
Sushil Kumar Dwivedi Vs Basic Shiksha Adhikari and Others

Special Appeal No. 19 of 2003

Court: Allahabad High Court

Date of Decision: March 10, 2003

Acts Referred:

Uttar Pradesh Recognized Basic Schools (Junior High School) (Recruitment and Conditions of Services of Teachers) Rules, 1978 " Rule 10, 10(5), 11, 5

Citation: (2003) 5 AWC 3688 : (2003) 2 UPLBEC 1216

Hon'ble Judges: S.P. Srivastava, J; Ashok Bhushan, J

Bench: Division Bench

Advocate: Ashok Khare and P.N. Ojha, for the Appellant; A.P. Sahi, R.S. Singh Advs. and S.C., for the Respondent

Final Decision: Dismissed

Judgement

Ashok Bhushan, J.

We have heard Sri Ashok Khare, Senior Advocate assisted by Sri P.N. Ojha, learned Counsels appearing for the

appellant and Sri A.P. Sahi and Sri R.S. Singh, the learned Counsels appearing for the respondent Committee of Management.

2. The Special Appeal has been filed by the appellant challenging the judgment dated 5.12.2002 passed by the learned Single Judge in Civil Misc.

Writ Petition No. 37030 of 2002 (Sushil Kumar Dwivedi v. Basic Shiksha Adhikari, Banda and Ors.) dismissing the writ petition filed by the

appellant.

3. Facts giving rise to this Special Appeal briefly stated are :-

Tilhar Junior High School, Oran, district Banda is a recognised Junior High School. A post of Head Master in the institution fell vacant for which an

advertisement was issued by the Management dated 2.10.1994. The appellant applied in pursuance of the said advertisement and was selected for

appointment as Head Master and appointment order dated 25.11.1994 was issued in favour of the appellant in pursuance of which he claims to

have joined on 1.12. 1994. The appellant also claims that the appointment of the appellant was approved by the District Basic Education Officer,

vide his order dated 10.3.1995. The institution was not receiving grant-in-aid and was brought on the grant-in-aid with effect from 1.12.1998.

After the institution being taken on -grant-in-aid it appears that the appellant was not paid his salary and he filed a Writ Petition No. 44443 of

1999 in this Court which was disposed of by this Court vide its order dated 4.10.1999 directing the District Basic Education Officer to decide the

representation of the petitioner. The order of single operation was passed thereafter. The appellant claimed that he was paid salary till August,

2001. The Committee of Management passed resolution on 4.3.2002 for terminating the services of the appellant, copy of which was sent to Basic

Shiksha Adhikari for approval. The Basic Shiksha Adhikari issued notice to the appellant dated 15.4.2002. A three member Enquiry Committee

was appointed by the District Basic Education Officer, the notice of which was also given to the appellant but he did not appear and sought for

adjournment on several dates. The Basic Shiksha Adhikari on 19.8.2002 granted approval to the resolution of the Committee of Management

terminating the services of the appellant. The Civil Misc. Writ Petition No. 37030 of 2002 was filed by the appellant challenging the order of the

Basic Shiksha Adhikari dated 19.8.2002 as well as the resolution of the Committee of Management dated 4.3.2002 which was dismissed by this

Court on 5.12.2002 against which the present Special Appeal has been filed.

4. The learned Counsel appearing for the appellant has raised following submission in support of this appeal :-

1. The orders impugned in the writ petition were liable to be set aside on the ground of violation of principles of natural justice since no enquiry was

held in accordance with the procedure prescribed and no hearing was given to the appellant either by the management or by the Basic Shiksha

Adhikari.

2. That although the appellant at the time of his initial appointment did not possess three years teaching experience and was also below 25 years of

age but by passage of time he had acquired the said qualifications and it is not open to the Committee of Management to terminate the services of

the appellant at this stage. The non-fulfillment of the aforesaid qualifications at best were only irregularities and by passage of time they stood

cured.

3. Assuming that the appointment of the appellant was void even then action for cancellation of such appointment could have taken place only

within reasonable period and not after lapse of eight years.

5. Learned Counsel for the appellant in support of the aforesaid submissions have also placed reliance on various decisions of the Apex Court and

this Court which will be referred while considering the respective submissions.

6. The Counsel appearing for the Committee of Management contended that the appointment of the appellant was contrary to statutory rules. The

appellant had not even attained the minimum age required for appointment at the time when he was appointed and further the lacked minimum

qualification, hence the appointment was void and no illegality has been committed by the Committee of Management in terminating the services of

the appellant. It has further been contended that opportunity was given to the appellant both by the Committee of Management and the Basic

Shiksha Adhikari but the same was not availed of by the appellant. The three member enquiry committee appointed by the Basic Shiksha Adhikari

was only for the purposes of assisting the Basic Shiksha Adhikari in taking decision on the resolution of the Committee of Management. The Basic

Shiksha Adhikari has not abdicated his jurisdiction in favour of the Committee of Management.

7. We have considered the submissions raised by the parties and have perused the record. The first submission of the Counsel for the appellant

pertained to complaint of violation of principles of natural justice. Although the learned Single Judge has not proceeded to examine the said

submission on the ground that appointment being void it is not necessary to go into that question but since the Counsel for the appellant has raised

the above submission we have examined the pleadings of the parties and considered the facts. The Committee of Management in its letter dated

4.3.2002 by which the resolution of the Committee of Management was forwarded to the Basic Shiksha Adhikari, has specifically stated that the

appellant was given repeated opportunities to place his case but the letters sent to the appellant were returned with the endorsement of "refusal".

After the aforesaid letters the Basic Shiksha Adhikari himself had issued a notice dated 15.4.2002 to the appellant which letter mentions the

allegations against the appellant, which were to the effect that the appointment of the appellant has been made contrary to the Uttar Pradesh

Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules, 1978 and inspite of appellant

having been given several opportunities to have his say, the letters were returned with the endorsement of "refusal" and no explanation was

submitted by the appellant. A copy of the aforesaid letter dated 15.4.2002 has been filed by the appellant himself as Annexure-12 to the affidavit.

The appellant claimed to have written a letter to the Basic Shiksha Adhikari asking for a copy of resolution. It appears that in pursuance of the

letter of the appellant asking the document from the Basic Shiksha Adhikari, the Basic Shiksha Adhikari vide his letter dated 4.5.2002 sent letter of

the management to the appellant. After letter of the Basic Shiksha Adhikari dated 4.5.2002 the appellant again insisted that he should be given the

copy of the record of the proceedings of 4.3.2002. Again Basic Shiksha Adhikari issued notice dated 7.6.2002 informing the appellant that the

document as required by him had been given on 4.5.2002 but no explanation has been given by the appellant. The said letter further stated that a

three member enquiry committee had been constituted before whom the appellant may appear and give his evidence. The appellant had received

the notice dated 7.6.2002 but submitted a letter dated 24.6.2002 that he is ill and should be given one month's time for giving his reply. Thereafter

the date 26.6.2002 was adjourned accepting the prayer of the appellant and another opportunity was given to the appellant. But inspite of that

opportunity the appellant did not submit any explanation and the Basic Shiksha Adhikari on 9.8.2002 passed an order approving the resolution of

the Committee of Management dated 4.3.2002.

8. From the aforesaid facts which are on the record it is clear that the opportunity was given to the appellant to have his say on the allegations

made by the Committee of Management against the appellant but the appellant did not submit any explanation nor submitted any evidence in

support of his case. It is relevant to note that in the notice issued by the Basic Shiksha Adhikari dated 15.4.2002 it was specifically stated that the

Management's case is that repeatedly letters were sent to the appellant which were not received but were returned with the endorsement of

"refusal". The appellant did receive notice dated 15.4.2002 but the appellant after the receipt of the aforesaid notice never contested the aforesaid

allegations nor submitted any reply. The Basic Shiksha Adhikari gave more than two opportunities to the appellant which were not availed of by

the appellant. The aforesaid facts clearly suggest that the appellant was not interested in submitting reply to the allegations against him on merits and

wanted to delay the matter. From the aforesaid we are fully satisfied that there was no violation of principles of natural justice and the action taken

by the respondents against the appellant was not ex-parte nor was taken by way of surprise. The appellant was fully aware of the allegations and

has in fact not denied in the writ petition as well as in the Special Appeal that he did not possess the qualification for the post at the time of

appointment. It is further not denied that he was under age when he was appointed on the post of Head Master. The observance of the principles

of natural justice are insisted so that injustice be not done to a person and the person and the person affected must have an opportunity to present

his case. In this case the principles of natural justice were duly observed. The first submission of the Counsel for the appellant thus has no

substance.

9. The second submission of the Counsel for the appellant is to the effect that lack of qualification which was there at the time of initial appointment,

stood removed by passage of time and the above ground cannot be taken by the respondents for termination of the services of the appellant at this

stage. Before we consider this submission it is appropriate to look into the manner and procedure adopted for the appointment of the appellant.

The appellant has filed a copy of the advertisement claimed to be published in a newspaper, namely, "Dainik Trishul Tej" dated 2.10.1994. The

advertisement states that 18.11.1994 is the date of interview. The appointment letter was issued to the appellant on 25.11.1994 which refers to the

resolution of the Committee of Management dated 20.11.1994. The appellant claims to have joined the service on 1.12.1994.

10. The selection and appointment of Head Master of recognised High School is governed by the Statutory Rules, namely, the Uttar Pradesh

Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules, 1978. Rule 10 relates to

procedure for selection, which is quoted as below:-

10. Procedure for Selection.-(1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it

in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of

preference, of three candidates found to be suitable for appointment.

(2) The list prepared under Clause (1), shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of

the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the

Management.

(4) The Manager shall within one week from the date of receipt of the papers under Clause (3) send a copy of the list to the District Basic

Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that-

(a) The candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) The procedure laid down in the rules for the selection of Head Master or Assistant Teacher, as the case may be, has been followed he shall

accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the management within two

weeks from the date of receipt of the papers under Clause (4).

(ii) If the District Basic Education Officer, is not satisfied as aforesaid, he shall return the papers to the management with the direction that the

matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under Clause

(4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee.

11. The above Rule 10 shows that the District Basic Education Officer, before according approval has to be satisfied that the candidate

recommended by the Selection Committee possesses the minimum qualification prescribed for the post. Rule 11 of the Rules provide that the

Management shall issue an appointment on receipt of the communication of the approval or as the case may be, on the expiry of the period of one

month under Clause (iii) of Sub-rule (5) of Rule 10. In the present case, the appointment letter is claimed to have been issued on 25.11.1994 on

which date neither there was approval of Basic Shiksha Adhikari nor the period provided under Clause (iii) to Sub-rule (5) had expired. The

approval order which has been annexed by the appellant himself as Annexure-3 to the writ petition dated 10.3.1995 does not suggest that

approval letter has been issued in response to the letter of the management seeking approval to the selection of the appellant held on 18.11.1994.

The said letter shows that some general approval was granted to the appellant as well as eight other teachers of the institution. Thus, the letter

dated 10.3.1995 which is claimed to be approval of selection of the appellant does not appear to be an approval as contemplated under Rule 10,

Sub-rule (5) of the aforesaid Rules. The aforesaid facts clearly shows that even the appointment of the appellant was made contrary to the

procedure prescribed under the statutory rules. It is thus clear that there is no material on record to prove that the Basic Shiksha Adhikari after

knowing the lack of qualification of the appellant had consciously approved the selection of the appellant. We are satisfied that there is not even

proper appointment of the appellant after following the statutory procedure prescribed under the Rules. Such appointee can not claim right of

continuance.

12. The submission of the Counsel for the appellant that since by passage of time the appellant had acquired qualification, thus the said lack of

qualification cannot be made a ground for termination, is also to be considered. Before proceeding further, it is relevant to note that the lack of

qualification of the appellant are both lack of minimum qualification as well as lack of minimum prescribed age. Admittedly the appellant did not

have three years teaching experience in recognised school. The minimum age prescribed for Head Master is 25 years. The date of birth of the

appellant is admittedly 5th June, 1973 and at the time of joining he was only 21 years and six months. The minimum age of 25 years for the post of

Head Master had a specific purpose and to permit appointment of a person who was only 21 years 6 months on the post of Head Master, is

wholly illegal. The learned Single Judge has rightly referred to Rule 5 which is in negative form providing that no person shall be appointed as Head

Master or Assistant Teacher in substantive capacity unless, he possesses the minimum qualification. It is further to be noted that under the Rules

there is no power of relation in qualification or in age given to any authority including the Selection Committee or the Basic Shiksha Adhikari. The

requirement of qualification as well as age was not relaxable. These facts clearly show that lack of qualification and of age on the part of the

appellant cannot be termed as mere irregularity which can be said to have been cured by passage of time.

13. In Kishorilal Charmakar and Another Vs. Distt. Education Officer and Another, , the appellants were appointed on the posts which were

meant for Scheduled Tribes candidates. The Tribunal found them not eligible to the post. The Apex Court held that the appellants were not

responsible for the mistake. They are not entitled to retain the undeserved benefit. The appellants in the aforesaid appeal were selected and were

also appointed and regularised. After show cause notice their services were terminated. The termination was challenged but the said challenge was

dismissed upholding the order of termination. The Apex Court held in Paragraph 5 :-

5. The appellants, however, are aggrieved by the observations of the Tribunal to the effect that they will have no right of consideration against any

further vacancy that may be advertised. They also submit that through no fault of theirs, they have worked for ten years as sub-teachers under

interim orders granted in their favour and, therefore, since the mistake is not occasioned by them, they should be allowed to continue. The Tribunal

has, in our view, rightly found them not eligible for the post which were meant for Scheduled Tribes candidates. The appellants are, however,

correct in submitting that they were not responsible for the mistake. This, however, does not entitle them to retain the undeserved benefit which

was accrued to them on account of the respondents' mistake. The Tribunal, however, was not justified in stating that they have no right of

consideration against any future vacancy. We, therefore, make it clear that if they are eligible, they will be entitled to apply and be considered for

any future vacancy of sub-teachers. In case, they are aged-barred, the period during which they have worked as sub-teachers will be considered

for relaxing the age bar, looking to the unusual circumstances of the present case and without his being considered as a precedent. The appeals

are, accordingly, dismissed.

14. In *Dr Prit Singh Vs. S.K. Mangal and Others*, , the Apex Court considered the appeal filed by the appellant who was selected and appointed

on the post of Principal by the Management which was also subsequently approved by the Vice Chancellor. The validity of the appointment was

challenged on the ground that the appellant did not possess the qualification on the date of appointment. It was contended that the qualifications

were subsequently amended and the appellant has now become eligible. The Apex Court repelled the contention of the appellant and held that the

appellant was not eligible for the appointment. It was held in Paragraph 13 :-

13. If he was not eligible for appointment in terms of the prescribed qualifications on the date he was appointed by the Managing Committee

subject to the approval of the Vice Chancellor, then later he cannot become eligible after the qualifications for the post were amended. As such we

are in agreement with the view expressed by the High Court, that on the date of appointment the appellant did not possess the requisite

qualifications and as such his appointment had to be quashed.

15. The Counsel for the appellant had cited *Ram Sarup Vs. State of Haryana and Others*, .; *J.C. Yadav and others Vs. State of Haryana and*

others, and 1982 UPLBEC 365 Smt. Shanti Devi Verma v. Deputy Director of Education and Ors., in support of his second submission. In Ram

Sarup's case (supra), it has been specifically noted in Paragraph 2 of the judgment that there was specific power on the Government to relax the

requirement of qualification in the case of promotion. Further, in Ram Sarup's case (supra), the Apex Court was considering the lack of

qualification pertaining to five years' experience only. In the present case, the appellant is under age on the date of appointment. In the aforesaid

case the Apex Court had not considered the effect of lack of qualification pertaining to age prescribed for a post; hence the said decision does not

help the appellant in the present case.

16. In J.C. Yadav and Ors. case (supra), the Rules conferred power on Government to relax rules. In the present case there is no power of

relaxation in the qualification either in Committee of Management or in the Basic Shiksha Adhikari or in any other authority. The case of J.C.

Yadav and others has also been relied upon in the case of Ram Sarup (supra) and in view of the reasons as stated above, the case of Ram Sarup

is not attracted in the present case.

17. The third case relied upon by the Counsel for the appellant, Smt. Shanti Devi Verma v. The Deputy Director of Education, Region I, Meerut

and Ors. (supra) is also a case where there was specific power of relaxation in the Act, in Smt. Shanti Devi Verma's (supra) the learned Single

Judge has noted the provision of Section 16-F of U.P. Intermediate Education Act as it stood at the relevant time which contained a proviso,

permitting relaxation in qualification. Further, as we have noted above in the present case the appointment of the appellant has not been made in

accordance with the procedure prescribed under the statutory rules hence the judgment in Smt. Shanti Devi Verma's case where there was no

allegation of the appointment not in accordance with the rules, does not help the appellant.

18. We are in full agreement with the view taken by the learned Single Judge in the impugned judgment that in view of provisions of U.P.

Recognised Basic Schools (Junior High School) (Recruitment and Conditions of Service of Teachers) Rules, 1978 the lack of minimum

qualification as well as the appellant being under age cannot be termed as mere irregularity.

19. Thus the second submission of the Counsel for the appellant has also no substance.

20. The third submission of the Counsel for the appellant is to the effect that even assuming that the appointment of the appellant was void the

action for cancellation of appointment has to take place within reasonable time. Several decisions have been relied upon by the Counsel for the

appellant in support of this submission namely; Mansaram Vs. S.P. Pathak and Others, Mohamad Kavi Mohamad Amin Vs. Fatmabai Ibrahim, ;

Smt. Santosh Yadav Vs. State of Haryana and others, (2000) 1 UPLBEC 85 Kalu Ram v. State of U.P. 24 ALR 412 Rajendra Prasad

Srivastava v. District Inspector of Schools and Ors. and 1996 (1) Allahabad Civil Journal 462, Rakesh Chandra Mittal v. State of Uttar Pradesh

and Ors..

21. It is true that in the present case the resolution for termination was passed on 4.3.2002 but from the facts brought on record it is clear that

dispute arose regarding the entitlement of payment of salary with the appellant immediately when the institution was taken on grant-in-aid on

1.2.1998. The appellant himself has stated that he had to file two writ petitions, Writ Petition No. 44443 of 1999 for payment of salary and arrears

was disposed of by this Court. As we have stated above, the approval order dated 10.3.1995, Annexure-3 to the writ petition, does not show

approval as contemplated under Rule 10 (5) of 1978 Rules, nor that was in reference to selection proceedings claimed to have been conducted

with regard to the appellant. There is nothing on record to establish that Basic Shiksha Adhikari knew that appellant lacks minimum qualification

and is undergo and approved the selection. There being nothing on the record to the above effect, the case of the appellant becomes further weak.

It is true that the Court may not approve the action taken against a person after lapse of unreasonable time but in the facts and circumstances of the

present case, where the appointment itself does not appear to be in accordance with the statutory procedure, we are not inclined to hold that the

action of the Committee of Management and the Basic Shiksha Adhikari is invalid on the aforesaid reasons. It is also relevant to note that the

institution was taken on grant-in-aid on 1.12.1998 and prior to that salary was being paid by the Committee of Management itself and after the

institution being taken on grant-in-aid the salary was not immediately paid to the appellant and the objections were taken by the authorities. The

appellant himself has referred by various allegations including filing of two writ petitions by him in this Court regarding payment of salary out of

which one writ petition is still pending. In the aforesaid view of the matter we are not inclined to accept the contention of the Counsel for the

appellant that there was unreasonable delay in taking the action.

22. Now coming to the cases cited by the Counsel for the appellant. In the case of Mansaram (supra), the appellant had entered the premises in

1954 and thereafter there had been numerous proceedings between him and the landlord and at no point of time the question of appellant's

entering the premises in contravention of Clause 21, Sub-clause (2) of the Order was raised. The objection was raised after twenty two years of

entry in the premises. In those circumstances the Apex Court held that the said exercise of eviction was not reasonable. Thus the aforesaid case

was on the facts of that case which does not help the appellant.

23. The next case of Mohammad Kavi Mohammad Amin (supra) was the case of exercise of suo motu enquiry u/s 84-C of the Bombay Tenancy

and Agricultural Lands Act, 1948. The said suo motu enquiry was initiated with regard to a sale deed. The above cases also do not come to the

rescue of the appellant in the present case.

24. Smt. Santosh Yadav v. State of Haryana (supra) was a case of an adhoc teacher who was appointed in the year 1980 for six months period

which was continued and ultimately she was confirmed in the year 1984 and in 1990 she was terminated on the basis of some letter dated

7.7.1981 that training diploma obtained by her from non-recognised institution was not recognised by the Haryana Government. The Apex Court

had noticed the fact that the initial appointment of the appellant was for six months which was kept renewed from time to time. Further, the letter

dated 7.7.1981 on the basis of which termination was issued itself was watered down on 22.7.1981 by another circular, Paragraph 6 of the

aforesaid judgment is relevant and is quoted below :-

6. It is not denied that the appellant was taken in service on the basis of the diploma/certificate she possessed, having obtained it from the

Secondary Education Board, U.P., Bareilly and that her six months" terms were kept renewed, from time to time, ignoring small gaps in between,

as was the pattern. Therefore, we fail to see that when she was acceptable in 1980 and her terms were kept renewed from time to time up till

22.5.1982, and onwards, whereafter she was confirmed in the year 1984, how could her services be terminated in the year 1990, when she

attained regularity in service. It is significant to note that the letter dated 7.7.1981 was itself watered down on 22.7.1981 (Annexure-A) clarifying

that the ban imposed on recruitment of persons who had obtained their diplomas/certificates from non-recognised institutions, would not apply to

those who were working as Teachers on stop-gap/adhoc/six months" basis before the summer vacation of 1981. Concededly, the appellant

occupied; that position as she was working on six monthly basis immediately before the summer vacation of 1992. Thus, on account of such

relaxation being available for her and she having earned regularity in her service, it was wholly wrong and arbitrary on the part of the Education

Department and the school to have deprived her of her job. Thus, the impugned order dated 27.3.1990 (Annexure-H) relieving the appellant from

her duties as Hindi Teachers with immediate effect, is quashed, putting her back to position with back wages and regularity of service, including

other service benefits such as seniority, promotion, increments etc., as would have normally been due to her.

25. From the facts noted in the above quoted paragraph of the Apex Court"s judgment it is clear that the termination of the appellant in the above

case was quashed on the special reasons mentioned therein. The case of Smt. Santosh Yadav also do not help the appellant.

26. Kalu Ram v. State of U.P. and Ors. (supra) was a case in which the petitioner was appointed in the year 1963 as Junior Engineer and after 36

years his services were terminated on the ground that he did not possess a diploma from a recognised school. Termination in that case was rightly

held arbitrary after a gap of 35 years. Aforesaid case was a case in which a person was terminated after more than three decades. The said case

also do not help the appellant in any manner.

27. The next case relied by the Counsel for the appellant is the case of Rajendra Prasad Srivastava v. District Inspector of Schools and Ors.

(supra). In the aforesaid case the petitioner who was clerk had continued in service for about twenty years in pursuance of the interim order

granted by the Court. In view of the aforesaid fact this Court held that it is not justified the unseat such person who had worked for twenty years.

Thus the main reason before the Court was the fact the appellant had worked for more than twenty years. Thus the above case is also

distinguishable.

28. The last case relied by the Counsel for the appellant Rakesh Chandra Mittal v. State of Uttar Pradesh and Ors. (supra) was also a case where

the petitioner had worked for twenty years. Removal at that stage was held to be not justified. In view of the aforesaid fact the Court observed that

even if there is any infirmity or irregularity in the appointment of the petitioner it had to be ignored.

29. In view of foregoing discussion we do not find any substance in any of the submission raised by the Counsel for the appellant. The learned

Single Judge has correctly appreciated the controversy raised before him and no infirmity can be found in the judgment warranting interference by

this Court in Appeal.

30. We do not find any merit in this Special Appeal and the same is accordingly dismissed. Parties will bear their own costs.