

(2015) 11 RAJ CK 0032

In the Rajasthan High Court

Case No : Civil Special Appeal (W) No. 628/2010 in Civil Writ Petition No. 8736/2008

Arun Singhvi

APPELLANT

Vs

The New India Assurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 04-11-2015

Acts Referred:

Constitution of India, 1950 — Article 129, 14, 141, 16
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33, 47, 47(2)

Citation : (2015) 11 RAJ CK 0032

Hon'ble Judges : Ajit Singh, Actg. C.J. and Arun Bhansali, J.

Bench : Division Bench

Advocate : N.R. Choudhary, for the Appellant; Jagdish Vyas, for the Respondent

Final Decision : Dismissed

Judgement

Arun Bhansali, J.—This appeal has been filed by the appellant aggrieved against order dated 29.07.2010 passed by learned Single Judge, whereby, the writ petition filed by the appellant seeking to question the validity of Promotion Policy of the respondent - New India Assurance Company ("the Company") qua persons with disabilities has been dismissed.

2. The appellant joined the services of the respondent Company on 12.07.1985 on the post of Assistant; whereafter he was promoted on 28.09.2001 on the post of Senior Assistant; the respondent Company issued its Promotion Policy for Supervisory, Clerical and Subordinate Staff - 2008 on 16.09.2008, wherein, under Clause 19(b) it was provided that as per the guidelines of Department of Personnel and Training, Government of India ("the Government") issued on the subject from time to time, 3% reservation for persons with disability while undertaking promotion exercise for promotion to the cadre of Assistant/Senior Assistant is made; whereafter, promotion exercise was undertaken by the respondent Company under the Promotion Policy for promotion to the cadre of

Scale-I Officer under Para 13.1 (Departmental) and 13.2 (Competitive) of the Promotion Policy; the appellant appeared in the general competition for promotion, however, could not succeed; whereafter, a writ petition was filed seeking to question Clause-19(b) of the Promotion Policy to the extent the same restricted the reservation in promotion to the post of Assistant and Senior Assistant and failed to provide for reservation for persons with disabilities for cadre of Scale-I Officer; a further prayer was made for direction to the respondent Company to provide 3% reservation to the persons with disabilities while undertaking promotional exercise pursuant to the notice dated 16.09.2008 (Annexure-4) to fill up the vacancies in the cadre of Scale-I Officer and to consider the candidature of appellant for promotion with consequential benefits.

3. The writ petition was resisted by the respondent Company by filing reply to the show cause notice issued by this Court; it was, inter alia, contended that appellant was appointed in the year 1985 under physically handicapped quota; the challenge to provisions of Clause-19(b) of the Promotion Policy was contested and denied; it was, inter alia, submitted that the grant of reservation to persons with disabilities is a matter of Policy and is covered by Policy of Government and instructions issued by it in this regard; the instructions provided for restricting the reservation for promotion in Group-C and D posts only; the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Act") do not prescribe for reservation in promotion and the reservations in promotions is only covered by the instructions of the Government and, therefore, the appellant was not entitled to any relief; reference was made to the Government instructions dated 20.11.1989 and 16.02.2000.

4. After hearing the parties, the learned Single Judge vide the impugned order came to the following conclusion:-

"7. Merely because for promotion to Scale-I/Group-A services, no such reservation of 3% has been carved out by the respondent-Insurance Company, the said policy cannot be said to fall foul with the mandate of Sections 33 and 47(2) of the PWD Act. As far as the opportunity of entering into employment is concerned, that was definitely provided by the respondent-Insurance Company to the petitioner and even up for promotion to the post of Senior Assistant, he got this benefit. So far as further promotion to Scale-I/Group-A is concerned, merely because no such reservation of 3% is provided, the Policy itself cannot be faulted. The respondent-Insurance Company was only acting within the parameters and guidelines laid down by the Central Government on 20.11.1989 and that position being further clarified by the letter/notification dated 16.02.2000 vide Annex-R/3 and Annex-R/4, reproduced above. The letter/clarification of 16.02.2000 came after the aforesaid PWD Act, 1995 was enacted by the Parliament. If the respondent Insurance Company had any intention to provide such reservation to such physically handicapped persons even for promotional avenues at all levels, they would have definitely provided for it in

their respective Promotion Policy or guidelines issued by them. Such conscious decision taken by the respondent-Union of India and respondent-Insurance Company after 1995 is not open to challenge and cannot be successfully assailed by the petitioner because such promotional avenues are not reserved in terms of Section 33 of the PWD Act or Scale-I/Group-A services.

8. Learned counsel for the petitioner also contended that in Annex-6 "Report of Committee on Identification of Jobs in Group-A and Group-B post for physically handicapped" vide Government of India, Department of Personnel & Training OM No. 36034/4/86-Estt. (SCT), dated the 25th November, 1986, in para 9(xv), the posts in Insurance Sector has already been identified for which the physically handicapped persons are considered suitable and, therefore, the post of administrative officer given in Appendix-7 of the said Office Memorandum, makes the petitioner entitle for promotion to the extent of 3% reservation on the basis of Section 33 of the PWD Act.

9. This contention of the petitioner also cannot be accepted in view of preamble of Office Memorandum as contained in para 1, which clearly stipulates that identification of jobs in Group-A and B posts, is confined only to direct recruitment post. Thus, it clearly means that the said posts have not been identified as suitable for physically handicapped persons while considering the promotional avenues to these posts of Group-A services. For this reason also, the said Office Memorandum (Annex-6) does not enure the benefit of reservation to the petitioner.

10. It is not the denial of promotion to the petitioner but on the other hand it is not carving-out an exception by 3% reservation, which is the Policy of the respondent-Insurance Company and same deserves to be up-held by this Court. The opportunity of promotion was even made available to the petitioner, not in reserved category, but in open category which the petitioner had availed but failed. It is only after such failure in the general competition for promotion to Scale-I/Group-A that the petitioner chose to challenge the said policy itself. It is in these circumstances, that challenge was laid by the petitioner to the said policy. However, the stage of the petitioner approaching the Court is not really relevant but the challenge deserves to be failed for aforesaid reasons."

5. In view of the above findings, the writ petition was dismissed.

6. Feeling aggrieved, the appellant has filed the present appeal; it was, inter alia, submitted by learned counsel for the appellant that the learned Single Judge fell in error on coming to the conclusion that provisions of Section 33 of the Act provides for reservation to persons with disabilities for appointment by direct recruitment only; with reference to provisions of Section 33 of the Act, it was submitted that the said provision applies to direct recruitment as well as promotion; the provisions of administrative instructions cannot override the provisions of the Act and, therefore, the provisions of Clause-19(b) of the Promotion Policy restricting the reservation to the extent of 3% only qua post of

Assistant/Senior Assistant and not providing for reservation in cadre of Scale-I Officer is clearly discriminatory and violative of Articles 14 and 16 of the Constitution of India.

7. Strong reliance was placed on judgment of Bombay High Court in National Confederation for Development of Disabled & Anr. v. Union of India & Ors. Public Interest Litigation No. 106/2000 decided on 04.12.2013, wherein, Bombay High Court based on its interpretation of judgment of Hon''ble Supreme Court in Union of India (UOI) and Another Vs. National Federation of the Blind and Others, came to the conclusion that as Hon''ble Supreme Court has directed that 3% reservation under the Act is to be computed on the total number of vacancies in the cadre strength, the same include the vacancies to be filled in by nomination and vacancies to be filled in by promotion; it was submitted that Special Leave Petition (C)... CC No. 13344/2014 Union of India & Ors. v. National Confederation for Development of Disabled & Anr. was rejected by Hon''ble Supreme Court on 12.09.2014 and, therefore, the issue raised in the writ petition stands squarely covered by the said judgment.

8. Further reliance was placed on Govt. of India through Secretary and Another Vs. Ravi Prakash Gupta and Another, , Justice Sunanda Bhandare Foundation Vs. Union of India (UOI) and Another, , National Federation of the Blind v. Union of India & Ors. Writ Petition (C) No. 15828/2006 decided on 12.09.2014 by Delhi High Court, Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, and State of Kerala and Others Vs. K. Prasad and Another, .

9. It was prayed that in view of the interpretation put by Bombay High Court in the case of National Confederation for Development of Disabled (supra) on provisions of Section 33 of the Act based on the law laid down by Hon''ble Supreme Court in the case of National Federation of the Blind (supra), the appeal may be allowed and the respondents be directed to provide for reservation to persons with disabilities for promotion to the cadre of Class-I Officer and the Promotion Policy to the extent contrary be set aside with all consequential benefits to the appellant.

10. The submissions made by learned counsel for the appellant were vehemently opposed by learned counsel for the respondent Company; it was submitted that the reservation for persons with disabilities is covered by the instructions issued by the Government in this regard from time to time and the Government instructions nowhere provide for grant of reservation to persons with disabilities in Group-A or Group-B posts and as admittedly cadre of Class-I Officer is Group-A post, the appellant is not entitled to claim any reservation; it was further submitted that the provisions of the Act nowhere provides for grant of reservation in promotions and provisions of Section 47(2) of the Act only provides that persons with disabilities would not be discriminated against in promotion, which provision cannot be construed to mean that the same provides for reservation in promotions across the board; the Government instructions provide for reservation in promotions qua Group-C and D posts and the same has

been provided for by the respondent Company.

11. Reference was made to the Policy instructions by the Government issued from time to time providing for reservations for persons with disabilities; it was submitted that subsequent to the judgment of Hon"ble Supreme Court in the case of National Federation of the Blind (supra), wherein, certain provisions of Office Memorandum ("OM") dated 29.12.2005 were struck down by Hon"ble Supreme Court nowhere provides for reservation in Group-A and Group-B posts and, therefore, the appellant cannot claim any right in this regard.

12. It was submitted that the judgment of Bombay High Court in National Confederation for Development of Disabled (supra) has apparently wrongly interpreted the judgement of Hon"ble Supreme Court in the case of National Federation of the Blind (supra) and, therefore, the same does not lay down correct law and merely because Special Leave Petition against the judgment of Bombay High Court has been rejected, the same does not become a binding precedent under Article 141 of the Constitution of India; it was prayed that the judgment passed by learned Single Judge does not call for any interference and the same deserves to be upheld.

13. We have considered the submissions made by learned counsel for the parties and have perused the material available on record and placed during the course of submissions.

14. The Promotion Policy of the respondent Company, in so far as relevant, regarding applicability of reservations for SC/ST employees and persons with disability and which has been challenged in the present proceedings, read as under:-

"19. Special provisions for SC/ST employees and Persons with Disability:

In order to increase opportunities of promotions and to safeguard the interests of employees belonging to Scheduled Castes, Scheduled Tribes and Persons with Disability, the following reservations, concessions and relaxations are made available to them in the matter of promotions from the Subordinate Staff, within Clerical Staff cadres and from clerical Cadres to Scale-I officers grade:

a)-

b)- As per the guidelines of Department of Personnel & Training, Govt. of India issued on the subject from time to time, 3% reservation for persons with disability (1% each of Visual disability, Hearing disability and Locomotor disability) (whilst undertaking promotion exercise for promotion to the cadre of Assistant/Senior Assistant.

The applicability of the reservation, will however, be limited to the promotion being made to those posts that are identified as being capable of being filled/held by appropriate category of Persons with Disability."

15. The Government OM dated 20.11.1989, which was issued prior to coming

into force of the Act provided as under:-

"The undersigned is directed to say that the Government has under consideration a proposal to introduce reservation in favour of the physically handicapped persons in posts filled by promotion. The matter has been examined and it has now been decided that when promotion are being made.

(i) Within Group "D", (ii) from Group "D" to Group "C" and (iii) within Group "C" reservation will be provided for the three categories of the physically handicapped persons namely, the visually handicapped, the hearing handicapped and the orthopedically handicapped

The applicability of the reservation, will, however, be limited to the promotions being made to those posts that are identified as being capable of being filled/held by the appropriate category of physically handicapped."

16. The said OM was clarified by another OM dated 16.02.2000, inter alia, indicating that there is no reservation in promotion for physically handicapped persons when promotions are made from Group-C to Group-B within Group-B and Group-B to Group-A.

17. The said OM dated 20.11.1989 was subsequently amended by OM dated 29.12.2005; the OM of 2005 provided the following qua the reservation in promotion:-

"QUANTUM OF RESERVATION

(i)

(ii) Three percent of the vacancies in case of promotion to Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability."

18. Further, Clause-14 of the OM of 2005 provided as under:-

"14. Reservation for persons with disabilities in Group "A" posts shall be computed on the basis of vacancies occurring in direct recruitment quota in all the identified Group "A" posts in the establishment. The same method of computation applies for Group "B" posts."

19. The OM dated 29.12.2005 was challenged by National Federation of the Blind before the Delhi High Court, which accepted the challenge and directed the Union of India to modify the OM dated 29.12.2005 being inconsistent with the provisions of Section 33 of the Act; the judgment of Delhi High Court was challenged before Hon"ble Supreme Court and Hon"ble Supreme Court in the case of National Federation of the Blind (supra) came to the conclusion that certain Clauses in the OM dated 29.12.2005 were contrary to the intention of the

legislature and were liable to be struck down and directed the appropriate government to issue new OM consistent with its decision; it was, inter alia, directed as under:-

"55. In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:

55.1 We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29-12-2005 and the subsequent OMs consistent with this Court's order within three months from the date of passing of this judgment.

55.2 We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

55.3 The appellant herein shall issue instructions to all the departments/public sector undertakings/government companies declaring that the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and the Nodal Officer in department/public sector undertakings/government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default."

20. After, the judgment of Hon"ble Supreme Court in National Federation of the Blind (supra), OM dated 03.12.2013 was issued by the Government and para 14 of the OM (quoted supra) was modified in the following manner:-

"Reservation for persons with disabilities in Group "A" or Group "B" posts shall be computed on the basis of total number of vacancies occurring in direct recruitment quota in all the Group A posts or Group "B" posts respectively, in the cadre."

21. Vide another OM dated 20.03.2014 it was indicated by the Government as under:-

"4. All the Ministries/Departments/Organisations of the Government of India are requested to compute the reservations for persons with disabilities at the earliest and immediately identify the posts for disabled persons and implement the same without default. However, the following points may be kept in view while computing reservations:-

(i) Three percent of the vacancies in case of direct recruitment to Group A, B, C and D shall be reserved for persons with disabilities of which 1% each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy; in the posts identified for each disability. Three percent of the vacancies in case of promotion to Group D and Group C posts in which direct recruitment, if any, does not exceed 75%

shall be reserved for persons with disabilities of which 1% each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy; in the posts identified for each disability;"

(emphasis supplied)

22. From the above stipulations made in the various OMs, it is apparent that the OMs/instructions consistently since 1989 have provided for 3% reservation of the vacancies in case of promotion to Group-D and Group-C posts, in which, direct recruitment does not exceed 75% and the same does not provide for any reservation in Group-B or Group-A posts in case of promotion.

23. The Bombay High Court in the case of National Confederation for Development of Disabled (supra) after quoting the directions of Hon"ble Supreme Court, as noticed hereinbefore, came to the following conclusion:-

"11. In view of the aforesaid decision of the Supreme Court, it is clear that reservation has to be computed with reference to total number of vacancies in the cadre strength and, therefore, no distinction can be made between the posts to be filled in by direct recruitment and by promotion. Total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination and vacancies to be filled in by promotion."

24. It was directed that the respondents will have to give benefit of reservation to persons with disabilities in the matter of promotion to posts in the Indian Administrative Services and directed the respondents to act accordingly.

25. The National Federation of the Blind filed Contempt Petition (Civil) No. 499/2014 before Hon"ble Supreme Court alleging disobedience of the directions issued by it in the case of National Confederation for Development of Disabled (supra).

26. The contentions, inter alia, included that the judgment of Hon"ble Supreme Court provided for reservation in the matter of promotions, however, no steps in this regard were taken by Union of India and, therefore, they were in contempt of the directions issued by Hon"ble Supreme Court.

27. The contentions raised in this regard were considered by Hon"ble Supreme Court in National Federation of The Blind Vs. Sanjay Kothari--> , wherein, it was, inter alia, observed and held as under:-

"3. Shri Rungta has primarily urged that contempt of this Court's order has been committed by the Respondent by not making provision for reservation in promotion and also by not identifying the posts against which the persons with disabilities can be appointed and in not making such appointments. Shri Rungta has submitted that notwithstanding the efflux of a long period of time since the Act came into force and the directions of this Court dated 8th October, 2013, a large number of vacancies remained unfilled and even those vacancies which

have been filled up constitute a negligible percentage of persons with impaired vision. Drawing the attention of the Court to paragraph 51 of the judgment, Shri Rungta submitted that this Court had clearly and categorically held that the provisions of the Act with regard to reservation would apply in the matter of promotion; however, no steps in this regard have been taken by the Union till date. All such acts and lapses on the part of the Union are in clear breach of this Court's order and, therefore, the appropriate authority of the Union including the impleaded Respondents are liable to be dealt with under the Contempt of Court's Act and Article 129 of the Constitution.

4. Shri Suri, learned senior Counsel appearing for the intervenor has submitted that in a writ petition before the Bombay High Court dealing with the issue of reservation in promotion, orders were passed holding that the decision of this Court in Union of India and Anr. v. National Federation of the Blind and Ors. (supra) provided for reservation in promotion and the special leave petition by the Union of India against the Bombay High Court judgment has been dismissed. In such circumstances, the issue with regard to reservation in promotion, according to Shri Suri, is no longer open and the Union is duty bound to give effect to such reservation.

5. Controverting the submissions advanced by Shri Rungta and Shri Suri, the learned Attorney has drawn our attention to Section 47 of the Act - The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which is in the following terms:

47. Non-discrimination in Government employment

.....(2) No promotion shall be denied to a person merely on the ground of his 20 disability:

Provided that the appropriate Government may having regard to the type of work carried on in any establishment, by notification and subject 25 to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this Section.

6. The learned Attorney General has contended that apart from the aforesaid, there is no other provision in the Act dealing with promotions. On the strength of Section 47(2) it cannot be contended that the Act provides for reservations in the matter of promotion. On the Other hand, Shri Ranjit Kumar, learned Solicitor General has placed before the Court the additional affidavit filed on behalf of the Union of India dated 29.05.2015 to show the steps taken by the Union to fill up over 15,000 identified vacancies. In this regard the learned Solicitor General has placed before the Court a compilation of the latest position which would go to show that 5629 posts earmarked for persons with disabilities have been so filled up whereas steps have been taken for filling up of over 6,000 posts whereas in respect of another about 3400 posts, the recruitment process is likely to be initiated shortly. The learned Solicitor General has further submitted that the Union is committed to fill up the 6,000 posts for which process has been initiated

by the end of December, 2015 and for the 3400 posts for which process is yet to be initiated by February, 2016. Insofar as reservation in promotion is concerned, it is argued by the learned Solicitor General that nowhere in the judgment the Court had any occasion to deal with the said issue; neither the directions issued by this Court including those in paragraph 51 are capable of being construed in the manner in which Shri Rungta and Shri Suri have argued.

7.

8.

9. Insofar as the reservation in promotion is concerned, the issue can be viewed from the perspective of the questions that had confronted the Court in Civil Appeal No. 9096 of 2013 as set out in paragraph 24 of the order of the Court which is to the following effect:

24. Two aspects of the impugned judgment have been challenged before this Court:

(a) The manner of computing 3% reservation for the persons with the disabilities as per Section 33 of the Act.

(b) Whether post based reservation must be adhered to or vacancy based reservation.

10. Para 51 of the order on which reliance has been placed by Shri Rungta must be viewed in the context of the questions arising for answer before the Court i.e. the manner of computation of vacancies in case of Groups A, B, C and D posts. All that the Court in the aforesaid paragraph 51 has held is that the manner of such identification must be uniform in the case of all the groups viz. A, B, C and D. Nothing beyond the above should be read in paragraph 51 of the Courts" order as aforesaid.

11. Coming to the point urged by Shri Suri with regard to the dismissal of the Union"s special leave petition all that needs to be noticed is that the order dated 12.09.2014 dismissing SLP(C) No...../2014 (CC No(s). 13344/2014) is an order of dismissal simpliciter. In the absence of any reasons, we cannot speculate as to the basis for the dismissal ordered by this Court.

12. Having answered the questions arising for determination in the manner indicated above we will have no reason to keep this contempt petition pending any further. The contempt petition is accordingly disposed of in terms of our conclusions and observations as above.

13. Having answered the issue of reservation in promotion in the manner indicated above, the application for clarification filed by the Union of India with regard to the said issue would stand answered in the above terms."

(emphasis supplied)

28. Hon"ble Supreme Court after noticing the contentions raised and the

response of the Union of India categorically observed that its judgment in the case of National Federation of the Blind (supra) should be read in the context of questions arising for answer before the Court and nothing beyond the above should be read in the Court's order and noticing the contention regarding the judgment of Bombay High Court in the case of National Confederation for Development of Disabled (supra) and dismissal of SLP against it, it was observed that in absence of any reasons the Court cannot speculate as to the basis for the dismissal ordered by it.

29. Further, based on its observations, the application filed by the Union of India regarding reservation in promotion was also directed to have been answered in terms of its order as noticed hereinbefore.

30. In view of categorical pronouncement of Hon''ble Supreme Court qua interpretation of its judgment in the case of National Federation of the Blind (supra) after noticing the judgment of Bombay High Court in the case of National Confederation for Development of Disabled (supra) that its judgment should be viewed in the context of the questions arising for answer and nothing beyond and further disposing of the application regarding clarification sought by Union of India for reservation in promotion in terms of its above determination, the interpretation put by Bombay High Court in the case of National Confederation for Development of Disabled (supra) on the judgment of National Federation of the Blind (supra), despite dismissal of SLP by the Hon''ble Supreme Court, cannot be said to be laying down correct law and, therefore, the submissions made by learned counsel for the appellant primarily based on the judgment of Bombay High Court in the case of National Confederation for Development of Disabled (supra) cannot be accepted. As the contentions regarding absence of reservation in promotions in the OM issued by the Government was specifically raised in the contempt petition before Hon''ble Supreme Court and the said contention was negated after noticing provisions of Section 47(2) of the Act, it cannot be said that the absence of reservation in Group-A and Group-B post in the OMs issued by the Government is bad; the Promotion Policy of the respondent Company clearly stipulates that the reservation would be provided to persons with disabilities based on the instructions of Government from time to time and as admittedly the instructions presently do not provide for any reservation in Group-A posts, in which the cadre of Class-I Officer of respondent Company falls, the appellant cannot claim any relief in this regard and it cannot be said that the judgment of learned Single Judge requires any interference.

31. So far as the judgments cited by learned counsel for the appellant in the case of Ravi Prakash Gupta (supra) and Justice Sunanda Bhandare Foundation (supra) are concerned, the same have no application to the facts of the present case as the same does not deal with the reservations in promotion for the persons with disabilities and judgments in the case of Hemraj Singh Chauhan (supra) and State of Kerala (supra), wherein, the principles regarding consideration for promotion and the order being contrary to the provisions of the Act being not

binding respectively also apparently have no application to the facts of the present case. The orders of Delhi High Court are apparently in conflict with the determination made by Hon''ble Supreme Court in the case of National Federation of the Blind (supra) while deciding the contempt petition and, therefore, the same also are of no assistance to the appellant.

32. In view of the above discussion, there is no substance in the appeal and the same is, therefore, dismissed. No order as to costs.