

(2014) 12 RAJ CK 0036

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 933/2001

Bheru and Others

APPELLANT

Vs

Mangilal and Others

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 439(6)
Limitation Act, 1963 — Section 5
Rajasthan Land Revenue Act, 1956 — Section 75, 76, 83, 9
Rajasthan Tenancy Act, 1955 — Section 188, 19, 19(2), 2, 212

Citation : (2015) 2 CDR 653

Hon'ble Judges : Veerender Singh Siradhana, J;Ajay Rastogi, J

Bench : Division Bench

Advocate : Saket Pareek and A.N. Sharma, Counsel, Advocates for the Appellant; K.K. Mehrishi, Sr. Advocate and Rajesh Kapoor, Counsel, Advocates for the Respondent

Judgement

1. Instant intra Court appeal is directed against order of the learned Single Judge dt. 21.09.2001. The brief facts which may be necessary & culled out for consideration of the instant appeal are that the suit land bearing khasra No. 4174 measuring 3 bighas 13 biswas at village Bagru Kalan Tehsil Sanganer, Jaipur indisputably was under the cultivatory possession of ancestors of the present appellants Bheru (deceased) & Murli (deceased) and Khatedari Parcha of the subject land in question was issued by the settlement department in Samwat 2011 in the name of Kalyan & Birdha respectively father & uncle of the present appellants.

2. The respondent Mangi Lal @ Mangla S/o Bhura filed application u/S. 19 of the Rajasthan Tenancy Act, 1955 in 1969 for conferment of khatedari rights before the Naib. Tehsildar, Sanganer who was officiating Tehsildar after taking report from the Patwari regarding possession over the suit land in clear violation of the principles of natural justice and without impleading the present appellants who

are recorded khatedars of the suit land passed order dt. 08.08.1969 by replacing names of appellants' father & uncle and substituted name of Mangi Lal @ Mangla conferring khatedari right on the suit land. Indisputably the appellants had no knowledge of the said order but in the light of order passed by the Naib Tehsildar (officiating Tehsildar) dt. 08.08.1969 mutation in the name of respondent Mangi Lal was opened on 08.09.1969 and thereafter this fact came to notice of the appellants about the said mutation opened in the name of respondent Mangi Lal, against the impugned action appeal (75/1970) came to be preferred at their instance before the Additional Collector on 20.01.1970 but as there was limitation of 90 days and since the appeal was preferred on 20.01.1970 and in support thereof filed application seeking condonation of delay u/S. 5 of the Limitation Act but the delay was not condoned the appeal came to be dismissed on the ground of limitation vide order dt. 29.06.1970 and a further revision preferred at the instance of the appellants before the Board of Revenue u/S. 230 of the Rajasthan Tenancy Act assailing order of Naib Tehsildar, Sanganer dt. 08.08.1969 & of Additional District Collector dt. 29.06.1970 but that came to be dismissed on the premise that revision u/S. 230 of the Rajasthan Tenancy Act is not maintainable, vide order dt. 02.12.1971.

3. After the regular Tehsildar took over charge of office and this fact came to his notice that the Naib Tehsildar who was officiating Tehsildar in a surreptitious manner exercising power u/S. 19 of the Rajasthan Tenancy Act passed arbitrary order dt. 08.08.1969 conferring khatedari rights in favour of Mangi Lal over the suit land in question bearing khasra No. 4174 measuring 3 bigas 13 biswas, the Tehsildar Sanganer inquired into the matter and sent its recommendations on 15.02.1970 to the Collector, Jaipur for cancellation of the order dt. 08.08.1969 who after hearing the respondent u/S. 83 of the Land Revenue Act referred the matter to the State Government on 22.02.1971 for taking appropriate action under law, pursuant thereto the order was passed by the Government on 19.06.1971 and the matter was referred back to the District Collector for taking appropriate action u/R. 14(4) of the Rajasthan Land Revenue (Allotment of Land for Agricultural Purposes) Rules, 1970 (hereinafter referred to Rules, 1970) and after affording opportunity of hearing to the respondent and taking note of the fact that the suit land bearing khasra No. 4174 measuring 3 bigas 13 biswas in which Birdha & Kalyan were recorded as khatedars in Samwat 2011 and their names were duly recorded in khasra girdavadari khata No. 19 and thereafter from Samwat 2012 and 2011-2016 which was recorded as Khudkhast of the suit land which indisputably belong in the khatedari of the present appellants in Samwat 2017 and in Khata No. 16 name of the respondent Mangla has been recorded and further observed that initially the revenue records of 2011 & 2012-2016 recorded as Khudkhast and indisputably was in the khatedari rights of the present appellants however in Samwat 2017 it was recorded in the name of Mangla and it was further observed that the Naib Tehsildar was not holding any competence to confer khatedari rights in favour of the respondent Mangla in exercise of power u/S. 19 of the Rajasthan Tenancy Act and accordingly after

examining the complete revenue records set aside the order passed by the Naib Tehsildar dt. 08.08.1969 vide its order 26.02.1973 and that order of the District Collector dt. 26.02.1973 came to be challenged by the respondent Mangla by filing appeal u/S. 75 of the Rajasthan Land Revenue Act before Revenue Appellate Authority in which present appellants were not impleaded as party respondents and that appeal came to be allowed vide order dt. 31.12.1986 primarily on the premise that the order dt. 08.08.1969 could not have been set aside by the District Collector exercising power u/R. 14(4) of the Rules, 1970.

4. When the appellants came to know of the said order dt. 31.12.1986 that the order of the District Collector dt. 26.02.1973 has been set aside, second appeal was preferred at their instance before the Board of Revenue u/S. 76 of the Rajasthan Land Revenue Act in which the respondent Mangi Lal and State both were impleaded as party respondents and the learned Board of Revenue apart from technicalities taking into consideration factual matrix of the matter as to who was the recorded khatedar of the suit land and the procedure followed by Naib Tehsildar exercising power u/S. 19 of the Rajasthan Tenancy Act in passing of order from which the controversy arose dt. 08.08.1969 and entry of mutation No. 406 dt. 08.09.1969 in favour of the respondent and all other objections, took assistance of Sec. 221 of the Rajasthan Tenancy Act read with Sec. 9 of the Rajasthan Land Revenue Act of general superintendence which vests with the Board of Revenue and arrived to the conclusion that the procedure adopted by Naib Tehsildar in passing of the order conferring khatedari rights in favour of the respondent was completely arbitrary and clear abuse of power and accordingly observed that those who are recorded khatedars namely Bheru & Murli no opportunity was afforded to them and order dt. 08.08.1969 was passed in clear violation of principles of natural justice and so also the competence of the Naib Tehsildar in passing of the order dt. 08.08.1969 & consequential mutation No. 406 dt. 08.09.1969 & the order of Revenue Appellate Authority dt. 31.12.1986 were quashed & set aside after assigning detailed reasons vide order dt. 10.10.1994 which was the subject matter of challenge at the instance of the respondent by filing of a writ petition in this Court.

5. It will be relevant to note that apart from the pending proceedings between the parties a separate revenue suit for declaration & permanent injunction u/S. 88 & 188 of Rajasthan Tenancy Act came to be filed at the instance of the respondent in 1984 for the self same subject land bearing khasra No. 4174 measuring 3 bigha 13 biswas Gram Bagru Tehsil Sanganer along with an application for temporary injunction u/S. 212 of the Rajasthan Tenancy Act, initially injunction was granted vide order dt. 07.11.1984, against which appeal came to be preferred by the appellants u/S. 225 of the Rajasthan Tenancy Act and after hearing the parties the appeal came to be dismissed vide order dt. 31.08.1987 which was subject matter of challenge at the instance of the present appellants by filing revision petition before the Board of Revenue and after hearing the parties the learned Board of Revenue vide its order dt. 03.06.1994 allowed the revision petition holding that the respondent had no title and

possession of the suit land and against the order of the Board of Revenue dt. 03.06.1994 the respondent preferred S.B. Civil Writ Petition No. 1215/1995, while dismissing the writ petition vide order dt. 21.09.2001 it was noticed by the learned Single Judge in its order that the possession of the suit land was with the appellants Bheru & Murli and they had been in possession of the suit land at the relevant time the respondent was not entitled for any injunction u/S. 212 of the Act and as informed to this Court the civil suit filed at the instance of the respondent seeking declaration & permanent injunction is still pending before the Ld. trial Court.

6. It may noticed that the writ petition preferred by the respondent against order of the Board of Revenue dt. 10.10.1994 the learned Single Judge failed to consider on merits, at the same time was of the view that since the earlier order passed by the Naib Tehsildar dt. 08.08.1969 has travelled upto the Board of Revenue and by an order dt. 02.12.1971 the revision petition preferred at the instance of the present appellants u/S. 230 of the Rajasthan Tenancy Act came to be rejected, the original order of the Naib Tehsildar dt. 08.08.1969 merges into the order of the Board of Revenue dt. 02.12.1971 and the procedure undertaken at the instance of the Tehsildar in examining the order passed by the Naib Tehsildar dt. 08.08.1969 which travelled upto the Board of Revenue according to learned Single Judge was not valid & justified and set aside order of the Board of Revenue dt. 10.10.1994 and that is the subject matter of challenge in the instant intra Court appeal.

7. Counsel for appellants submits that the provisions of sub-section (1-A) was added by sec. 3 of the Rajasthan Amendment Act No. 12 of 1961 which commenced w.e.f. 05.04.1961 in Sec. 19 of the Rajasthan Tenancy Act, 1955 and by virtue of Sec. 2 of Sec. 19 it is provided that every tenant referred to in clause (b) of sub-section (1) claiming the right mentioned in that sub-section accrued to him on the appointed date shall file application within two years before the competent authority being the Assistant Collector and that can very well be noticed from part-II of schedule-III appended to the Rajasthan Tenancy Act where the Assistant Collector is authorized to entertain such application for declaration of having acquired khatedari rights u/S. 19 of the Rajasthan Tenancy Act to be entertained within two years from the appointed date and according to the counsel application for declaration of having acquired khatedari rights u/S. 19 cannot be heard & decided below the Court of Assistant Collector and under these facts & circumstances the Naib Tehsildar was not having any jurisdiction & competence to hear & decide the aforesaid application filed by the respondent u/ Sec. 19 of Tenancy Act and apart from it the revenue records clearly indicate that the present appellants are recorded khatedars of the suit land in question in Samwat 2011 and at all stages thereafter and the order passed by the Naib Tehsildar certainly has adversely affected the rights of the present appellants and passing of order behind the back of the present appellants dt. 08.08.1969 was wholly arbitrary and in violation of the principles of natural justice.

8. Counsel submits that the appeal preferred by the appellants before the Additional Collector was dismissed being barred by limitation vide order dt. 29.06.1970 and the revision petition preferred thereafter before the Board of Revenue u/S. 230 of the Rajasthan Tenancy Act also came to be dismissed holding that it was not maintainable and under these facts & circumstances merits of the order passed by the Naib Tehsildar dt. 08.08.1969 has never been examined by the Court of appeal/revisonal authority and under these facts & circumstances the theory of doctrine of merger which has been considered & adopted by the learned Single Judge in nullifying the procedure initiated for the suit land in question by the Tehsildar & examined by the District Collector in the first instance on merits & arrived to the conclusion that the order of the Naib Tehsildar dt. 08.08.1969 conferring khatedari rights in favour of the respondent was wholly without jurisdiction and the revenue records have not at all been looked into by the Naib Tehsildar while passing of the order dt. 08.08.1969 and the matter was further travelled upto to the Board of Revenue and finally the Board of Revenue vide its order dt. 10.10.1994 confirmed orders of the District Collector could not have been nullified on the basis of principle of doctrine of merger which in the present facts & circumstances is not at all applicable and this is one of the manifest error which the learned Single Judge has committed in passing of the order impugned dt. 21.09.2001.

9. Counsel further submits that if the Court fails to interfere in protecting rights of the parties and the order of learned Single Judge if not considered & examined by this Court on merits the fact remains that the order which is per se bad in the eye of law passed by Naib Tehsildar who does not hold any competence under law and which the respondents have not been able to justify before this Court and if such order dt. 08.08.1969 is restored this will be a gross injustice caused to the present appellants and the order passed by the learned Single Judge under these facts & circumstances based on the principle of merger does not hold good and requires interference by this Court and in support of submission placed reliance on the judgment of Apex Court in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, and Commissioner of Central Excise, Delhi Vs. Pearl Drinks Ltd., .

10. On the other hand, learned Senior Counsel Sh. Melirishi while supporting order of the learned Single Judge impugned herein dt. 21.09.2001 submits that once the order of Naib Tehsildar dt. 08.08.1969 travelled upto the Board of Revenue became final and the second round of litigation initiated at the instance of the Tehsildar, Jaipur was wholly uncalled for and power u/R. 14(4) of the Rules, 1970 was not available and to exercise under right to general superintendence u/S. 221 of the Rajasthan Tenancy Act read with section 9 of the Rajasthan Land Revenue Act was abuse of power and such an order passed by the Board of Revenue is not legally sustainable in the eye of law in the second round of litigation and the learned Single Judge has rightly set aside such orders which were not legally sustainable and further submits that indisputably R. 14(4) of the Rules, 1970 could have been exercised by the Collector upon conferment of the khatedari rights and this what has been considered in the case of Pat Ram

& Ors. v. State of Raj. & Ors., 1995 (2) RBJ 780.

11. Counsel further submits that as regards supervisory powers of the Board of Revenue provided u/S. 9 of the Rajasthan Land Revenue Act are concerned that has to be exercised where alternative remedy of appeal or revision is not available and such extraordinary jurisdiction of the Board of Revenue cannot be invoked and once the remedy of appeal & revision has been exercised by the appellants exercise of power u/Sec. 9 of the Act was not valid & sustainable in the eye of law and placed reliance upon judgment of Single Bench of this Court in Narendra Kumar Acharya v. Bhure Khan & Ors., 2004 RRD 687.

12. We have considered the submissions made by counsel for the parties and with their assistance examined the material on record.

13. At the outset it will be appropriate to first take note of the fact that while quashing order of the Board of Revenue dt. 10.10.1994 the learned Single Judge in its order impugned dt. 21.09.2001 has not examined the dispute on merits and from the narration of facts after order of the Naib Tehsildar dt. 08.08.1969 and opening of mutation on 08.09.1969 the matter travelled upto the Board of Revenue but at no stage the order dt. 08.08.1969 was examined on merits and at the same time independent proceedings initiated by the Tehsildar on 15.02.1970 came to be affirmed by the District Collector after opportunity of hearing being afforded to the parties in arriving to a final conclusion that the proceedings initiated by the Naib Tehsildar dt. 08.08.1969 for conferment of khatedari rights was neither legally sustainable nor valid & justified in its order dt. 26.02.1973 and which finally came to be affirmed by the Board of Revenue vide its order dt. 10.10.1994 was not accepted by the learned Single Judge primarily on the premise that the order dt. 08.08.1969 of Naib Tehsildar since travelled upto the Board of Revenue and became final based on the principles of doctrine of merger the orders passed by the revenue authorities was held not sustainable in the eye of law.

14. It will be appropriate to first examine the basic principle of doctrine of merger which we do not find at all being discussed by the learned Single Judge in its order impugned. The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on the principles of propriety in the hierarchy of justice delivery system and it will depend on the nature of jurisdiction exercised by the superior forum and the content of the subject matter of challenge laid or capable of being laid shall be determinative factors for applicability of merger. It is true that whenever the matter is disposed of in appeal or revision by the appellate or revisional authority on merits after the parties being heard the principle of merger certainly would apply to the orders passed. The principle of merger has been examined by the Apex Court in the judgment reported in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, and observed as under :--

"The principle that the decree of the trial Court merges in the decree of the

appellate Court was held to be applicable in *U.J.S. Chopra v. State of Bombay* to orders passed in criminal proceedings. In that case the High Court dismissed summarily an appeal filed by an accused against his conviction and sentence. Thereafter, the State of Bombay filed an application in the High Court for enhancement of the sentence. While holding that the summary dismissal of the appeal preferred by the accused did not preclude him from taking advantage of the provisions of Section 439(6) of the CrPC and showing cause against his conviction when he was subsequently called upon to show cause why the sentence imposed on him should not be enhanced, *Bhagwati and Imam JJ.* observed : "A Judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties...would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below." (pp. 133-134). *Das, J.* agreed with the conclusion of the majority as regards the right of the accused to challenge the conviction under Section 439(6) but he went a step further and said that there is a merger or replacement of the judgment of the lower Court whenever the High Court disposed of the appeal or revision and that "it makes no difference whether the dismissal is summary or otherwise". (p. 118).

15. It also came to be considered by the Apex Court in the judgment reported in *State of Kerala and Another Vs. Kondottyparambanmoosa and Others*, and observed as under:--

"In this view of the matter, we are, therefore, of the opinion that the doctrine of merger would only apply in a case when a higher forum entertains an appeal or revision and passes an order on merit and not when the appeal or revision is dismissed on the ground that delay in filing the same is not condoned. In our view, mere rejection of the revision petition on the ground of delay cannot be allowed to take away the jurisdiction of the Board, whose order forms a subject-matter of petition and Section 85(9) of the Act confers powers on the Board to reopen the case if such grounds for reopening the case are shown to exist."

16. It further came to be considered by the Apex Court in the judgment reported in *Commissioner of Central Excise, Delhi Vs. Pearl Drinks Ltd.*, and observed as under:--

"No reference to the pronouncements of this Court on the subject can be complete without a reference to the decision of this Court in *Kunhayammed* case and *Mauria* case. In *Kunhayammed* case a three-Judge Bench of this Court reviewed the decisions rendered on the subject and summed up its conclusions in para 44 of this decision. One of the said conclusions apposite to the case at hand is in the following words : (SCC p.384)

"44. To sum up, our conclusions are :

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and

the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter."

There is, in the light of the above pronouncements, no gainsaying that the doctrine of merger will depend largely on the nature of the jurisdiction exercised by the superior Court and the content or the subject-matter of challenge laid or capable of being laid before it."

17. The doctrine of merger certainly has application as it either modify or substitute. After the parties being heard and the judgment is pronounced in the Court of appeal or revisional jurisdiction one can say it is merger or replacement of the judgment of the Court below and the order of the lower Court merges into the judgment of the Higher Court. But where the appeal is dismissed on the ground of delay or any other technicalities without being examined on merits the doctrine of merger may not have any application. However, the matter has been recently referred by the Apex Court to be considered by the Larger Bench in *Khoday Distilleries Ltd. and Others Vs. Mahadeshwara S.S.K. Ltd.*, but in absence of any outcome of the matter referred to the Larger Bench as observed by the Apex Court, in our considered view unless the matter being examined by the Court of appeal or revisional Court on merits after the parties to the litigation being heard the principle of merger may not have any application and that is neither merger nor replacement of the order initially passed by the authority and in our considered view the order of the learned Single Judge based on the principle of merger setting aside order of the District Collector dt. 26.02.1973 and of the Board of Revenue dt. 10.10.1994 is not legally sustainable in the eye of law.

18. We may not like to rest the matter here and can be noticed from the available records that the initial order passed by the Naib Tehsildar u/S. 19 of the Rajasthan Tenancy Act dt. 08.08.1969 pursuant to which mutation was opened in the name of the respondent on 08.09.1969 as apparent on the face of it was illegal and without any competence and we find substance in the submission made by counsel for appellants that u/S. 19(2) of the Act every tenant of Khudkhast or sub-tenant referred to in clause (b) of sub-section (1) claiming that the rights mentioned in the sub-section accrued to him on the appointed date in the whole or any part of his holding shall within two years of appointed date and on payment of a Court fee apply to the Assistant Collector and by virtue of item No. 35(d) which was added by Sec. 7 of Rajasthan Act No. 4 of 1960 which was commenced w.e.f. 21.03.1960 of Part-II of Schedule-III the Assistant Collector was authorized by the State Government to entertain such application for

declaration of having acquired khatedari rights u/S. 19(2) which has. to be filed within two years of the appointed date and indisputably in the instant case the application was filed by the respondent much after the period provided u/S. 19(2) and apart from it there is no provision for seeking condonation of delay or extension of time and that apart application is to be entertained by the Assistant Collector and the Naib Tehsildar was otherwise not holding any competence to pass orders on such an application filed by the respondent u/S. 19(2) of the Rajasthan Tenancy Act, 1955 for conferment of khatedari rights and the respondent was unable to justify & support order the order passed by the Naib Tehsildar dt. 08.08.1969 u/S. 19(2) of the Act and as regards the further appeal or revision which was preferred by the appellant is concerned, that came to be dismissed on limitation or being not maintainable and merits of the matter either by the appellate or by the revisional Court was not looked into and mere rejection of appeal or revision in the facts could not have confirmed the order originally passed by the Naib Tehsildar dt. 08.08.1969 and the principle of merger has no application in the facts of the instant case.

19. At the same time, when the regular Tehsildar took over the charge and it came to his notice that his predecessor who was the officiating Tehsildar passed such order for conferment of the khatedari rights dt. 08.08.1969 without examining the revenue records the Tehsildar took cognizance and send its recommendations to the District Collector for quashing of such illegal order passed by his predecessor in his office who was officiating Tehsildar. It will be appropriate to reproduce what has been recorded by the District Collector in its order dt. 26.02.1973 which reads as under:--

20. We find that the order was assailed/challenged by the respondent in appeal before the Revenue Appellate Authority but there was no challenge to the facts noticed by the District Collector in its order dt. 26.02.1973 and travelled upto the Board of Revenue and the matter was disposed of on merits finally taking note of R.14(4) of the Rules, 1970 but it is not the case of the parties that there is no provision under which such order could be examined at the higher forum and there is no appeal or revision provided under the Act for examining the validity of such order passed by the Naib Tehsildar conferring khatedari rights without application of principle of law.

21. After opportunity of hearing being afforded in the peculiar facts & circumstances in our considered view it can certainly be looked into by the Board of Revenue in exercise of general superintendence u/S. 221 of the Rajasthan Tenancy Act read with Sec. 9 of the Land Revenue Act and we do not find any error in the order of the Board of Revenue dt. 10.10.1994 but the learned Single Judge failed to consider on merits and based on the principles of merger set aside the orders and which as already observed by us is not legally sustainable in the eye of law.

22. As we have already noticed from the records that there is already a suit filed by the respondent u/S. 88 & 188 of the Rajasthan Tenancy Act for declaration &

permanent injunction along with application for temporary injunction filed u/S. 212 of the Rajasthan Tenancy Act and which also travelled upto the High Court and the finding of fact came on record that the respondent was not entitled to seek any injunction over the suit land in question as was not able to satisfy all the three ingredients; prima facie case, balance of convenience & irreparable loss and in the absence of possession of the suit land being established the respondent was not considered for grant of temporary injunction prayed for and that being finally confirmed by this Court in the proceedings which were initiated at the instance of the respondent in CWP-1215/1995 we do not find any justification in granting approval to the order originally passed by the Naib Tehsildar dt. 08.08.1969 and the consequential mutation opened in the name of the respondent on 08.09.1969 and this what the Board of Revenue finally considered & examined in its order dt. 10.10.1994.

23. Indisputably the order passed by the Naib Tehsildar dt. 08.08.1969 opportunity of hearing to the recorded khatedars of the suit land in question was not afforded and it is settled principles of law that no-one should be condemned unheard and right of hearing is one of the basic tenet of administrative law and mandate of the principles of natural justice being violated the original order dt. 08.08.1969 is not sustainable in law. Consequently, in our considered view the present appeal deserves acceptance and is hereby allowed and order of the learned Single Judge impugned herein dt. 21.09.2001 is hereby quashed and set aside. No cost.