
(2008) 03 AHC CK 0241

Allahabad High Court

Case No: None

Smt. Bimla Devi Gupta

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: March 5, 2008

Acts Referred:

- Constitution of India, 1950 - Article 300A
- Income Tax Act, 1961 - Section 269UA, 269UC, 269UD, 269UE, 269UF

Citation: (2009) 221 CTR 359

Hon'ble Judges: S.S. Chauhan, J; R.K. Agrawal, J

Bench: Division Bench

Final Decision: Allowed

Judgement

R.K. Agrawal, J.

By means of the present writ petition, the petitioner has challenged the order dt. 14th July, 1993 passed by the Appropriate Authority, IT Department, Lucknow, respondent No. 1, whereby the property of the petitioner situate at Tonk House, Prayag Narain Road, Lucknow, having land of an area of 27,520 sq. ft. and the built-up area of 5,220 sq. ft. had been purchased by the Central Government under the provision of Chapter XX-C of the IT Act, 1961 (hereinafter referred to as "the Act").

2. Briefly stated, the facts giving rise to the present writ petition are as follows:

According to the petitioner, she is the owner in possession of the premises, known as, Tonk House, Prayag Narain Road, Lucknow. It is a residential accommodation in which the petitioner is living along with her family. The bungalow was constructed on leasehold plot No. 60 of Butlerganj Scheme, Prayag Narain Road, Lucknow, and was leased to one Mr. Shagir Khan of Nazirabad, Lucknow, on 27th Aug., 1941 for a period of 90 years. On 28th Aug., 1941, Mr. Shagir Khan transferred the land in question with all his rights to Her Highness Aminuzamini Begum Maharani of Tonk,

who constructed a Kothi and out-houses etc. The plot was sub-divided by the Nazul Officer. The petitioner purchased the land in question including the construction thereon from Maharani of Tonk on 15th May, 1965. On account of some financial difficulty faced by her husband, the petitioner decided to sell the land including the construction in question to one M/s Qadir Industries (P) Ltd. for a consideration of Rs. 27,00,000. u/s 269UC of the Act, the petitioner made an application in the prescribed Form 37-1 for permission/no objection. The agreement for sale was executed on 11th July, 1990 and the application in Form No. 37-1 was filed soon thereafter. Certain information was sought for by the Appropriate Authority, which was given. However, the Appropriate Authority, vide order dt. 26th Sept., 1990 directed for pre-emptive purchase of the premises in question u/s 269UD of the Act. The order dt. 26th Sept., 1990 was subject-matter of challenge before this Court in Writ Petn. No. 10634 of 1990 on the ground that the order has been passed in gross violation of equity, fair play and natural justice. This Court, vide judgment and order dt. 17 May, 1993, allowed the writ petition and set aside the order dt. 26th Sept., 1990 passed by the Appropriate Authority. The Court directed that the issue regarding pre-emptive purchase of the property owned by the petitioner be decided after giving an opportunity of hearing to show-cause against the pre-emptive purchase. In compliance with the direction given by this Court, in its order dt. 17th May, 1993, the Appropriate Authority issued show-cause notice on 17th June, 1993 calling upon the petitioner to appear before him on 12th July, 1993 and to submit whatever she wanted to say. The petitioner appeared before the Appropriate Authority on the date fixed and submitted her reply which was considered by the Appropriate Authority. The Appropriate Authority, however, passed an order on 14th July, 1993 directing for pre-emptive purchase of the property in question. The Appropriate Authority, however, directed that while making the payment, the amount of Rs. 18,16,320, demanded by the Nazul Officer towards mutation and Rs. 45,408 for annual rent and any other arrears will be retained by the Central Government out of the whole consideration of Rs. 27,00,000 agreed between the petitioner and M/s Qadir Industries (P) Ltd. It may be mentioned here that before the Appropriate Authority M/s Qadir Industries (P) Ltd., the purchaser, who had entered into an agreement to purchase the property in question with the petitioner, had given its no objection meaning thereby that it had no interest or grievance in the property if it is purchased by the Central Government under Chapter XX-C of the Act.

3. The order dt. 14th July, 1993 is under challenge in the present writ petition on several grounds.

4. The writ petition was taken up on 30th July, 1993 when the Court passed the following order:

Sri S.C. Misra, appearing on behalf of opposite parties states that he would be filing a counter-affidavit by 3rd Aug., 1993. Rejoinder affidavit, if any, may be filed on 4th

Aug., 1993. Put upon 4th Aug., 1993.

Sri S.C. Misra, learned Counsel for the opposite parties, on the basis of the instructions received from the Pairokar of the Department present in Court, makes a statement that till the next date, the opposite parties are not going to take possession of the property or disturb the same in any manner. In view of the above, no interim order is required to be passed.

5. By way of an amendment application, which was allowed on 1st Nov., 2004, a specific averment has been made in para 2IT that the Appropriate Authority has failed to tender or deposit the whole or any part of the amount of consideration in terms of Section 269UG(1) and as such the impugned pre-emptive purchase order deserves to be quashed.

6. A detailed counter-affidavit has been filed by the respondents denying the allegations made in the petition. So far as the averments made in para 2IT of the petition, as amended, are concerned, in para 31 of the counter-affidavit filed by Mohd. Syed Raza Qazmi, working as ITO with the Appropriate Authority, IT Department, Lucknow, it has been stated that as the property was never handed over to the Appropriate Authority and as such the question of payment of apparent consideration does not arise. It has further been stated that the petitioner is free to handover possession of the property to the Appropriate Authority and have the payment of apparent consideration as admissible and the purchase order dt. 14th July, 1993 is liable to be maintained.

7. We have heard Sri R.C. Gupta, learned Counsel for the petitioner and Sri D.D. Chopra, learned senior standing Counsel for the respondents.

8. Sri R.C. Gupta, learned Counsel, raised all the grounds to challenge the order dt. 14th July, 1993 which have been taken by the petitioner in the writ petition. However, it is not necessary to go into all the grounds raised by the petitioner as the Court is of the view that the petition can be disposed of on the short ground of non-compliance of the provisions of Sections 269UE and 269UH of the Act.

In para 2 IT of the writ petition, as amended, a specific plea has been raised by the petitioner that the Central Government had not made the payment of the amount of apparent consideration as the Central Government had neither tendered the amount of apparent consideration after making the deductions mentioned in the impugned order dt. 14th July, 1993 to the petitioner nor had deposited the same with the Appropriate Authority within the time provided u/s 269UE of the Act and, therefore, in view of Section 269UH of the Act, the property stood revested with the petitioner.

9. Sri D.D. Chopra, learned senior standing Counsel, on the other hand, submitted that under Sub-section (2) of Section 269UE of the Act, the petitioner was under an obligation to surrender or deliver possession of the property in question to the

Appropriate Authority within 15 days from the date of the order and as, in the present case, the possession has not been delivered, may be on account of the undertaking given by the then senior standing Counsel of the IT Department, the provisions of Section 269UH regarding revesting are not attracted. He submits that the payment is to be made only after the delivery of possession and not before, even though the property may vest with the Central Government on the passing of the order u/s 269UD of the Act.

10. We have given our* anxious consideration to the various pleas raised by the learned Counsel for the parties.

11. We find that the Appropriate Authority had passed the order of presumptive purchase on 14 July, 1993 by directing that a sum of Rs. 18,16,320, demanded by the Nazul Officer towards mutation and Rs. 45,408 for annual rent and any other arrears be retained from the apparent consideration of Rs. 27,00,000 payable to the petitioner. This Court while entertaining the writ petition on 30th July, 1993, had not stayed the operation of the order dt. 14th July, 1993 passed by the Appropriate Authority u/s 269UD of the Act. On the other hand, on the basis of the statement given by the learned senior standing Counsel at that time, which was based on the instructions received from the Pairokar present in the Court, that the opposite parties were not going to take possession of the property and disturb the same in any manner, this Court was of the view that no interim order was required to be passed. The operation of the order of vesting having not been stayed by this Court, we are of the considered opinion that the provisions of Sections 269UE and 269UH of the Act would come into play.

12. Sections 269UE 269UF 269UG and 269UH of the Act, for ready reference, are reproduced below:

Section 269UE--Vesting of property in Central Government-(1) Where an order under Sub-section (1) of Section 269UD is made by the Appropriate Authority in respect of an immovable property referred to in Sub-clause (i), of Clause (d) of Section 269UA, such property shall, on the date of such order, vest in the Central Government in terms of the agreement for transfer referred to in Sub-section (1) of Section 269UC:

Provided that where the Appropriate Authority, after giving an opportunity of being heard to the transferor, the transferee or other persons interested in the said property, under Sub-section (1A) of Section 269UD, is of the opinion that any encumbrance on the property or leasehold interest specified in the aforesaid agreement for transfer is so specified with a view to defeat the provisions of this chapter, it may, by order, declare such encumbrance or leasehold interest to be void and thereupon the aforesaid property shall vest in the Central Government free, from such encumbrance or leasehold interest.

(2) The transferor or any other person who may be in possession of the immovable property in respect of which an order under Sub-section (1) of Section 269UD is

made, shall surrender or deliver possession thereof to the Appropriate Authority or any other person duly authorised by the Appropriate Authority in this behalf within fifteen days of the service of such order on him:

Provided that the provisions of this sub-section and Sub-sections (3) and (4) shall not apply where the person in possession of the immovable property, in respect of which an order under Sub-section (1) of Section 269UD is made, is a bona fide holder of any encumbrance on such property or a bona fide lessee of such property, if the said encumbrance or lease has not been declared void under the proviso to Sub-section (1) and such person is eligible to continue in possession of such property even after the transfer in terms of the aforesaid agreement for transfer.

(3) If any person refuses or fails to comply with the provisions of Sub-section (2), the Appropriate Authority or other person duly authorised by it under that sub-section may take possession of the immovable property and may, for that purpose, use such force as may be necessary.

(4) Notwithstanding anything contained in Sub-section (2), the Appropriate Authority may, for the purpose of taking possession of any property referred to in Sub-section (1), requisition the services of any police officer to assist him and it shall be the duty of such officer to comply with such requisition.

(5) For the removal of doubts, it is hereby declared that nothing in this Section shall operate to discharge the transferor or any other person (not being the Central Government) from liability in respect of any encumbrances on the property and, notwithstanding anything contained in any other law for the time being in force, such liability may be enforced against the transferor or such other person.

(6) Where an order under Sub-section (1) of Section 269UD is made in respect of an immovable property, being rights of the nature referred to in Sub-clause (ii) of Clause (d) of Section 269UA, such order shall have the effect of-

(a) Vesting such right in the Central Government; and

(b) Placing the Central Government in the same position in relation to such rights as the person in whom such a right would have continued to vest if such order had not been made.

(7) Where any rights in respect of any immovable property, being rights in, or with respect to, any land or any building or part of a building which has been constructed or which is to be constructed, have been vested in the Central Government under Sub-section (6), the provisions of Sub-sections (1), (2), (3) and (4) shall, so far as may be, have effect as if the references to immovable property therein were references to such land or building or part thereof, as the case may be.

Section 269UF--Consideration for purchase of immovable property by Central Government.--(1) Where an order for the purchase of any immovable property by

the Central Government is made under Sub-section (1) of Section 269UD, the Central Government shall pay, by way of consideration for such purchase, an amount equal to the amount of the apparent consideration.

(2) Notwithstanding anything contained in Sub-section (1), where, after the agreement for the transfer of the immovable property referred to in that sub-section has been made but before the property vests in the Central Government u/s 269UE, the property has been damaged (otherwise than as a result of normal wear and tear), the amount of the consideration payable under that sub-section shall be reduced by such sum as the Appropriate Authority, for reasons to be recorded in writing, may by order determine.

Section 269UG--Payment or deposit of consideration.--(1) The amount of consideration payable in accordance with the provisions of Section 269UF shall be tendered to the person or persons entitled thereto, within a period of one month from the end of the month in which the immovable property concerned becomes vested in the Central Government under Sub-section (1), or, as the case may be, Sub-section (6), of Section 269UE:

Provided that if any liability for any tax or any other sum remaining payable under this Act, the WT Act, 1957 (27 of 1957), the GT Act, 1958 (18 of 1958), the Estate Duty Act, 1953 (34 of 1953), or the Companies (Profits) Surtax Act, 1964 (7 of 1964), by any person entitled to the consideration payable u/s 269UF, the Appropriate Authority may, in lieu of the payment of the amount of consideration, set off the amount of consideration or any part thereof against such liability or sum, after giving an intimation in this behalf to the person entitled to the consideration.

(2) Notwithstanding anything contained in Sub-section (1), if any dispute arises as to the apportionment of the amount of consideration amongst persons claiming to be entitled thereto, the Central Government shall deposit with the Appropriate Authority the amount of consideration required to be tendered under Sub-section (1) within the period specified therein.

(3) Notwithstanding anything contained in Sub-section (1), if the person entitled to the amount of consideration does not consent to receive it, or if there is any dispute as to the title to receive the amount of consideration, the Central Government shall deposit with the Appropriate Authority the amount of consideration required to be tendered under Sub-section (1) within the period specified therein:

Provided that nothing herein contained shall affect the liability of any person who may receive the whole or any part of the amount of consideration for any immovable property vested in the Central Government under this chapter to pay the same to the person lawfully entitled thereto.

(4) Where any amount of consideration has been deposited with the Appropriate Authority under this section, the Appropriate Authority may, either of its own

motion or on an application made by or on behalf of any person interested or claiming to be interested in such amount, order the same to be invested in such Government or other securities as it may think proper, and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as will, in its opinion, give the parties interested therein the same benefits therefrom as they might have had from the immovable property in respect whereof such amount has been deposited or as near thereto as may be.

Section 269UH--Revesting of property in the transferor on failure of payment or deposit of consideration.--(1) If the Central Government fails to tender under Sub-section (1) of Section 269UG or deposit under Sub-section (2) or Sub-section (3) of the said section, the whole or any part of the amount of consideration required to be tendered or deposited thereunder within the period specified therein in respect of any immovable property which has vested in the Central Government under Sub-section (1) or, as the case may be, Sub-section (6) of Section 269UE, the order to purchase the immovable property by the Central Government made under Sub-section (1) of Section 269UD shall stand abrogated and the immovable property shall stand revested in the transferor after the expiry of the aforesaid period:

Provided that where any dispute referred to in Sub-section (2) or Sub-section (3) of Section 269UG is pending in any Court for decision, the time taken by the Court to pass a final order under the said sub-sections shall be excluded in computing the said period.

(2) Where an order made under Sub-section (1) of Section 269UD is abrogated and the immovable property revested in the transferor under Sub-section (1), the Appropriate Authority shall make, as soon as may be, a declaration in writing to this effect and shall-

(a) deliver a copy of the declaration to the persons mentioned in subs. (2) of Section 269UD; and

(b) deliver or cause to be delivered possession of the immovable property back to the transferor or, as the case may be, to such other person as was in possession of the property at the time of its vesting in the Central Government u/s 269UE.

13. From a reading of the provision of Section 269UE of the Act, it is seen that the property in respect of which an order u/s 269UD is made by the Appropriate Authority, it vests with the Central Government from the date of such order which, in the present case, would be 14th July, 1993. u/s 269UF of the Act, the Central Government is required to pay the amount equal to the amount of apparent consideration for purchase of immovable property where an order has been made under Sub-section (1) of Section 269UD of the Act.

14. Section 269UG of the Act provides for making or tendering payment of the amount of consideration within a period of one month from the end of the month in

which the immovable property became vested in the Central Government under Sub-section (1) or Sub-section (6) of Section 269UE of the Act. It provides for certain deductions to be made while tendering the payment.

15. Section 269UH provides for revesting of the property on failure of the Central Government to deposit apparent consideration within the stipulated period u/s 269UG of the Act. The language of Section 269UH of the Act is very clear and categorical. It provides that on the failure of the Central Government to deposit or tender the amount of consideration within the stipulated period, the order of purchase of the immovable property by the Central Government made under Sub-section (1) of Section 269UD, shall stand abrogated and the immovable property shall stand vested in the transferor after the expiry of the aforesaid period.

16. The provisions of Sections 269UE 269UG and 269UH of the Act came up for consideration before the apex Court in the cases of [Asgar S. Patel and Others Vs. U.O.I. and Others](#), and Ramesh Bhai J. Patel v. Union of India (2000) 164 CTR 648 (SC) : AIR 2001 SC 339, wherein the apex Court has held that in view of the categorical provision regarding payment and deposit of consideration, as a consequences of failure to make such tender, the pre-emptive purchase would stand abrogated and the property shall stand revested with the transferor.

17. Admittedly, in the present case, the respondents have failed to tender or deposit the apparent consideration, after deducting the amount mentioned in the impugned order dt. 14th July, 1993, within the stipulated period, i.e., by 31st Aug., 1993. u/s 269UH of the Act, the property stands revested on 1st Sept., 1993 with the petitioner.

18. The submission of Sri D.D. Chopra, learned senior standing Counsel, that as the possession was not taken by the Appropriate Authority on account of the statement given by the then learned senior standing Counsel on 30th July, 1993, the property would not stand vested with the Central Government on 14th July, 1993, is wholly misconceived. It is to be remembered that in taxation laws there is no equity and the provisions have to be strictly construed.

19. So far as the interpretation of taxing statute is concerned the principles have been well-settled by the numerous decisions of the apex Court. A taxing statute is to be strictly construed. The apex Court in the case of Member Secretary, Andhra Pradesh State Board for Prevention & Control of [Member-secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution Vs. Andhra Pradesh Rayons Ltd. and Others](#), has held as follows:

6. It has to be borne in mind that this Act with which we are concerned is an Act imposing liability for cess. The Act is fiscal in nature. The Act must, therefore, be strictly construed in order to find out whether a liability is fastened on a particular industry. The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to its natural construction

of words. See the observations in *Nicklethwait In re* (1885) 11 Ex 452 at p. 456. Also see the observations in *Tenant v. Smith* (1892) AC 150 and Lord Halsbury's observations at p. 154. See also the observations of Lord Simonds in *St. Aubyn v. Att. Gen.* (1951) 2 All ER 473 at p. 485. Justice Rowlatt of England said a long time ago, that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One has to look fairly at the language used. See the observations in *Cape Brandy Syndicate v. IRC* (1921) 1 KB 64 at p. 71. This Court has also reiterated the same view in [Gursahai Saigal Vs. Commissioner of Income Tax, Punjab](#), [Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar](#), and *CED v. Kantilal Trikamal* .

20. The aforesaid decision was followed by the apex Court in the case of [M/s. Saraswati Sugar Mills Vs. Haryana State Board and others](#),

21. In the case of [COMMISSIONER OF INCOME TAX Vs. KASTURI and SONS LTD.](#), , the apex Court has referred to the view expressed by Justice G.P. Singh in his famous book *Principle of Statutory Interpretation* while holding that the taxing statute should be strictly construed in the following words:

The well established Rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means: "The subject is not to be, taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words." In a classic passage Lord Cairns stated the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words: "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". Relying upon this passage Lord Upjohn said: "Fiscal measures are not built upon any theory of taxation.

22. In the case of [The Federation of Andhra Pradesh Chambers of Commerce and Industry and Others Vs. State of Andhra Pradesh and Others Etc. Etc.](#), , the apex Court has held as follows:

...It is trite law that a taxing statute has to be strictly construed and nothing can be read into it. In the classic passage from *Cape Brandy Syndicate* (1921) 1 KB 64 which

was noticed in the judgment under appeal, it was said:

In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment, there is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.

This view has been reiterated by this Court time and again. Thus, in *State of Bombay v. Automobile & Agricultural Industries Corporation* (1961) 12 STC 122, this Court said:

But the Court in interpreting a taxing statute will not be justified in adding words thereto so as to make out some presumed object of the legislature.... If the legislature has failed to clarify its meaning by the use of appropriate language, the benefit thereof must go to the taxpayer. It is settled law that in case of doubt, that interpretation of a taxing statute which is beneficial to the taxpayer must be adopted.

23. In the case of [Hansraj and Sons Vs. State of Jammu and Kashmir and Others](#), the apex Court after referring to its earlier decisions has held that Courts have to interpret provisions of fiscal statute strictly so as to give benefit of doubt to the litigants which is well established and admits of no doubt.

24. Ordinarily, the Rule of benevolent construction has been applied while construing the welfare legislations or provisions relating to the relationship between weaker and stronger contracting parties. Thus, the question of applying the Rule of benevolent construction as canvassed by the learned Counsel for the petitioners would not be attracted in the present case.

25. In the case of [Commissioner of Income Tax, Bombay Vs. Gwalior Rayon Silk Manufacturing Co. Ltd.](#), the apex Court has held that it is settled law that the expression used in a taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative animation and it is to be read and understood according to its language, and logic alone will not be determinative of a controversy arising from a taxing statute.

26. In the case of AIR 2003 SC 2103 the apex Court has held as follows:

11. It is well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary Rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said, "statutes should be construed, not as theorems of Euclid", Judge learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them" see *Lenigh Valley Coal Co. v. Yensavage* 218 FR 547 . This view was

reiterated in [Union of India and Others Vs. Filip Tiago De Gama of Vedem Vasco De Gama](#),

12. In [D.R. Venkatachalam and Others Vs. Dy. Transport Commissioner and Others](#), it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

13. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. See [M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd.](#), The legislative casus omisus cannot be supplied by judicial interpretative process....

27. In the case of [Petron Engineering Construction Pvt. Ltd. and Another Vs. Central Board of Direct Taxes and Others](#), the apex Court has held that when two interpretations are possible to be made, the interpretation which is favourable to the assessee should be adopted.

28. The provision of Chapter XX-C of the Act has to be construed strictly as it is expropriatory legislation. It deprives a person of his property which can only be done in accordance with the Constitutional safeguards provided under Article 300A of the Constitution of India and the statutory provisions of Chapter XX-C of the Act.

In view of the aforesaid discussions, we are of the considered opinion that as the Central Government had not tendered or deposited the amount of apparent consideration, minus the amounts mentioned in the impugned order dt. 14th July, 1993, to be tendered/deposited by 31st Aug., 1993, the property stands revested and the order dt. 14th July, 1993 passed by the Appropriate Authority, IT Department, Lucknow, respondent No. 1, stands abrogated.

29. The writ petition, therefore, succeeds and is allowed. The order dt. 14th July, 1993 is set aside. However, in the facts and circumstances of the case, there will be no order as to costs.