

(2012) 01 KAR CK 0312
In the Karnataka High Court
Case No : Writ Appeal No. 4738 of 2011 (S-R)

Bangalore Water Supply and Sewerage Board	APPELLANT
Vs	
Bangalore Water Supply and Sewerage Board Pensioners Association and The Secretary to the Government of Karnataka	RESPONDENT

Date of Decision : 31-01-2012

Acts Referred:

Army Pension Regulations, 1961 — Regulation 34
Constitution of India, 1950 — Article 14, 21, 226

Citation : (2012) 01 KAR CK 0312

Hon'ble Judges : Vikramajit Sen, C.J.; B.V. Nagarathna, J

Bench : Division Bench

Advocate : Udaya Holla, for Sri M.S. Narayan, for the Appellant; H.N. Narayan, for Smt. Lakshmy Iyengar, Advocate for R-1 to R-3, Shri. B. Veerappa, Additional Government Advocate for R-4, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, C.J.—This appeal assails the order of the learned Single Judge dated 4.2.2011 directing the Bangalore Water Supply & Sewerage Board (hereafter referred to as "Board") to accord the members of the petitioner Association revised pensionary benefits with effect from 1.7.2003 onwards upto 1.7.2008 and thereafter in accordance with revision of pay scales wherever and whenever applicable. Secondly, the learned Single Judge has accepted and acted upon the undertaking of the petitioner Association to the effect that they shall not insist on payment of arrears prior to 1.7.2008, and has directed that these would not be payable consequent upon the revision of pension retrospectively. Thirdly the respondent - Board has also been called upon to consider the request of the petitioner Association vis-a-vis sanction of medical benefits to the pensioners and their spouses on such terms as the Board deems fit. Fourthly, the respondent - Board has been directed to implement the foregoing three directions within a period of three months from the date of receipt of a copy of

the impugned order. The facts so far as they are germane for a decision of this appeal, succinctly stated, are thus. The Board has itself fixed and implemented pay scales for its employees since 1.7.1986. Revisions of pay scales have occurred on 1.7.1990, 1.7.1994, 1.7.1998, 1.7.2003 and 1.7.2008. It appears that pension was revised with regard to all employees on two previous occasions, that is, 1.7.1990 and 1.7.1994. In 1998 the Board devised a dichotomy within the pensioners, viz., the dividing date having retirements prior and post 1.7.1990. The petitioner Association espoused the cause of those pensioners, falling in the first category. Since several representations ended in futility, the Association had no alternative but to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. Pensioners falling in the second category have received the benefit of the revised pension with regard to the increases on 1.7.1990 as well as 1.7.1994 and onwards. It appears that the State Government has revised pension with effect from 1.4.1998 on the general revision of pay scales, but the Board has, not extended these benefits to the petitioners with effect from. 1.4.1998 onwards.

2. The learned Single Judge has granted the relief mentioned above almost entirely on the decision of the Constitution Bench in *D.S. Nakara and Others Vs. Union of India (UOI)*, . The petitioners before the Constitution Bench were retired pensioners of the Central Government, civil servants and members of the Armed Forces. Therefore the present petitioners - pensioners must inevitably swim or sink depending on whether they fall within or without the ratio of *Nakara*. The Constitution Bench in *Nakara* had referred to its previous Constitution Bench decision in *Deokinandan Prasad Vs. The State of Bihar and Others*, and reiterated that it is indeed an antiquated notion that pension is a bounty or gratuitous payment flowing from the sweet will or grace of the employer and that it is not claimable as a right. The Constitution Bench in *Nakara* opined that pension is not only compensation for loyal services rendered but that it partakes of a measure of socio-economic justice. The Constitution Bench also noticed that "the continuous upward movement of the cost of living index has a sequel on inflationary input and diminishing purchasing power of rupee necessitated upward revision of pension". We can do no better than to reproduce extracts from this celebrated judgment for the reason that it is our understanding that this Appeal must perforce predicted completely and comprehensively on the ratio decidendi of *Nakara*.

42. If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who

retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worse off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs 8100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs 12,000 p.a. and average emolument will be computed on the basis of last 10 months' average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter-productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours' difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14.

43. Further the classification is wholly arbitrary because we do not find a single acceptable or persuasive reason for this division. This arbitrary action violated the guarantee of Article 14. The next question is what is the way out?

49. But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the liberalised pension scheme, because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable. And that would take care of the grievance of retrospectivity. In our opinion, it would make a marginal difference in the case of past pensioners because the emoluments are not revised. The last revision of emoluments was as per the recommendation of the Third Pay Commission (Raghubar Dayal Commission). If the emoluments remain the same, the computation of average emoluments under amended Rule 34 may raise the average emoluments, the

period for averaging being reduced from last 36 months to last 10 months. The slab will provide slightly higher pension and if someone reaches the maximum the old lower ceiling will not deny him what is Otherwise justly due on computation. The words "who were in service on March 31, 1979 and retiring from service on or after that date" excluding the date for commencement of revision are words of limitation introducing the mischief and are vulnerable as denying equality and introducing an arbitrary fortuitous circumstance can be served without impairing the formula. Therefore, there is absolutely no difficulty in removing the arbitrary and discriminatory portion of the scheme and it can be easily severed.

65. That is the end of the journey. With the expanding horizons of socio-economic justice, the Socialist Republic and welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criteria: "being in service and retiring subsequent to the specified date" for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of "being in service on the specified date and retiring subsequent to that date" in impugned memoranda, Exs. P-1 & P-2, violates Article 14 and is unconstitutional and is struck down. Both the memoranda shall be enforced and implemented as read down as under: In other words, in Ext. P-1, the words:

that in respect of the government servants who were in service on March 31, 1979 and retiring from service on or after that date

and in Ex. P-2, the words:

the new rates of pension are effective from April 1, 1979 and will be applicable to all service officers who became/become non-effective on or after that date

are unconstitutional and are struck down with this specification that the date mentioned therein will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. Omitting the unconstitutional part it is declared that all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement. Arrears of pension prior to the specified date as per fresh computation is not admissible. Let a writ to that effect be issued. But in the circumstances of the case, there will be no order as to costs.

3. On behalf of the appellant - Board it has been conceded that the ratio in

Nakara applies on all fours to the facts of the present case. However reliance has been placed on the subsequent decisions of two Judge Benches in *State of W.B. Vs. Monotosh Roy and Another*, ; *State of W.B. v. W.B. Government Pensioners' Association* (2002) 5 SCC 179; *State of Punjab and Others Vs. Amar Nath Goyal and Others*, and *Sudhir Kumar Consul Vs. Allahabad Bank*, . There can be no cavil that all these judgments run counter to the tenor and essence of Nakara; nay they are all inconsistent and irreconcilable with the binding opinion of the Constitution Bench. What option lies before us is the conundrum that stares us in the face. It becomes imperative to delve into the principle of stare decisis, that is, the parameters within which the later Bench of a High Court or the Supreme Court can move around with regard to a decision already rendered by a Bench of greater strength.

4. The question before the Constitution Bench in *Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc.*, was whether the Land Acquisition Act, 1894 postulated a claim to solatium at thirty per cent of the market value regardless of the date of the acquisition. In that context several Judgments of the Supreme Court came to be cited. It was in those circumstances the Supreme Court clarified the law in these terms:-

26. It is not necessary to refer to all the cases on the point. The broad guidelines are easily deducible from what has gone before. The possibility of further defining these guiding principles can be envisaged with further juridical experience, and when common jurisprudential values linking different national systems of law may make a consensual pattern possible. But that lies in the future.

27. There was some debate on the question whether a Division Bench of Judges is obliged to follow the law laid down by a Division Bench of a larger number of Judges. Doubt has arisen on the point because of certain observations made by O. Chinnappa Reddy, J. in *Javed Ahmed Abdulhamid Pawala Vs. State of Maharashtra*, . Earlier, a Division Bench of two Judges, of whom he was one, had expressed the view in *T.V. Vatheeswaran Vs. State of Tamil Nadu*, that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle a person under sentence of death to invoke Article 21 of the Constitution and demand the quashing of the sentence of death. This would be so, he observed, even if the delay in the execution was occasioned by the time necessary for filing an appeal or for considering the reprieve of the accused or some other cause for which the accused himself may be responsible. This view was found unacceptable by a Bench of three Judges in *Sher Singh and Others Vs. State of Punjab*, , where the learned Judges observed that no hard and fast rule could be laid down in the matter. In direct disagreement with the view in *T. V. Vatheeswaran (supra)*, the learned Judges said that account had to be taken of the time occupied by proceedings in the High Court and in the Supreme Court and before the executive authorities, and it was relevant to consider whether the delay was attributable to the conduct of the accused As a

member of another Bench of two Judges, in Javed Ahmed Abdul Hamid Pawala (supra) O. Chinnappa Reddy, J. questioned the validity of the observations made in Sher Singh (supra) and went on to note, without expressing any concluded opinion on the point, that it was a serious question "whether a Division Bench of three Judges could purport to overrule the judgment of a Division Bench of two Judges merely because three is larger than two. The court sits in divisions of two and three Judges for the sake of convenience and it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of two Judges. Vide *Young v. Bristol Aeroplane Co. Ltd.* (1944) 2 All ER 293. It may be otherwise where a Full Bench or a Constitution Bench does so." It is pertinent to record here that because of the doubt cast on the validity of the opinion of Sher Singh (supra), the question of the effect of delay on the execution of a death Sentence was referred to a Division Bench of five Judges, and in *Triveniben Vs. State of Gujarat*, the Constitution Bench overruled *T. V. Vatheeswaran* : 1983 CriLJ 693 (supra).

28. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising; the same point subsequently before a Division Bench of a smaller number of Judges? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the Courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainly in the law laid down by a superior Court, the ideal condition would be that the entire court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and, by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In *John Martin Vs. State of West Bengal*, a Division Bench of three Judges found it right to follow the law declared in *Haradhan Saha Vs. The State of West Bengal and Others*, decided by a Division Bench of five Judges, in preference to *Bhut Nath Mete Vs. The State of West Bengal*, decided by a Division Bench of two Judges. Again in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, Beg, J held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in *His Holiness Kesavananda Bharati Sripadagalvaru Vs.*

State of Kerala, . In Ganapati Sitaram Balvalkar and another Vs. Waman Shripad Mage (Since Dead) through Lrs, , this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three Judges of the Court. And in Mattulal Vs. Radhe Lal, this Court specifically observed that where the view expressed by two different Division Benches of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and Others Vs. The State of Gujarat and Others, , that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was re-affirmed in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., which noted that a Division Bench of two Judges of this Court in Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, had differed from the view taken by an earlier Division Bench of two Judges in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, on the point whether the doctrine of promissory estoppel could be defeated by invoking the defence of executive necessity, and holding that to do so was wholly unacceptable reference was made to the well accepted and desirable practice of the later Bench referring the case to a larger Bench when the learned Judges found that the situation called for such reference.

5. Raghubir Singh was applied once again by the Constitution Bench in Chandra Prakash v. State of U.P., AIR 2002 SC 1652. We think it is instructive and worthwhile to extract the following observations from Chandra Prakash in order to underscore that there is a consistent and constant judicial opinion, spanning across decades, on this aspect of jurisprudence:

22. Almost similar is the view expressed by a recent judgment of a five-Judge Bench of this Court in Parija's case(supra). In that case, a Bench of two learned Judges doubted the correctness of the decision of a Bench of three learned Judges, hence, directly referred the matter to a Bench of five learned Judges for reconsideration. In such a situation, the five-Judge Bench held that judicial discipline and propriety demanded that a Bench of two learned Judges should follow the decision of a Bench of three learned Judges. On this basis, the five-Judge Bench found fault with the reference made by the two-Judge Bench based on the doctrine of binding precedent.

23. A careful perusal of the above judgments shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the law declared by this Court should be certain, clear and consistent. As stated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them but also because in doing so they embody a

declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of Raghbir Singh held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or smaller number of Judges. It is in furtherance of this enunciation of law, this Court in the latter judgment of Parija (supra) held that-

But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.

In order to avoid prolixity we shall go no further than mention Union of India (UOI) and Another Vs. K.S. Subramanian, and M/s. Indian Petrochemicals Corporation Ltd. and Another Vs. Shramik Sena, .

6. In this analysis, our conclusion on the extremely important aspect of stare decisis is that when a Bench is faced with a decision of a previous Bench of equal strength it is expected to follow the previous decision and apply its ratio. Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., , followed in M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., cogitated on the principle of per incuriam. Their Lordships held that "Certainty of law, consistency of rulings and comity of courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases.....a prior decision of this court on identical facts and law binds the court on the same points in a later case. Here we have a decision admittedly rendered on facts and law indistinguishably identical, and that ruling must bind". The same maxim has been considered in detail in the decision reported as State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, . We think that the following paragraphs call for reproduction:

40. Incuria" literally means "carelessness". In practice "per incuriam" appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions

when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law?. Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., P.153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. the Court did not feel bound earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The bench held that, "precedents sub-silentio and without argument are of no moment". The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistence are core of judicial discipline. But that which escapes in the Judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

7. If the freedom to pick and choose between two decisions of the Supreme Court of India is bestowed on subordinate courts, it would run counter to Article 141 of the Constitution of India which simply and concisely states that - "the law declared by the Supreme Court shall be binding on all Courts within the territory of India". In Government of Andhra Pradesh v. A.P. Jaiswal, AIR 2001 SC 499 it has been enunciated that "consistency is the corner stone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedence, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice". S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, , reminds and reiterates that a "coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement."

8. Union of India (UOI) and Another Vs. Major Bahadur Singh, concerned the question of whether the decision of the Apex Court in U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, established a binding precedent. Their Lordships clarified that the Court should abjure expounding the law without any discussion on the subject. The passages extracted above were once again reiterated. In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, the Court opined that where a decision is rendered merely on the factual matrix of the case it would not constitute a declaration of the law and would therefore not form a precedent. We, so very often the difference between an Order and a Judgment is lost sight of. Orders are restricted to the facts obtaining in that case alone and unlike Judgments have no significance in rem. Quite recently the three Judge Bench has condensed law on the subject succinctly in Pyare Mohan Lal Vs. State of Jharkhand and Others, to be that "in case there is a conflict between two judgments of this Court, the judgment of the larger Bench is to be followed." While so doing their Lordships had harkened back to the observations in the Seven Judge Bench decision reported as A.R. Antulay Vs. R.S. Nayak and Another, wherein it is held that "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. After deep cogitation we think that the dictum of Nakara applies on all force to the material facts that presented before us. If this is so, we must be shown a decision of a larger Bench which has come to a different conclusion. Conglomeration of the law, none has been shown to us and therefore, presumption which must be drawn is that two Judge Benches were seized of a factual matrix that was demonstrably distinguishable from Nakara. Brevity demands us to show no more than this. It is in this analysis, we uphold the decision of the learned Single Judge who has also confined himself to the conclusion of law laid down in Nakara. While we were hearing the arguments, we had articulated our opinion that it would be unfair to hold that the pensioners' unilateral undertaking to forego from their claiming arrears of pension does not preclude them to claim revision in pension. We continue to hold that opinion, since the Order of the learned single Judge has been assailed without any success. The number of pensioners have dwindled over the years and since that has liberated from their reliant penury. But since we would be setting a precedent of large financial proportion, we shall abjure from going any further than the learned Single Judge had ventured.

The Writ Appeal is dismissed with costs throughout.