

(2003) 09 JH CK 0027

Jharkhand High Court

Case No: AFAD No. 176 of 1998

Rajendra Prasad and Another

APPELLANT

Vs

Bishwanath Prasad Singh

RESPONDENT

Date of Decision: Sept. 11, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 11
- Transfer of Property Act, 1882 - Section 83

Citation: (2003) 3 BLJR 2288 : (2003) 4 JCR 547

Hon'ble Judges: Vishnudeo Narayan, J

Bench: Single Bench

Advocate: Debi Prasad and Praveen Kumar, for the Appellant; Manjul Prasad, for the Respondent

Final Decision: Allowed

Judgement

Vishnudeo Naryan. J.

1. This appeal at the instance of the plaintiffs-appellant is directed against the impugned judgment and decree dated 18.7.1988 and 25.7.1988 respectively passed in Title Appeal No. 26 of 1987 by Shri Jugal Kishore Prasad, 6th Additional District Judge, Palamau at Dal-tonganj whereby and whereunder the judgment and decree dated 27.6.1987 and 8.7.1987 respectively passed in Title Suit No. 11 of 1986 by Munsif, Daltonganj. Palamau were affirmed and the said appeal was dismissed.
2. The plaintiffs-appellant had filed Title Suit No. 11 of 1986 for declaration that the transaction dated 24.6.1977 though ostensibly expressed in the shape of a deed of sale was really a transaction of usufructuary mortgage which has made clear in the deed of agreement executed by the defendant-respondent on the same date simultaneously in favour of the plaintiffs-appellant and for a further declaration that the said transaction of the usufructuary mortgage dated 26.6.1977 stands redeemed u/s 12 of the Money Lenders Act. The plaintiffs-appellant has further

sought for direction to the defendant-respondent to give vacant possession of the suit land to the plaintiffs-appellant failing which the plaintiffs-appellant be put back in possession of the suit land through the process of the Court.

3. The case of the plaintiffs-appellant, in brief, is that they are the occupancy raiyat of the suit land detailed in Schedule A of the plaint and they fell in need of money in the month of June, 1997 and approached the defendant-respondent for a loan of Rs. 3.000/- against the usufructuary mortgage of the suit land but the defendant-respondent agreed to lend the said amount on the condition that they execute a deed of sale for the land in his favour as he has no money lending licence and the defendant-respondent further told that a transaction between them will be really an usufructuary mortgage transaction and it will be made clear in the deed of agreement which he will simultaneously execute in their favour and the deed of agreement shall be executed by him simultaneously as part of the transaction, the recitals would be such as not to leave any doubt that the so called sale deed was really a deed of conditional sale by way of a deed of usufructuary mortgage. It is alleged that having regards to the pressing need of money and intimacy between them and the defendant-respondent the plaintiffs-appellant executed a deed of sale in favour of the defendant-respondent in respect of the suit land on 24.6.1977 which was registered as deed No. 5365 and on that very day simultaneously the defendant-respondent also executed a deed of agreement in favour of the plaintiffs-appellant and the said deed of agreement was registered as deed No. 5366 dated 24.6.1977 and it was made clear in the deed of agreement by the defendant-respondent that the sale deed executed in his favour by the plaintiffs-appellant regarding the suit land is really a Baibulbafa deed meaning thereby the conditional sale deed which was really a deed of usufructuary mortgage though ostensibly it was termed as sale deed. It is also alleged that it was stipulated in the deed of agreement that default of payment of the amount of Rs. 3,000/- by the date agreed upon between the parties and mentioned in the deed of agreement, the document executed by the plaintiffs-appellant in favour of the defendant-respondent would then become an absolute sale deed. The plaintiffs-appellant tendered Rs. 3,000/- to the defendant-respondent within the period of due date as per term of the agreement which the defendant-respondent evaded to accept and, thereafter, the plaintiffs-appellant deposited the said amount through treasury challan No. 24 dated 22.6.1978 in view of the order of the Court in Miscellaneous Case No. 14 of 1978 u/s 83 of the Transfer of Property Act which was contested by the defendant-respondent in which he had made out a case that the document executed in his favour on 14.6.1977 by the plaintiffs-appellant was out and out a deed of sale and on hearing both the parties the learned Munsif held and decided that the transaction between the parties on 24.6.1977 was really a transaction of usufructuary mortgage. It is also alleged that the defendant-respondent has remained in cultivating possession of the suit land for more than 8-1/2 years and therefore, the said transaction of usufructuary mortgage

stands automatically redeemed after the expiry of a period of seven years in terms of Section 12 of the Bihar Money Lenders Act, 1974 and the entire amount due also stands duly satisfied. The plaintiffs-appellant demanded the vacant possession of the suit land which was denied. Hence, the necessity of the suit.

4. The case of the defendant-respondent, *inter alia*, is that the plaintiffs-appellant had sold the suit land by executing a registered sale deed dated 24.6.1977 to the defendant-respondent for consideration of Rs. 3,000/- and he came in possession over the same and got himself mutated in respect thereof and the said sale deed is out and out a sale deed and the defendant-respondent has acquired indefeasible right, title and interest therein. It is alleged that there was never a talk of advancement of loan between them and he has never agreed to advance loan to the plaintiffs-appellant and he had never agreed to lend money to them on the condition that the plaintiffs-appellant shall execute a deed of sale which shall be treated as usufructuary mortgage transaction. It is also alleged that the deed of agreement which was executed by him on the date of the sale deed as executed by misrepresentation giving an option to the plaintiffs-appellant to obtain re-coveyance of the suit land for the same amount of Rs. 3,000/- if the plaintiffs-appellant wanted to do so within a year and the contents of the deed of agreement as never read over and explained to him. It is also alleged that it is hard to believe that he would have agreed to recite the expression *Baibulbafa* in the agreement knowing well that he has obtained absolute sale deed and the recitals in the agreement are fraudulent and meant to have wrongful gain to the plaintiffs-appellant. The further case of the defendant-respondent is that the sale deed executed by the plaintiffs-appellant is not a mortgage and Section 12 of the Bihar Money Lenders Act, 1974 has no application in this case and the only course open to the plaintiffs-appellant was to obtain a decree for specific performance of contract in accordance with law within the statutory period which the plaintiffs-appellant did not take and the proceeding u/s 83 of the Transfer of Property Act is not maintainable in view of the fact that the transaction is out and out a sale and not an ostensible sale.

5. In view of the pleading of the parties the learned trial Court framed the following issues for adjudication.

(i) Is the suit, as framed, maintainable?

(ii) Have the plaintiffs got cause of action for the suit?

(iii) Is the sale deed dated 24.6.1977 real transaction of usufructuary mortgage deed in view of the agreement of the same day executed by the defendant and, if so, are the plaintiffs entitled to a decree as prayed for?

(iv) To what relief or reliefs, if any, the plaintiffs are entitled?

6. The learned trial Court while deciding issue No. (iii) aforesaid has held that the sale deed dated 24.6.1977 (Ext. A) read with registered deed of agreement (Ext. 2) is

not a mortgage by conditional sale but only a sale with a condition to repurchase within a time specified and the plaintiffs-appellant did not exercise their right to re-purchase the suit land within the statutory period and his suit is, therefore, barred by limitation under the provision of Article 54 of the Limitation Act. In view of the finding aforesaid the suit of the plaintiffs-appellant was dismissed.

7. Aggrieved by the judgment and decree of the trial Court the plaintiffs-appellant preferred Title Appeal No. 26 of 1987. The lower appellate Court affirmed the finding arrived at the trial Court on reappraisal and re-appreciation of the evidence oral and documentary on the record and also dismissed the appeal as per the impugned judgment and decree. The learned appellate Court below relying upon the ratio of the case of Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, has held that if the sale and agreement to re-purchase are embodied in separate document then the transaction cannot be a mortgage whether the documents are contemporaneously executed, or not. It has also been held that transaction is a sale with a condition to repurchase and Section 83 of the Transfer of Property Act is not attracted in this case and any money so deposited by the plaintiffs-appellant u/s 83 aforesaid cannot save limitation. It has also been held that in a case for sale with condition to re-purchase the plaintiffs-appellant has to file a case of specific performance of contract within the statutory period and having not done so the suit of the plaintiffs-appellant is barred under the provisions of the Limitation Act.

8. The plaintiffs-appellant have come before this Court in appeal against the concurrent finding of both the Courts below. This Court while admitting the appeal for hearing formulated the substantial question which runs thus :--

"Whether in view of the admission made by respondent No. 2 in Ext. 2 to the effect that the parties understood the document to be a deed of Baibulbafa, learned Court committed error of law in construing Ext. A without taking into consideration the admissions made by the parties to the aforementioned effect, in view of the decision reported in Indira Kaur and Ors Vs. Sheo Lal Kapoor, ?"

9. Assailing the impugned judgment it has been submitted by the learned counsel for the plaintiffs-appellant that admittedly two registered documents were executed contemporaneously on 24.6.1977, one by the plaintiffs-appellant said to be a purported sale deed (Ext. A) in respect of the suit property in favour of the defendant-respondent for Rs. 3,000/- and the other registered agreement (Ext. A) by defendant-respondent specifically reciting therein that the said purported sale deed is Baibidbafa (mortgage by conditional sale) and the recital made in the registered deed of agreement (Ext. 2) shall have the effect to control the sale deed (Ext. A) and an admission made by the defendant-respondent in the deed of agreement subsequent to the sale deed is binding on him and in this view of the matter the intention of the parties is very much explicit that the sale deed (Ext. A) is definitely not a sale outright but it is Baibulbafa i.e., mortgage by conditional sale and the learned appellate Court below did not properly construe the intention of the parties

to the transaction over looking the admission made by the defendant-respondent in the registered agreement subsequent to the sale deed. In support of his contention reliance has been placed on the ratio of the case of Indira Kaur and Ors Vs. Sheo Lal Kapoor, . It has been further contended that as per the intention of the parties and the subsequent admission made in the registered deed of agreement that the purported sale deed is not out and out a sale rather a Baibidbafa, the plaintiffs-appellant tendered Rs. 3,000/- to the defendant-respondent and on his refusal invoked the jurisdiction of the Court u/s 83 of the Transfer of Property Act by filing Miscellaneous Case No. 14 of 1978 and deposited the said amount within the due date which was allowed on contest. It has further been contended that in view of the order passed in Miscellaneous Case aforesaid the contention of the defendant-respondent is barred by resjudicata and he cannot be allowed to set up in his defence that Ext. A is out and out a sale deed and in support of his contention reference was made to explanation VIII of Section 11 of the CPC in which it has been mandated that an issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue shall operate as resjudicata in a subsequent suit notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised. In support of his contention reliance has been placed on the ratio of the case of Sulochana Amma Vs. Narayanan Nair, . It has been observed by the Apex Court therein which runs thus :-

"The expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which -had arisen directly and substantially between the parties or their privies and decided finally by a competent Court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as res judicata in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a competent Court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies."

x x x

"The objects underlying Explanation VIII, that by operation of the Ron obstante clause finality is attached to a decree of civil Court of limited pecuniary jurisdiction also to put an end to the vexatious litigation and to accord conclusiveness to the issue tried by a competent Court, when the same issue is directly and substantially in issue in a later suit between the same parties or their privies by operation of Section 11. The parties are precluded to raise once over the same issue for trial."

It has also been contended that in this view of the matter the controversy regarding the nature of Ext. A read with Ext. 2 has been finally and conclusively determined by the Court in the said miscellaneous case and the purported transaction is a Baibulbafa and not a sale outright and as such a limitation for redemption is 30 years when the right to redeem or to recover possession accrues as per Section 61 of the Law of Limitation Act, 1963. It has been contended that the plaintiffs-appellant have already deposited the sum of Rs. 3,000/- much prior to the due date in the proceeding u/s 83 of the Transfer of Property Act i.e. Miscellaneous Case No. 14 of 1978 and, therefore, plea u/s 16(C) of the Specific Relief Act is not at all open to the defendant-respondent. Lastly it has been contended that Section 92 of the Evidence Act does not put a bar to vary the term of a registered document by other registered document and as such Section 92 of the said Act is not attracted in this case. Viewed thus the concurrent finding of both the Courts below is not only erroneous but perverse and thus the impugned judgment is unsustainable.

10. Refuting the contention aforesaid it has been submitted by the learned counsel for the defendant-respondent that there is concurrent finding of both the Courts below that the sale deed Ext. A is out and out a sale and it is definitely not a Baibulbafa in view of the mandate of Section 58(C) of the Transfer of Property Act and as there is no stipulation contained therein regarding the re-purchase or re-conveyance of the land covered under it notwithstanding the fact that both the sale deed (Ext. A) and the registered deed of agreement (Ext. 2) were contemporaneously executed by the parties in favour of each other In support of his contention reliance has been placed upon the ratio of cases of Chunchun Jha (supra) and [Mushir Mohammed Khan \(Dead\) By LRS. Vs. Smt. Sajeda Bano and Others,](#) . It has also been submitted that the ratio of the case of Sulochana Amma (supra) is not applicable in the facts and circumstances of this case in view of the ratio of the case of [Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi,](#) . It has also been contended that the order passed in Miscellaneous case aforesaid cannot operate as res judicata against the defendant-respondent in respect thereof. Lastly it has been contended that the transaction between the parties is definitely not a Baibulabafa and as such the plaintiffs-appellant ought to have exercised their rights for specific performance of contract on the basis of stipulation contained in Ext. A within the stipulated period and having not done so they are non-suited in this case and, therefore," there is no illegality in the impugned judgment of both the courts below requiring an interference therein,

11. It is an admitted fact that the plaintiffs-appellant executed a document purporting to be a sale deed (Ext. 2) of the suit property for consideration of Rs. 3,000/- favouring the defendant-respondent on. 24.6.1977 and on the same day a contemporaneous document (Ext. 4) was executed by the defendant-respondent in favour of the plaintiffs-appellant agreeing to re-convey the suit property for the said sum of Rs. 3,000/- within one year of the date of execution of the said document which has been termed as "Ekranama". It is also an admitted fact that the

possession of the suit property was delivered to the defendant-respondent who is continuing in possession thereof. Ext. A was registered as deed no. 5365 on the day it was executed and the Ekrarnama (Ext. 2) executed and registered on the same day is deed on 5366. There is an unilateral declaration in the most clear and unequivocal terms made by the defendant-respondent in Ext. A that the sale deed, executed in his favour is a Baibulbafa. The question for consideration is as to whether the transaction was really one of mortgage though apparently of sale in form or a sale outright with a condition or re-purchase and the controversy is a vexed one having plethora of conflicting decisions of the different Courts which led to the amendment to Section 58 of the Transfer Property Act. Section 58(C) of the said Act mandates that if the sale and agreement to re-purchase are embodied in separate documents then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. Section 58(C) aforesaid excludes transactions embodied in more than one document from the category of mortgage. Therefore, it is reasonable to support that persons, who choose not to use two documents, do not intend the transaction to be a sale unless they displace that presumption by clear and expressed words and if the/conditions of Section 58(C) of the said Act are fulfilled, the deed should be construed as a mortgage and for that intention of the parties is the determining factor. For construing the proper import of a document the intention must be gathered from the document itself. If the words of the document are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. In the case of ambiguity in the language employed in the document, it is permissible to look into the surrounding circumstances to determine what was intended by the parties. Therefore, in every such case the question is what upon a fair construction is the meaning of the instruments executed by the parties.

12. Let us now look into the recitals of both the documents i.e., Ext. 2 and Ext. A to construe their legal effect and the intention of the parties executing those documents. The plaintiff-appellant has executed a registered document (Ext. A) in favour of the defendant-respondent describing it as sale deed for Rs, 3,000/- in respect of the suit property. It has been recited therein that the executants have to repay some antecedent debts and they have no option but to sell the land as there is no scope for them to get the money from anywhere and they requested the vendee to purchase the land which was accepted by the vendee and as such out of their free will and volition and with disposing mind they have sold the properties to the vendee after receiving Rs. 3,000/- and transferred their rights in the property therein in favour of the vendee. It has also been recited therein that the executants i.e., the vendors shall have no right over the properties covered under this deed. It has also been recited therein that the vendees have now acquired absolute and indefeasible right and title and possession over the properties mentioned therein Ext. 2 is a registered deed of Ekrarnama contemporaneously executed by the

defendant-respondent in favour of the plaintiffs-appellant which is in respect of the land covered under Ext. A for the same consideration. There is recital in the Ekrarnama (Ext. 2) that the plaintiffs-appellant who are the vendors in Ext. A have executed the registered deed in favour of the defendant-respondent which is in fact Baibulbafa executed by them and it has been agreed between them prior to execution of Ext. A that the sale in question shall be treated as Baibulbafa and in view thereof defendant-respondent makes a declaration that the vendors of Ext. A or that heirs on making payment of Rs. 3,000/- on or before 23.6.1978 shall get the said property re-conveyed and the defendant-respondent shall not create any hindrance or obstruction in respect thereof and in case of any obstruction or evasion the plaintiffs-appellant shall deposit a sum of Rs. 3,000/- in the Government Treasury and they will get a sale deed compulsorily registered. It, therefore, appears from the recitals of Ext. A read with Ext 2 that both the parties had intended that though sale deed is an ostensible sale but in fact it is Baibulbafa. The words appearing in Ekrarnama (Ext. 2) are very express and clear and there is no ambiguity therein. The declaration made in Ext. 2 by the defendant-respondent in his unequivocal unilateral declaration regarding the nature of the transaction which was taken place between them and this declaration of the defendant-respondent tantamounts his admission that the transaction by Ext. A read with Ext. 2 are definitely not out and out a sale but it is a Baibulbafa. The contention of the defendant-respondent that the said Ekrarnama (Ext. 2) is the result of misrepresentation is not tenable at all in view of the fact that he did take no step within the stipulated period to get the said Ekrarnama set aside in accordance with law and thus it cannot be said that the said Ekrarnama (Ext. 2) is not binding on him and cannot be given effect to. The obvious reason for entering into such a transaction of ostensible sale coupled with a contemporaneous Ekrarnama making an unequivocal unilateral declaration therein to construe the said sale deed as Baibulbafa or re-conveyance of the property with the due date on payment of the consideration amount was that if it was not garbed with the paraphernalia and was given the nomenclature of a mortgage, the period of redemption would have been 30 years and this period could not have been curtailed without attracting the doctrine of clog of equity of redemption.

This appears to be the obvious reason for the defendant-respondent for resorting to this device. The recitals of both the documents clearly spell out the real intention of the parties that it was a transaction of mortgage to secure a sum of Rs. 3,000/-. Therefore, the admission contained in Ext. 2 has its effect to control the import of Ext. A, the purported sale deed. There is averment in the plaint that the real intention of the parties was to create a mortgage. The plaintiffs-appellant tendered the sum of Rs. 3,000/- to the defendant-respondent as per the stipulation contained in Ext. 2 which was not accepted as a result of which the plaintiffs-appellant invoked the jurisdiction of the Court u/s 83 of the Transfer of Property Act and deposited the said amount of Rs. 3,000/- by Treasury Challan in view of the fact that the

transaction was a mortgage reading Ext. A and Ext. 2 together as per the intention of the parties and the said proceeding was contested by the defendant-respondent. It is pertinent to mention here that the Court of Munsiff in the proceeding u/s 83 of the Transfer of Property Act had held that the transaction between the parties is a mortgage by conditional sale and it is not out and out a sale deed. This finding has reached its finality in view of the fact that the defendant-respondent did take no step to get it set aside. The plaintiffs-appellant filed the suit within the statutory period of limitation when inspite of long wait after the order in Section 83 of the Transfer of Property Act, the possession over the suit property was neither delivered to them by the defendant-respondent nor the suit property was re-conveyed to them by executing a registered deed of transfer.

The plea of resjudicata taken by the defendant-respondent is not tenable in the facts and circumstances of this case in view of the explicit provision made in Explanation VIII of Section 11 of the Code of Civil Procedure. I have already stated above the ratio of the case of Sulochana Amma, (supra), in which it has been observed by the Apex Court that an order of an issue which has arisen directly and substantially between the parties or their privies and decided finally by a competent Court though of limited or special jurisdiction which includes pecuniary jurisdiction will operate as res judicata in a subsequent suit or proceeding notwithstanding the fact that such Court of limited or special jurisdiction was not competent Court to try the subsequent suit and in this view of the matter the defendant-respondent is precluded to raise the same issue for adjudication in this case. The ratio of the case of Smt. Gangabai (supra) is of no help to the defendant-respondent in the facts of this case in view of the fact that the finding as to title by the Small Cause Court does not operate as res Judicata in a subsequent suit for determination of interest in immovable property as it has seen the light of the day prior to the amendment of Section 11 of the Code of Civil Procedure, Explanation VIII has been introduced in Section 11 of the CPC by the CPC Amendment Act, 1976. Therefore, in this case the defendant-respondent stands precluded as per the principle of res judicata to re-agitate that the sale deed Ext. A is out and out a sale deed. Since the transaction between the parties is a mortgage by conditional sale i.e., Baibulbaga as per Ext. 2 read with Ext. A and the amount of Rs. 3,000/- having been deposited u/s 83 of the Transfer of Property Act in Miscellaneous Case No. 14 of 1978, therefore, there was no need for the plaintiffs-appellant to sue for specific performance of the contract and the defendant-respondent has wrongly taken a plea in respect thereof which has no application at all in this case. It is also essential to make it clear that statutory period of limitation is 30 years for redemption and it cannot be said that the suit of the plaintiffs-appellant is barred by limitation. The ratios of the cases of Chunchun Jha (supra) as well as Mushir Mohammed Khan (supra) is of no help to the defendant-respondent in this case as in both the cases aforesaid there was no recital in the agreement there in that the sale deed is a Baibul-bafa. In both the cases aforesaid there as stipulation in the agreement for re-conveyance of the

property and in this view of the matter it was observed in both the cases that on consideration of the documents, the transaction between the parties is not a mortgage or mortgage by conditional sale or usufructuary mortgage. Provisions of Section 92 of the Evidence Act is also of no help to the defendant-respondent in the facts and circumstances of this case. The terms of sale deed dated 24.6.1977 (Ext. A) is being varied by other registered document (Ext. A). Assuming defendant-respondent to have acquired absolute title in respect of the suit property by virtue of sale deed (Ext. A), he has himself as owner thereof had made a declaration in the agreement that the sale deed is not an outright sale deed but a Baibulbafa and this admission on the part of the defendant-respondent is his admission having the effect on the nature of the transactions between him and the plaintiffs-appellant in respect of the suit land and viewed thus the import of both the documents taken together is that the sale deed (Ext. A) is definitely not a sale outright. Thus the said sale deed did not confer absolute indefeasible title in the defendant-respondent as vendees. Therefore, there is relationship of mortgager and mortgagee between the parties and plaintiffs-appellant are entitled to get back the suit properties as they have already deposited the sum of Rs. 3,000/- being the consideration in the proceeding u/s 83 of the Transfer of Property Act as per terms of the Ekrarnama (Ext. 2) much before the due date. Both the Court below did not properly construe the import of Ext. A read with Ext. 2 and the intention of the parties in respect thereof and they have, accordingly, erred in dismissing the suit of the plaintiffs-appellant. Therefore, the impugned judgment suffers with illegality which requires an interference therein.

13. There is merit in this appeal and it succeeds. The appeal is hereby allowed. The impugned judgment and decree of the appellate Court below as well as the judgment and decree of the trial Court are hereby set aside. The suit of the plaintiffs-appellant is hereby decreed. The right title and interest of the plaintiffs-appellant is hereby declared in the suit property. The defendant-respondent is directed to deliver the vacant possession of the suit property to the plaintiffs-appellant within three months from the date of this judgment failing which the plaintiffs-appellant shall recover possession over the suit property through the process of the Court in accordance with law. There shall be no order as to costs in the facts and circumstances of this case.