

(2010) 05 MAD CK 0038

Madras High Court

Case No: C.R.P (NPD) No's. 800, 844 and 845 of 2010 and M.P. No's. 1,1 and 1 of 2010

Rabiya Basheer Ali

APPELLANT

Vs

C. Devandra Prased

RESPONDENT

Date of Decision: May 19, 2010

Acts Referred:

- Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 - Section 10(2)

Citation: (2010) 4 LW 318

Hon'ble Judges: S. Tamilvana, J

Bench: Single Bench

Advocate: K. Sridhar, for the Appellant; Inamdar Ameenur Rahman, for the Respondent

Final Decision: Allowed

Judgement

S. Tamilvana, J.

C.R.P (NPD) No. 800 of 2010 has been filed challenging the order, dated 02.02.2010 made in R.C.A. No. 165 of 2009 on the file of the Rent Control Appellate Authority / VIII Judge, Court of Small Causes, Chennai, confirming the order, dated 29.04.2009 made in M.P. No. 185 of 2009 in M.P. No. 115 of 2009 in R.C.O.P. No. 508 of 2009 on the file of the Rent Controller / XIII Judge, Court of Small Causes, Chennai.

2. C.R.P (NPD) No. 844 of 2010 has been filed challenging the order, dated 02.02.2010 made in R.C.A. No. 166 of 2009 on the file of the Rent Control Appellate Authority / VIII Judge, Court of Small Causes, Chennai, confirming the order, dated 30.03.2009 made in M.P. No. 115 of 2009 in R.C.O.P. No. 508 of 2009 on the file of the Rent Controller / XIII Judge, Court of Small Causes, Chennai.

3. C.R.P (NPD) No. 845 of 2010 has been filed challenging the order, dated 02.02.2010 made in R.C.A. No. 167 of 2009 on the file of the Rent Control Appellate Authority / VIII Judge, Court of Small Causes, Chennai, confirming the order, dated 29.04.2009 made in M.P. No. 184 of 2009 in M.P. No. 115 of 2009 in R.C.O.P. No. 508 of 2009 on the file of the Rent Controller / XIII Judge, Court of Small Causes,

Chennai.

4. It is an admitted fact that the Rent Control Original Petition in R.C.O.P. No. 508 of 2009 was filed by the Respondent herein, as landlord u/s 10(2)(i), 10(2)(ii)(a) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18 of 1960 as amended by Act 23 of 1973 (herein after referred to as Act), seeking an order of eviction of the Petitioner / tenant from the premises relating to the Rent Control Original Petition.

5. Miscellaneous petition in M.P. No. 115 of 2009 was filed in the said R.C.O.P by the Respondent / landlord, seeking an order to appoint an Advocate-Commissioner to inspect the petition premises and to note down the persons, who are in occupation, nature of business carried on by them in the petition premises and rent being paid by the occupants.

6. Learned Rent Controller in the order, dated 30.03.2009 passed in M.P. No. 115 of 2009 has specifically stated that exparte Advocate-Commissioner was appointed for the aforesaid purpose, without issuing notice to the Respondent therein / tenant. Hearing the submissions made by the learned Counsel appearing for the Respondent / landlord by the aforesaid order, Advocate-Commissioner was appointed, without providing opportunity to the Petitioner / tenant, who was the Respondent therein. Subsequently, the Petitioner / tenant filed two petitions one in M.P. No. 184 of 2009 to set aside the exparte order and M.P. No. 185 of 2009 to suspend the warrant issued to the Advocate-Commissioner, pursuant to the order, dated 30.03.2009 passed in M.P. No. 115 of 2009. By common order, dated 29.04.2009, miscellaneous petitions filed in M.P. No. 184 of 2009 and M.P. No. 185 of 2009 were dismissed by the learned Rent Controller. Aggrieved by which three Rent Control Appeals were preferred.

7. Accordingly, R.C.A. Nos. 165 of 2009 and 167 of 2009 were preferred against the common order, dated 29.04.2009 made in M.P. Nos. 184 of 2009 and 185 of 2009 in M.P. No. 115 of 2009 in the aforesaid R.C.O.P. R.C.A. No. 166 of 2009 was filed against the order and decretal order, dated 30.03.2009 made in M.P. No. 115 of 2009 in the aforesaid R.C.O.P.

8. By a common order, dated 02.02.2010 all the three Rent Control Appeals were dismissed by the learned Rent Control Appellate Authority / VIII Judge, Court of Small Causes, Chennai. Against which, separate revisions have been preferred in C.R.P (NPD) Nos. 800 of 2010, 844 of 2010 and 845 of 2010.

9. Mr. K. Sridhar, learned Counsel appearing for the Petitioner / tenant submitted that the Courts below have failed to see that it is the burden of the Respondent / landlord, who has filed the R.C.O.P for eviction, has to establish the ground of subletting and furnish details of the alleged sub-tenants to prove the same before the Rent Controller. However, without furnishing details of the alleged sub-tenants and furnishing supporting materials, he has filed a petition for appointment of an Advocate-Commissioner to inspect the petition premises to find out who are all the

persons in occupation of the said premises, nature of business and rental advance paid by them. According to him, the relief sought for is nothing but to find out possession of the premises and the name of occupation by Advocate-Commissioner and also for collecting evidence for the case filed by the Respondent / Petitioner, though the same is not legally permissible.

10. Per contra, Mr. Inamdar Ameenur Rahman, learned Counsel appearing for the Respondent / landlord submitted that the Respondent / landlord has filed petition in M.P. No. 115 of 2009 not for finding the possession of the premises or to collect evidence, but only to find out who are all in occupation of the premises and nature of the business being carried on in the premises and also to collect the particulars of rent being paid by the sub-tenants.

11. Both the learned Counsel, in order to enlighten the legal aspect involved in this case have produced the following decisions:

1. [Padam Sen and Another Vs. The State of Uttar Pradesh](#), 2.M. Vedapuri v. O.M. Raj and another ADJ 2008 MHC 4400 3.A. Nagarajan v. A. Madhanakumar, CDJ 1996 MHC 4974.B. Madasamy v. S. Sivakami Ammal, CDJ 2004 MHC 718 5. Gurunath Manohar Pavaskar and Ors. v. Nagesh Siddappa Navalgund and Ors., CDJ 2007 SC 13396. Dhavamani v. Radhakrishnan Chettiar, CDJ 2004 MHC 685 7. Podugu Appa Rado (died) and Ors. v. Grandhi Satiraju (died) and Ors., CDJ 2008 APHC 11328.R. Devaraj v. M. Veerappa Gounder and Anr., CDJ 2009 MHC 5973 9.R.V. Ramalingam v. Abdul Muthaliff, CDJ 1992 MHC 08710. Tejrav Sarammal v. Bajranglal Daman, CDJ 2004 MHC 947 11. [T.S. Ramu Vs. Neelakandan](#), 12. [M.P. Appulu Vs. A. Fatima Zohra and Another](#), 13. Minor Amid Stanly and Anr. v. Lakshmiammal and Ors., CDJ 2009 MHC 324 14. [Rajendran Vs. Lilly Ammal alias Nelli Ammal and another](#), 15. Devadoss v. A. Duraisingh 2002 (3) CTC 748 16. Krishnamurthy, T.K. v. Tamil Nadu Water and Drainage Board 2006 (5) CTC 178 17. [Mr. D. Kuttayappan and Others Vs. Meenakshiammal Polytechnic Unit of Meenakshiammal Trust](#), 18. Chandrasekaran v. Doss Naidu 2005 (3) MLJ 47319. M/s. Benz Automobiles Private Limited v. Mohanasundaram 2003 (3) MLJ 391 20.K.M.A. Wahab and Ors. v. Eswaran and Anr. 2008 (3) CTC 597

12. In Padam Sen and Anr. v. The State of U.P., AIR 1961 SC 218, three Judge Bench of the Hon"ble Supreme Court has held that Court has no inherent power u/s 151 to appoint an Advocate-Commissioner to seize account books in the possession of the Plaintiff, upon an application by the Defendant that he has apprehension that they would be tampered with. The Hon"ble Apex Court further held that the Court cannot seize them forcibly by appointing an Advocate-Commissioner, but it can summon them and if not produced, it can penalise the party and also draw adverse presumption against him. If the documents are forged, while in the possession of the Plaintiff, the Defendant can prove the forgeries and dispute the entries. The Hon"ble Supreme Court has categorically ruled that it is not the business of the Court to collect evidence in favour of one party.

13. In *K.M.A. Wahab and Ors. v. Eswaran and Anr.*, reported in 2008 (3) CTC 597, His Lordship, A. Kulasekaran, J, has held that appointment of Advocate Commissioner for making enquiry about the factum of possession of the property in dispute is improper since the same has to be adjudicated upon framing issues and on appreciation of evidence.

14. In *M/s. Benz Automobiles Private Limited v. Mohanasundaram*, reported in 2003 (3) MLJ 391, His Lordship AR. Ramalingam,J, has held that Advocate-Commissioner cannot be appointed to find out the factum, as to who is in possession of the property. Even if an Advocate-Commissioner is appointed and his report is filed, it can be questioned by the other side by filing objections, as the dispute in the suit could be resolved only on the basis of oral and documentary evidence let in by the parties.

15. In [Chandrasekaran Naidu and Others Vs. V. Doss Naidu](#), , Her Lordship R. Banumathi, J has held that though appointment of Advocate-Commissioner was sought for under the pretext of noting down the physical features, indirectly it was only to find out the factum of possession. As the material issue involved in the suit relating to the nature of possession and lawful right of the parties, it was held that the material issue of determining the possession cannot be left to an Advocate-Commissioner.

16. In [Mr. D. Kuttiyappan and Others Vs. Meenakshiammal Polytechnic Unit of Meenakshiammal Trust](#), , Her Lordship R. Banumathi, J held that the Defendants therein were not entitled to seek for appointment of Advocate-Commissioner to note their possession, as it is well settled that Commissioner cannot be appointed for noting down the factum of possession or the enjoyment of property.

17. In *Krishnamurthy, T.K v. Tamil Nadu Water and Drainage Board*, reported in 2006 (5) CTC 178, His Lordship S. Rajeswaran, J has held that Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties, since the parties should prove their case by letting in legally acceptable evidence and the report of the Commissioner can only aid the Court in evaluating the evidence to come to just conclusion.

18. In *Devadoss v. A. Duraisingh*, reported in 2002 (3) CTC 748, His Lordship A. Ramamurthy, J, has held that Advocate Commissioner cannot be used for fact finding purposes and as such, the order passed by the Court below is not sustainable under law. It is always open to the decree-holder to examine the concerned persons as witnesses and prove as to how and in what manner they got the cable connection relating to the suit.

19. In [Rajendran Vs. Lilly Ammal alias Nelli Ammal and another](#), , His Lordship S. Jagadeesan, J, has held that Advocate-Commissioner cannot be appointed to find out the fact as to who is in possession of suit property in a case.

20. In *Minor Amid Stanly and Anr. v. Lakshmiammal and Ors.*, reported in CDJ 2009 MHC 324, His Lordship S. Palanivelu, J, has held that the factum of possession cannot be ascertained by Commissioner, as the same could be proved by letting in oral and documentary evidence by the parties before the Court.

21. In [M.P. Appulu Vs. A. Fatima Zohra and Another](#), , His Lordship T. Sathiadev, J, has held that "There are circumstances in which, it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the parties. It may so happen, when a landlord high-handedly starts pulling down a portion of the main building, the tenant would be greatly interested in securing a Commissioner appointed forthwith. If the right of tenant to have access to stair-case is obstructed, he is most interested in seeking appointment of Commissioner and secure immediate relief, for restoring amenities, which is assured to him u/s 17 of the Act." His Lordship T. Sathiadev, J, while interpreting Section 18(A) of the Act held that if application for appointment of Commissioner is not properly understood and appreciated and resulted in dismissal of the application; to hold that an appeal would not lie, which would result in taking away the affected party's right, which is enshrined in the Act itself.

22. In [T.S. Ramu Vs. Neelakandan](#), , His Lordship S. Sardar Zackria Hussain, J, has held that appointment of Advocate-Commissioner to find out the actual area under the occupation of the tenant and to file report is legally maintainable u/s 18(A) of the Act. However, in the instant case, the purpose for seeking appointment of Commissioner is different.

23. In *Tejraj Sarammal v. Bajranglal Daman*, CDJ 2004 MHC 947, His Lordship S. Sardar Zackria Hussain, J has held that appointing the Advocate-Commissioner exparte and directing the advocate-commissioner to inspect the petition shop thrice a day between 10.00 a.m to 5.00 p.m continuously for a week without issuing notice to the landlord to elucidate the facts as to whether actually the Respondent landlord occupied the petition shop.

24. In *R.V. Ramalingam v. Abdul Muthaliff*, reported in CDJ 1992 MHC 087, His Lordship AR. Lakshmanan, J, has held that on the ground that the tenant has substantially damaged the back portion of the building and is also attempting to unauthorisedly put up some construction and in view of the attitude of the tenant, it was found necessary to appoint an Advocate-Commissioner to make a local inspection of the building and to note down the physical features of the building and the structure thereon and submit a report to the Court with plan and accordingly, the application was found to be maintainable u/s 18(A) of the Act.

25. The Andhra Pradesh High Court in *Podugu Appa Rao (died) and Ors. v. Grandhi Sathiraju (died) and others*, reported in CDJ 2008 APHC 1132, held that the

Advocate-Commissioner appointed to find out whether the tenant had committing any act of waste, affecting the value and utility of the building, as sustainable under law.

26. The Hon''ble Supreme Court in Gurunath Manohar Pavaskar and Ors. v. Nagesh Siddappa Navalgund and others, reported in CDJ 2007 SC 1339, has held that the learned trial Judge may appoint an Advocate-Commissioner for the purpose of taking measurement of the suit land.

27. In A. Nagarajan v. A. Madhanakumar, reported in CDJ 1996 MHC 497, His Lordship Shivappa, J held that for the purpose of elucidating facts in respect of any matter in dispute where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, certain facts, to make it clear, intelligible and to throw light upon the matter in issue, relating to the main case as well as the facts leading to the dispute.

28. In M. Vedapuri v. O.M. Raj and another, reported in CDJ 2008 MHC 4400, this Court (S.TAMILVANAN, J), based on the Advocate-Commissioner's report and plan marked as Exs.C.1 and C.2 held that the petition premises therein was not properly maintained due to the waste and left out of the chicken meat stall found at the premises and was emanating bad and foul smell in an unhygienic condition.

29. In Sha Ukchand and Ors. v. Yogesh, reported in CDJ 2008 MHC 338, His Lordship M. Venugopal, J, based on the Advocate-Commissioner's report and sketch and also the evidence adduced by him, held that learned Rent Controller and the learned Rent Control Appellate Authority had not adverted to the maintainability of the R.C.O.P referred to in the revision petition.

30. The pertinent point to be decided in these three Revision petitions is whether the learned Rent Controller had properly considered the application and appointed Advocate-Commissioner, as contemplated u/s 18(A) of the Tamil Nadu Buildings (Lease and Rent Control) Act, to inspect the petition premises, to find out who are all the persons in occupation of the premises, nature of business and the rental / advance paid by them.

31. It is a well settled proposition of law that as per Section 18(A) of the Act, Rent Controller has power to appoint Commissioner in any proceeding pending before him and for that purpose, he shall have all the powers, as that of a Civil Court under the Code of Civil Procedure, 1908. Order XXVI Code of CPC deals with the power of the Court in appointing Commissioner.

32. It is also not in dispute that Advocate-Commissioner be appointed to inspect any property relating to the dispute for the purpose of noting down the physical features of the property. In case if measurement is needed, the Advocate-Commissioner so appointed may be directed to inspect the property and

take measurement with the help of surveyor. Similarly, Advocate-Commissioner may be appointed to examine any witness on a special circumstance, warranting necessity of examining the witness by following the procedure known to law. However, it is a settled proposition of law that an Advocate-Commissioner cannot be appointed to find out the factum of possession of any property relating to the dispute, since the same could be adjudicated upon by adducing oral and documentary evidence in the manner known to law before the Court.

33. The Hon"ble Apex Court and this Court, by various decisions have categorically held that possession of a property cannot be ascertained by way of appointing Advocate-Commissioner.

34. Mr. Inamdar Ameenur Rahman, learned Counsel appearing for the Respondent / landlord has not disputed the legal proposition that Advocate-Commissioner cannot be appointed to find out the factum of possession and enjoyment of the property or for the purpose of collecting evidence. On the other hand, the learned Counsel argued that the relief sought for is not to find out the possession of the property but only to find out the persons, who is in occupation of the premises, relating to the R.C.O.P. The learned Counsel argued that the term "possession" is different from "occupation".

35. In the Law Lexicon by P. Ramanatha Aiyar, "Occupation" and "Possession" as held by the Lush J., R v. St. Pancras, 2 QBD 588 is given as thus:

"Occupation includes possession as its primary element, but it also includes something more. Legal possession does not, of itself constitute an occupation. The owner of vacant house is in possession, and may maintain trespass against any one who invades it; but as long as he leaves it vacant he is not in occupation; nor is he an occupier."

36. It is well settled that there is distinction between "Occupation" and "Possession", however, in certain respect both terms are similar, but not identical. In the decision reported in 1941 NLJ 534; AIR 1941 Nag 357, the concept of possession is understood, as per legal terminology, a complex one, which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely, the animus possidendi, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. It is true that physical occupation is ordinarily the best and the most conclusive proof of possession, though both terms are different, in other context.

37. In respect of possession, there are certain classifications, such as, actual possession, constructive possession and symbolic possession. It can be construed as actual possession, when the immovable property is in the immediate occupancy of a party. The actual exercise of power to deal with the estate by the owner and exclude other persons from meddling with it. As far as constructive possession is concerned,

which exists in contemplation of law without actual personal occupation, that which the law annexes to the title, the possession of one claiming to hold by virtue of some title, without having the actual occupancy. Actual occupancy is not required for symbolic possession. In a land acquisition matter, when it is not disputed that the land is vested in the Government and compensation being fixed for the land and existing building, symbolic possession could be taken by the officials of the Land Acquisition Department, as per procedure, which may not be an actual possession.

38. The term "Occupation", as per the New Oxford Dictionary English, includes the action of entering and taking control of a building or premises. The action or fact of living in or using a building or other place, in addition to the meaning of a job or profession.

39. The Chambers Dictionary, new edition, would say that the term "Occupation" is the state of occupying, possession, the state of being employed or occupied etc. As per the meaning of the dictionary, the term occupation will also convey the meaning of holding possession of an immovable property.

40. Though the term "Occupation" also relates to the personal occupation of a person namely, avocation, or an act relating to any job or business. It cannot be disputed that the term "Occupation" normally convey the meaning of physical possession of an immovable property, when it relates to a Rent Control case or a dispute relating to immovable property. One of the grounds raised in the R.C.O.P for eviction against the Petitioner / tenant is on the basis of sub-letting the property, hence, in the said context, the term "Occupation" has to be interpreted, on the facts and circumstances only as possession of the immovable property.

41. In the light of various decisions referred to above, it is made clear that occupation referred to in the Interlocutory Application relating to the Revision petitions is only possession of the Rent control premises, which cannot be ascertained by way of appointing Advocate-Commissioner, since the same has to be decided only by Court, based on evidence. Three Judge Bench of the Hon'ble Supreme Court in the decision reported in [Padam Sen and Another Vs. The State of Uttar Pradesh](#), has categorically ruled that it is not the business of the Court to collect evidence for a party.

42. In the instant case, though the Respondent / landlord filed R.C.O.P. No. 508 of 2009 u/s 10(2)(i) and 10(2)(ii)(a) of the Act, in the miscellaneous petition in M.P. No. 115 of 2009, he has not specifically stated who are all the sub-tenants in possession or occupation of the premises, relating to the Rent Control Original Petition and the details of business run by them and also the rent particulars. On the other hand, he filed Application for appointment of Advocate-Commissioner, u/s 18(A) of the Act and seeking direction to the Advocate-Commissioner, to inspect the petition premises and to find out the persons, who are in occupation of the said portions, nature of business and rental advance paid by them. It would not be possible for the

Commissioner to furnish the aforesaid details, without conducting an enquiry. As the details were not furnished by the Respondent / landlord in the Rent Control Original Petition, it may be construed an act of collecting evidence by the Petitioner / tenant. A party to the proceeding cannot collect material or evidence by appointing Advocate-Commissioner. As held by the Hon"ble Apex Court, it would not be the duty of any Court to collect evidence for a party.

43. As per the decision, reported in CDJ 1992 MHC 87 (cited supra), His Lordship AR. Lakshmanan,J, has held that on the ground of substantial damage being cause at the back portion of the building and attempting to put up unauthorised construction by the tenant, considering the urgency and the legal necessity, this Court found that appointment of Advocate-Commissioner u/s 18(A) of the Act is legally maintainable.

44. Similarly, in the decision, reported in [M.P. Appulu Vs. A. Fatima Zohra and Another](#), His Lordship T. Sathiadev, J, has held that as the landlord therein had high-handedly started pulling down a portion of the main building, considering the fact that he might destroy the valuable rights of the parties, in order to take prompt action, His Lordship T. Sathiadev, J, held that in the circumstances, appointing Advocate-Commissioner for recording timely assessment is essential to meet the ends of justice.

45. However, on the facts and circumstances of the instant case, there is no necessity for the learned Rent Controller to appoint Advocate-Commissioner, without notice and providing opportunity to the Respondent / landlord to raise his defence. However, the same was not considered by the Rent Control Appellate Authority.

46. It is clear in the light of various decisions referred to above, that unless there is urgency to safe guard the property or to protect the valuable rights of a party, Court cannot pass an interim order in the admission stage, without providing opportunity to the other side. An exparte interim order for appointment of Commissioner u/s 18A of ht Act could be justified, only when a landlord or tenant is high-handedly, started in pulling down a portion of the building or making unauthorised construction or causing waste or damages or creating public nuisance, by way of causing annoyance, in order to safe guard the property and protect the valuable right of an aggrieved party, other wise only after providing opportunity to the other side, Advocate-Commissioner be appointed.

47. In the instant case, the Respondent / landlord had not furnished the details as to who are all in occupation of the premises, nature of business run by them and other details, however, seeks direction to the Commissioner, to note down the persons, who are in occupation, nature of business, rental advance paid by them, hence, in my view the direction would amount to collecting of evidence in favour of one party, namely the Respondent / landlord, which is not legally permissible.

48. As contemplated, u/s 18(A) of the Act, though the Court below is vested with power in appointing Commissioner, similar to that of the power available under Order XXVI CPC, to any civil Court, Commissioner cannot be appointed to find out the possession of the property relating to the dispute by using the word occupation of the rented premises. Similarly, seeking direction to the Commissioner to find out the names of the persons, who are in occupation, nature of business run by them and the rental advance paid by them and file a report before the Court, without furnishing the details, to prove the alleged sub-lease by a tenant would amount to collecting of evidence. Hence, the order passed by the learned Rent Controller in M.P. No. 115 of 2009 and M.P. Nos. 184 and 185 of 2009 in M.P. No. 115 of 2009 confirmed by the learned Rent Control Appellate Authority in R.C.A. Nos. 165, 166 and 167 of 2009 are not legally sustainable, hence, to meet the ends of justice, all the three Civil Revision Petitions are to be allowed, setting aside the impugned orders passed by the Courts below.

49. However, it is made clear that there is no legal bar against the parties to the rent control proceeding to file any petition for appointment of Commissioner to note down the physical features and to measure the property, on reasonable grounds. If any such petition is filed, the same shall be decided by the Court below on merits, after providing opportunity to the other party, uninfluenced by this order.

50. With the above observation, the Civil Revision Petitions in C.R.P (NPD) Nos. 800 of 2010, 844 of 2010 and 845 of 2010 are allowed and the impugned Judgments and Decrees passed by the learned Rent Control Appellate Authority in R.C.A. Nos. 165 of 2009, 166 of 2009 and 167 of 2009 and the connected orders and decretal orders passed by the learned Rent Controller in M.P. No. 115 of 2009 and M.P. Nos. 184 of 2009 and 185 of 2009 in M.P. No. 115 of 2009 are set aside. Consequently, connected miscellaneous petitions are closed. However, there shall be no order as to costs.