of the duty which was impugned in the case before the Supreme Court apply

to the present case also. It is not disputed that the Petitioner could sell little less or more than the stipulated quantities of liquor depending on

various factors. It is also apparent that the incidence of the duty would not have been uniform in the present case, because the amount collected

has no relation to the quantity or quality of the product, but is related only to what the Petitioner thought it could recoup by sale of the excisable

liquor. It is also not disputed that the privilege of selling was auctioned well before the goods might or might not have actually come into existence.

The position is made worse for the State by condition No. 28(i) of the conditions of licence to which reference has repeatedly been made by Mr.

Babu Ram Aggarwal, learned Counsel for the State. The stipulation in that condition is that it is the wholesale vendor who would function as stock

list for retail vendors and will charge from the latter fixed prices of the country spirit in question plus the still-head duty paid by the wholesaler, and

a surcharge to cover the godown expenses and profits. Mr. Aggarwal has argued that in the absence of special permission granted by the Excise

and Taxation Authorities, the Petitioners had to obtain their stocks only from such wholesalers who had already paid out still-head duty in respect

of the quota to be lifted by the Petitioners. If this is so, the charge under the still-head duty could not in the eye of law be described as an excise-

duty in the circumstances of these cases. In *The State of Bombay Vs. S.S. Miranda Limited*, it was held that once an excise-duty has been paid,

in respect of certain goods, an additional amount as excise-duty would not be recoverable in respect of the same goods merely on the ground that

the rate of duty has subsequently been enhanced. Their Lordships observed that they could not see an excisable article which had been subjected

to duty once would be liable to further duty nor to the difference in case of increase in the rate. Applying the same principles to the instant case it

appears that once excise-duty known as still-head duty had been levied in respect of the stock lifted by the wholesaler from the bonded warehouse

or from the manufacturer of the liquor as the case may be, the relationship of the said duty with the manufacture or production of the liquor had

come to an end, and in that event, it would be for the wholesaler to recoup himself to the extent of the excise-duty paid by him by including the

same in the price to be charged by him, but the said item would lose the character of an excise-duty and would cease to be leviable as such by the

State.

11. Mr. Babu Ram Aggarwal concedes that the impugned condition No. 8 in Annexure A-11 cannot possibly be sustained unless the validity of

Rule 36(23-A) is upheld. Rule 36(23-A) is in the following terms:

(23-A) The licensee of a country spirit shop shall have to lift the minimum annual quota fixed for that shop by the Collector and shall lift every

month his proportionate monthly quota as calculated on the basis of the annual quota and shall deposit still-head duty realizable thereon. In the

event of any deficiency in the amount of still-head duty realizable on full proportionate quota due to the short lifting of quota by the licensee or non-

depositing of the full amount of still-head duty, the deficiency may be realised from the amount of security deposited under Clause (22-A). The

resulting deficiency in the amount of security shall be made good by the licensee within a period of seven days of the receipt of intimation by him of

such realization. In case the short lifting of proportionate quota or the short deposit of still-head duty continues for two consecutive months or in

case the licensee fails to make up the deficiency in the amount of security within a period of seven days of the receipt of intimation by him his

license shall be liable to cancellation.

12. The requirements of this rule appear to have been carried over into conditions Nos. 7 and 8 of the licence. So far as the first part of Rule

36(23-A) which is incorporated into condition No. 7 of the licence is concerned, no valid attack can be made against it, but in so far as Rule 36

(23-A) provides that in the event of any deficiency in the amount of still-head duty realizable on full proportionate quota due to the short lifting of

quota by the licensee, the deficiency may be realised from the amount of security or otherwise, the rule appears to transgress the limits and bounds



within which an excise-duty has to be contained. This part of the rule also appears to violate the spirit of Section 23 of the Punjab Excise Act,

which provision is in the following words:

23. No intoxicant shall be removed from any distillery, brewery, warehouse, or other place of storage established or licensed under this Act, unless

the duty (if any) payable under Chapter V has been paid or a bond has been executed for the payment thereof.

13. There is no doubt that the above-quoted section prohibits the removal of any excisable article from any distillery or warehouse, etc., unless an

excise-duty payable on it has been paid out or a bond has been executed for the payment thereof, but this provision shows that the intention of the

legislature is to insist on payment of the excise-duty in question only if the article has to be removed from a distillery or a warehouse. In exercise of

powers conferred by Sections 31 and 32 of the Punjab Excise Act (1 of 1914), the Governor of Punjab has issued the Punjab Excise Fiscal (First

Amendment) Order, 1565, which is operative with effect from the 1st of April, 1965. The opening part of the said Fiscal Order is in the following

words:

The following shall be the rates of duty leviable in respect of spirit removed from any distilleries licensed in Punjab, or when imported into Punjab

from any State or Union Territory in India per proof litre of the strength of London proof to be increased or reduced in proportion as the strength

of spirit exceeds or is less than London proof:

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The language of the Fiscal Order is also consistent with the intention behind Section 23 of the Excise Act. It may not be necessary to provide for

the imposition and recovery of the excise-duty only at the time of removal of the article from the bonded warehouse or the distillery. It may

certainly be open to the appropriate authorities to impose or recover the duty at any stage from the time of the manufacture of the article till the

time it reaches the hands of the consumer. But it cannot be provided in the case of a duty of the nature of excise that it would be payable by a

licensee even if he does not want to and does not in fact obtain the excisable article for sale or even for consumption. Nor would it be leviable as

an excise-duty in respect of an article on which such duty has already been charged and recovered. Since the impugned part of Rule 36(23-A) of

the liquor rules and condition No. 8 of the conditions of the licence offend against the said principles and provide that the taxable event is not the

production of the liquor but the acceptance of the licence to sell, in other words since the levy imposed by the said rule and the said condition is in

respect of sale and not production of country liquor, the same are hereby struck down as being ultra vires entry 51 in list II of the Seventh schedule

to the Constitution and against the principles authoritatively settled by the Supreme Court in the aforesaid cases.

Mr. Munjral has then argued that once the licence had been cancelled by the appropriate authority on January 7, 1966, the conditions of the

licence could not be enforced against the Petitioners and they could not, therefore, be called upon to pay the licence fee and still-head duty in

respect of the period during which their licences were not in force. This would no doubt be true in respect of the still-head duty in case the

excisable, articles were not obtained by the Petitioners, and in respect of the quota not actually lifted by them. But this argument has no force in so

far as it relates to the licence fee as Section 38 of the Excise Act which is in the following terms, authorises the recovery of the licence fee in case

of the cancellation of the licence u/s 36. It is admitted on behalf of the Petitioners that they did not pay out the balance of the licence fee due from

them in accordance with the conditions of the licence. That being so, in the absence of anything further, the cancellation of their licences appears to

have been justified. Whether the cancellation was justified or not, the Excise Authorities were entitled to recover the entire licence fee. The

cancellation of the licence has, therefore, no effect on the liability of the Petitioners to pay the balance of the licence fee due from them which is

recovered u/s 38:

38. In the case of cancellation or suspension of a licence under Clause (a), (b), (c), (d) or (e) of Section 36, the fee payable for the balance of the

period for which any licence would have been current but for such cancellation or suspension, may be recovered from the ex-licensee as excise

revenue.

14. The next argument of Mr. Munjral is based on the alleged oral assurances said to have been given to the Petitioners by the Minister-in-charge

and by the Chief Minister. We are unable to go into contentions of this type in exercise of our jurisdiction under Article 226 of the Constitution. If

the Petitioners have any valid cause of action based on any such assurances, it is open to them to claim the requisite redress by a proper action in a

competent civil Court.

15. The last argument of Mr. Tirth Singh Munjral is that the Excise Authorities cannot effect recovery of the amount mentioned in the impugned

demand u/s 60 of the Act, as the amount in question is not admitted by the Petitioners to be due from them. The operative part of Section 60 of the

Act is in the following words:

60(1) The following moneys, namely:

(a) all excise revenue,

(b) any loss that may accrue, when in consequence of default a grant has been taken under management by the Collector or has been resold by

him u/s 39, and

(c) all amounts due to the Government by any person on account of any contract relating to the excise revenue, may be recovered from the person

primarily liable to pay the same, or from his surety (if any), by distress and sale of his movable property, or by any other process for the recovery

of arrears of land revenue due from land-holders or from farmers of land or their sureties.

(2) \* \* \* \* \*

(3) \* \* \* \* \*

16. Counsel emphasises that the above-quoted section cannot come into operation except in respect of the amount "due" from the licensee.

According to Mr. Tirath Singh Munjal, if the liability is disputed, the amount cannot be said to be "due". We regret we are unable to agree with

this contention. Merely by reason of dispute as to liability, a debtor cannot claim that the amount ceases to be due from him. On the facts and in the

circumstances of these cases, the amount and the balance of the licence fee appears to be prima facie due u/s 36 read with Section 38 of the Act.

Counsel has relied on the judgment of this Court in Custodian General of Evacuee Property New Delhi and Ors. v. Harnam Singh AIR 1957 P&H

58, wherein the dispute related to a time-barred amount being due or not due u/s 48 of the Administration of Evacuee Property Act (31 of 1950).

That proposition appears to have no relevancy to the issue raised by the learned Counsel before us. Moreover, it has been argued by Mr. Babu

Ram Aggarwal that the Excise and Taxation Officer has been vested with the powers of Assistant Collector under the Land Revenue Act by

means of a notification and that the recovery proceedings are to be resorted to by the said authority in exercise of those powers. It is, therefore,

apparent that the Excise Authorities can determine the amount due to them as such authorities and can recover the same in exercise of their powers

as Assistant Collectors by virtue of the notification by which the said powers have been vested in them.

17. Counsel has raised various other points regarding the validity of the contract and also about the licence fee not being due on account of the

still-head duty having been struck down on the allegation that the contract was indivisible. These are not matters which can be decided in these

proceedings, because they necessarily involve decision of disputed questions of fact. It is open to the Petitioners to raise these matters in

appropriate proceedings in a competent Civil Court, if so advised.

18. For the foregoing reasons these writ petitions partially succeed and it is held that the Respondents are not entitled to levy, charge or recover

from the Petitioners any amount on account of still-head duty in respect of the liquor which has not actually been lifted by the Petitioners either from

the wholesalers or from the manufacturers. Consequently the demand on account of the balance of still-head duty in respect of goods not lifted by

the Petitioners is set aside and quashed. It is also directed that if any such amount has already been recovered from the Petitioners, the same shall

be refunded to them. The Petitioners are not entitled to any other relief in these writ petitions. In the peculiar circumstances of these cases, there is

no order as to costs.