

(2016) 02 GUJ CK 0187

In the Gujarat High Court

Case No : Special Civil Application No. 2092 of 2002

D.K. Dave

APPELLANT

Vs

Secretary, Government of Gujarat and Others

RESPONDENT

Date of Decision : 23-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Gujarat Sales Tax Act, 1969 — Section 30

Citation : (2016) 02 GUJ CK 0187

Hon'ble Judges : Abhilasha Kumari, J.

Bench : Single Bench

Advocate : Vidhi J. Bhatt, Advocate, for the Appellant; Vacha Desai, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—1. By way of this petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 05.11.2001, passed by the Disciplinary Authority (respondent No. 1), whereby, the penalty of withholding one increment of Rs. 175/- in the petitioner's pay-scale for a period of five years, with future effect, has been imposed upon him.

2. Briefly stated, the factual matrix of the case is as follows:

2.1 The petitioner was initially recruited and appointed as a Junior Clerk, with effect from 12.05.1975. He was, thereafter, transferred to the Sales Tax Department on 20.11.1976, and promoted as a Senior Clerk. The petitioner was promoted as a Sales Tax Inspector on 30.09.1991, and posted at Navsari. Thereafter, the petitioner was transferred to the office of the Sales Tax Officer No. III, Unit-II, Junagadh with effect from 02.12.1992. Thereafter the petitioner was transferred to the office of Sales Tax Officer No. II, Unit-II, Junagadh, with effect from 18.05.1993.

2.2 The services of the petitioner were placed under suspension vide order dated

02.02.1996, with his Head Quarter at Junagadh, on the ground that during the scrutiny of the documents produced by one M/s. Shrinathji Industries (Oil Mill), Shahpur, Taluka: Vanthali, in support of its application for granting Registration Certificate under Section 30 of the Gujarat Sales Tax Act, 1969, no proper scrutiny was carried out by the petitioner before the Registration Certificate was granted to the said firm. The said firm had collected sales tax and committed evasion of sales tax by indulging in bogus billing activities.

2.3 A Chargesheet dated 24.01.1997, containing one Article of Charge, was issued to the petitioner. The allegation against the petitioner was that while discharging his duties at Unit-2, Junagadh, the petitioner was asked to examine the application of M/s. Shrinathji Industries, Shahpur, for obtaining the Registration Certificate under the local and Central Sales Tax Acts. While examining the application, the petitioner did not take proper care in verifying the documents. Therefore, the registration number came to be issued without examining the correctness of the said documents. The firm in question, after getting the registration number, indulged in billing activities without doing any commercial manufacturing activities. It is further stated that the State Government was entitled to collect tax from M/s. Shrinathji Industries but no tax has been paid by it due to which a gross loss has been suffered by the State Government. Thus, the petitioner, in the process of examining the application for registration, has shown lack of devotion to duty and doubtful integrity. Resultantly, the petitioner was charged with breach of sub-rule (1)(i) and (ii) of Rule 3 of the Gujarat Civil Services (Conduct) Rules, 1971 ("the Conduct Rules" for short).

2.4 The petitioner submitted his reply to the Chargesheet, on 18.03.1997. However, as the inquiry did not proceed further, the petitioner preferred Special Civil Application No. 853 of 1998. This Court, by an order dated 30.06.1998, directed the respondents to review the suspension period of the petitioner within a period of six weeks and to complete the Departmental Inquiry by the end of November 1998. Subsequent thereto, the Departmental Inquiry against the petitioner commenced on 17.08.1998. The petitioner appeared before the Inquiry Officer and submitted his defence statement on 01.10.1998.

2.5 On 02.11.1998, the Inquiry Officer levied additional Charge. The petitioner gave a detailed reply to all the Charges on 11.11.1998.

2.6 After taking into consideration the entire material on record, the Inquiry officer, by his Report dated 04.01.1999, concluded that the Charges levelled against the petitioner were not proved.

2.7 On 11.04.2000, the Disciplinary Authority issued a Show Cause Notice to the petitioner, stating that it did not agree with the findings recorded by the Inquiry officer and asking the petitioner to make a final representation. On 08.05.2000, the petitioner replied to the said Show Cause Notice, in detail. The Disciplinary Authority did not accept the reply of the petitioner and vide the impugned order

dated 05.11.2001, imposed the penalty of withholding one increment of Rs. 175/- in the petitioner's pay-scale for a period of five years, with future effect. Aggrieved thereby, the petitioner has approached this Court by way of the present petition.

3. Ms. Vidhi J. Bhatt, learned advocate for the petitioner has submitted that as per sub-rule (2) of Rule 10 of the Gujarat Civil Services (Discipline and Appeal) Rules, 1971 ("the Discipline and Appeal Rules"), if the Disciplinary Authority disagrees with the findings of the Inquiry Officer on any article of charge, then it has to record the reasons for such disagreement as also its own findings on such charge, if the evidence on record is sufficient for the purpose.

4. It is further submitted that the said Show Cause Notice does not specify on what grounds the Disciplinary Authority does not agree with the Inquiry Officer's findings. In fact, the notice only reiterates allegations No. (2), (6) and the additional charge. The Disciplinary Authority has not recorded its tentative reasons for disagreement with the findings of the Inquiry Officer. The Disciplinary Authority has exercised power in a manner not provided for in sub-rule (2) of Rule 10 of the Discipline and Appeal Rules, resulting in a breach of the said mandatory provisions. It is submitted that the non-compliance of the above mandatory provisions is fatal, therefore, the proceedings stand vitiated. As a result, the punishment is also vitiated and the order of punishment is required to be quashed and set aside.

5. It is further submitted that when the rule casts an obligation on the Disciplinary Authority to record reasons for disagreeing with the Inquiry Officer's report and such reasons are not supplied to the delinquent, it causes prejudice to the delinquent. The purpose of issuing Show Cause Notice in the case of disagreement with the findings of the Inquiry Officer, is to grant the delinquent an opportunity to persuade the Disciplinary Authority not to disagree with the conclusions reached by the Inquiry Officer, for the reasons given in the Inquiry Report. Unless the Disciplinary Authority gives specific reasons for disagreement in the Show Cause Notice, it would be difficult for the delinquent to satisfactorily give reasons as to why the Disciplinary Authority ought to have agreed with the findings of the Inquiry Officer. In the absence of any grounds or reasons in the Show Cause Notice, it would remain an empty formality, causing grave prejudice to the delinquent officer and resulting in injustice to him.

6. It is further contended that in the present case, it seems that the Disciplinary Authority, with a predetermined mind, issued a second Show Cause Notice to the petitioner, who is merely being used as a scapegoat to make him responsible for the alleged bogus billing activities done by M/s. Shrinathji Industries. This is evident from the fact that the Disciplinary Authority, while issuing the second Show Cause Notice, did not give any tentative reasons or record its own findings for disagreeing with the findings of the Inquiry Officer. If the Disciplinary Authority had anything substantial against the petitioner, it would have recorded tentative reasons and findings for disagreeing with the Inquiry Officer's report.

The act of issuing the second Show Cause Notice is only a farce to show that the Disciplinary Authority has complied with the principles of natural justice. In fact, the principles of natural justice have been violated in this case because the petitioner did not get a fair hearing before the Disciplinary Authority.

7. It is next submitted that the petitioner submitted his reply to the second Show Cause Notice dated 11.4.2000, on 8.5.2000. Unaware of the specific reasons for disagreeing with the findings of the Inquiry Officer, the petitioner gave a detailed reply dealing with allegations No. (2), (6) and the additional charge. On 5.11.2001, the Disciplinary Authority passed the penalty order of stoppage of one increment of Rs. 175/- in his current pay in the pay-scale of Rs. 5500-175-9000 with reduction to a lower stage by one stage for a period of five years with future effect. In the said order, the Disciplinary Authority has simply stated that the representation made by the petitioner on 8.5.2000 to the second Show Cause Notice dated 11.4.2000, is rejected.

8. It is submitted that the findings of the Inquiry Officer were in favour of the petitioner. If the Disciplinary Authority wanted to overturn the said findings, there had to be an application of mind to the record of inquiry and specific findings for rejecting the case of the petitioner have to be recorded. The Disciplinary Authority is akin to an Appellate Authority and therefore, while exercising power, it has to disclose the reasons for disagreeing with the findings recorded by the Inquiry Officer. The Disciplinary Authority has not relied on any document/evidence to arrive at a different finding than the one recorded by the Inquiry Officer. The penalty order dated 5.11.2001, is, therefore, perverse as no reasons or evidence is discussed for rejecting the representation of the petitioner.

9. It is submitted that by way of filing an affidavit-in-reply, the respondents have tried to justify the penalty order dated 5.11.2001, by supplying fresh reasons. That, it is settled law that the Government must defend its action on the basis of the order itself and cannot improve or justify its stand by filing a subsequent affidavit.

10. Learned counsel for the petitioner further submitted that the petitioner retired from service on 13.10.2013, on attaining the age of superannuation. Nineteen years have passed since the Chargesheet was issued. The penalty order was passed on 5.11.2001. As more than 14 years have elapsed since the penalty order, the entire record, evidence or relevant documents might not be available with the authorities and/or the petitioner. The petitioner is a senior citizen now. With age, his memory has faded and he may not be able to represent his case effectively. Moreover, the Disciplinary Authority has filed an affidavit in the present petition on 24.12.2002, thereby delaying the proceedings of the petition. Therefore, it is submitted that in the interest of justice the proceedings may not be remanded back to the Disciplinary Authority to proceed further from the stage of issue of the second show-cause notice.

11. Lastly, it is submitted that the petitioner was suspended from duty on

02.02.1996 and the suspension order was revoked on 02.09.1998. The respondent authority, while passing the penalty order has not said anything about the manner in which the suspension period is required to be treated, therefore, the Competent Authority may be directed to pass an order as to how the period of suspension should be treated.

12. In support of the above submissions, reliance is placed on the following decisions:

(i) Punjab National Bank And Others v. Kunj Behari Misra - , (1998) 7 SCC 84 (paras 14 and 19).

(ii) Yoginath D. Bagde v. State of Maharashtra And Another - , (1997) 7 SCC 739 (para 29).

(iii) D.L. Sharma v. D.S. Shukla and or his Successor in office and Anr. - Special Civil Application No. 7007 of 2001 decided on 12.12.2007 (paras 8, 9, 10, 12 to 14).

(iv) Mathura Prasad v. Union of India And Others - , (2007) 1 SCC 437 (paras 18 and 19).

(v) Ranjit Singh v. Union of India And Others - , (2006) 4 SCC 153 (para 21).

13. The petition has been opposed by Ms. Vacha Desai, learned Assistant Government Pleader. It is submitted that a huge scam was unearthed by the Collector, Junagadh, involving ten employees. After proper verification, necessary action was initiated, resulting in delay in the initiation of proceedings. However, it cannot be contented that petitioner was victimized or prejudicial treatment was given to him.

14. It is submitted that the Inquiry Officer, in his Report, has held that the charges against the petitioner are not proved. The provisions of Rule 10(2) and 12 of the Gujarat Civil Service (Discipline and Appeal) Rules, 1971, have been duly complied with by the Disciplinary Authority and there is no procedural lapse.

15. It is contended that in the statement of disagreement by the Disciplinary Authority, the charge and tentative reasons are specifically stated. In the reasons for disagreement, the first line states the facts whereas the second line states the reason that sufficient care is not taken while determining the amount of surety based on the tax to be calculated annually. Therefore, the first line refers to "what is done" and the second line is about "what ought to have been done". Thus, reasoning is there.

16. It is submitted that the Disciplinary Authority had reason to believe that the petitioner did not bring to the notice of the authorities that the businessman had no experience or entrepreneur skills. In spite of departmental instructions in that regard, he did not examine the application properly and has indirectly helped the businessmen and thus committed serious misconduct amounting to dereliction of duty and showed lack of devotion to duty. The Disciplinary Authority has,

therefore, recorded the reasons for disagreement, and its own findings as required under Rule 10(2). Moreover, as required under Rule 12, a copy of inquiry report, reasons for disagreement were communicated. Therefore, the requirements of the said rule were fulfilled.

17. Learned Assistant Government Pleader submitted that the reply of the petitioner to the Show Cause Notice has been considered by the Disciplinary Authority before passing the order of penalty, as stated in the order. It is submitted that, as tentative reasons for disagreement have been given by the Disciplinary Authority, the impugned order ought to be confirmed. Learned Assistant Government Pleader further contents that considering the nature of the charges, the punishment imposed is just and proper and may not be interfered with.

18. Regarding the judgments cited on behalf of the petitioner, it is submitted that they merely lay down propositions of law, which have been duly complied with by the respondents. Even otherwise, the facts of each case have to be seen before applying the ratio of those cases to the facts of the present case.

19. In the background of the above submissions, the main contention raised by Ms. Vidhi J. Bhatt, learned counsel for the petitioner, is that while issuing the reasons for disagreement with the findings of the Inquiry Officer, the Disciplinary Authority has not recorded any tentative reasons for arriving at such disagreement, or even his own findings. In this regard, reference may be made to sub-rule (2) of Rule 10 of the Discipline and Appeal Rules, which reads as follows:

"10. Action on the Inquiry report:

(1)

(2) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge if the evidence on record is sufficient for the purpose.

(3)

(4)"

(emphasis supplied)

20. A perusal of the above rule, therefore, makes it amply clear that the Disciplinary Authority is obliged to record reasons for disagreement with the findings of the Inquiry Officer on any article of charge, as also its own findings on such charge, if the evidence on record is sufficient for the purpose. In the present case, the evidence on record is, no doubt, sufficient to allow the Disciplinary Authority to record reasons for disagreement with the findings of the Inquiry Officer and its own findings on such charge.

21. It is settled law that the findings recorded by the Disciplinary Authority while disagreeing with the findings recorded by the Inquiry Officer, are to be tentative in nature, as has been laid down by the Apex Court in several judgments.

22. In *Yoginath D. Bagde v. State of Maharashtra And Another* (supra), the Supreme Court has held as below:

"29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the findings of the Inquiring Authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The Rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before disciplinary authority finally disagrees with the findings of the Inquiring Authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the Inquiring Authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the Inquiring Authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the Inquiring Authority are not germane and the finding of "not guilty" already recorded by the Inquiring Authority was not liable to be interfered with."

(emphasis supplied)

23. In *Punjab National Bank And Others v. Kunj Behari Misra* (supra), relied upon on behalf of the petitioner, the same principle of law has been reiterated in the following manner:

"14. In *Ram Kishan* case disciplinary proceedings on two charges were initiated against Ram Kishan. The enquiry officer in his report found the first charge not proved and the second charge was partly proved. The disciplinary authority disagreed with the conclusion reached by the enquiry officer and a show cause was issued as to why both the charges should not be taken to have been proved. While dealing with the contention that the disciplinary authority had not given any reason in the show cause to disagree with the conclusions reached by the enquiry officer and that, therefore, the findings based on that show cause notice was bad in law, a Two-Judge Bench at page 161 observed as follows:

"The purpose of the show-cause notice, in case of disagreement with the findings of the enquiry officer, is to enable the delinquent to show that the disciplinary authority is persuaded not to disagree with the conclusions reached by the enquiry officer for the reasons given in the enquiry report or he may offer additional reasons in support of the findings by the enquiry officer. In that

situation, unless the disciplinary authority gives specific reasons in the show cause on the basis of which the findings of the enquiry officer in that behalf is based, it would be difficult for the delinquent to satisfactorily give reasons to persuade the disciplinary authority to agree with the conclusions reached by the enquiry officer. In the absence of any ground or reason in the show-cause notice it amount to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him. The mere fact that in the final order some reasons have been given to disagree with the conclusions reached by the disciplinary authority cannot cure the defect."

... ..

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

(emphasis supplied)

24. In Mathura Prasad v. Union of India And Others (supra), the Supreme Court has held as below:

"18. Even if the enquiry officer had, in his first report, proceeded on surmises and conjectures as was observed by the High Court, the disciplinary authority could disagree with the said finding but it was, therefore, required to record its reasons. No reason was recorded. Sub-Rules (2) and (3) of Rule 10 aim at achieving the same purpose. If sufficient materials are not available on record, a direction for holding a further enquiry may be issued in terms of sub-rule (2) of Rule 10 so as to enable the department to lead further evidence before him. For the said purpose also, reasons are required to be recorded by the disciplinary authority. An opportunity of hearing to the delinquent officer is required to be given. However, in the event, the disciplinary authority comes to the conclusion that the conclusion arrived at by the enquiry officer on the basis of materials placed by the parties are incorrect, he may disagree with the said findings but even, therefore, he is required to record reasons in support thereof. The requirement of sub-rule (2) or sub-rule (3) having not been complied with, the enquiry officer could not have arrived at a different finding. The High Court unfortunately did not consider this aspect of the matter.

19. When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedures laid down under sub-Rules are required to be strictly followed. It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review."

(emphasis supplied)

25. In *Ranjit Singh v. Union of India And Others* (supra), relying upon the judgment of the Supreme Court in *Punjab National Bank And Others v. Kunj Behari Misra* (supra), similar principles of law have been propounded.

26. From the principles of law enunciated in the above-quoted judgments of the Supreme Court, read with the provisions of sub-rule (2) of Rule 10 of the Discipline and Appeal Rules, it can clearly be deduced that in the event that the Disciplinary Authority disagrees with the findings of the Inquiry Officer, it is incumbent upon it to record tentative reasons for such disagreement and to provide an opportunity of hearing to the delinquent officer. If no reasons have been indicated in the Show Cause Notice communicating the reasons for disagreement, the delinquent employee cannot be expected to put up an effective defence, as he would not be in a position to know the tentative reasons why the Disciplinary Authority disagrees with the findings of the Inquiry Officer. He would, therefore, be put in a thoroughly disadvantageous position, even if he is granted an opportunity of hearing. Such an opportunity of hearing would be ineffective and inadequate and more in the nature of an empty formality, giving the impression of an outward compliance with the principles of natural justice, even when the spirit and substance of such compliance is missing.

27. Per contra, it has been argued on behalf of the respondent-State that the reasons for disagreement have been stated in the impugned order, inasmuch as the first line of the Show Cause Notice dated 11.04.2000, contains the grounds for disagreement with regard to Charges and the rest of the paragraph(s) pertaining to the said relevant articles of charge contain the reasons. On the basis of the above argument, the learned Assistant Government Pleader has urged that the mandate of sub-rule (2) of Rule 10 has been followed.

28. If the grounds for disagreement issued by the Disciplinary Authority along with the second Show Cause Notice dated 11.04.2000 are perused, it is revealed that, the article of charge has merely been reiterated and it has been stated that the petitioner did not take sufficient care while verifying the application made by M/s. Shrinathji Industries for obtaining Registration Certificate, inasmuch as that the petitioner did not bring to the notice of the authorities that the businessman did not have experience, enterprising abilities or skills so as to be eligible for the Registration Certificate. Further, the petitioner did not comply with the departmental instructions in this regard. It is stated that by taking into account

one month's production capacity of goods to be manufactured, one month's tax is calculated and accordingly surety amount is determined and in this manner the petitioner indirectly helped the businessman for his billing activities. These can hardly be stated to be tentative reasons for disagreement with the findings of the Inquiry Officer, which are based on voluminous evidence discussed in the Inquiry Report. In fact, no tentative reasons have been given by the Disciplinary Authority in support of the conclusion arrived at, that the petitioner has not taken sufficient care of determining the surety amount based on the estimated annual tax. Neither have the so-called flaws found by the Disciplinary Authority in the findings of the Inquiry Officer, been discussed.

29. The above statements are more in the nature of conclusions rather than tentative findings or reasons for disagreement with the findings of the Inquiry Officer. It is not the conclusion that the Disciplinary Authority proposes to arrive at that is relevant at this stage, but the tentative reasons for disagreement with the findings of the Inquiry Officer, that are required to be communicated to the delinquent employee so that such employee gets an adequate opportunity of meeting with the tentative reasons.

30. It clearly transpires from a perusal of the reasons for disagreement recorded by the Disciplinary Authority that the requirements of Rule 10(2) of the Discipline and Appeal Rules have not been met with, as no reasons have been recorded. It is clear that the Disciplinary Authority has failed to communicate the reasons for disagreement, as laid down by the Supreme Court in the above-quoted judgments.

31. The net result of the above discussion is that, due to the lack of tentative reasons being communicated to the petitioner, he is unable to make a representation addressing those specific reasons. The opportunity of hearing granted to the petitioner can hardly be called effective or adequate. It is more in the nature of an empty formality to show an outward compliance with the Rules and law. In effect, the principles of natural justice have clearly been violated and the petitioner has suffered prejudice and injustice due to such violation.

32. Further, the tone and tenor of the so-called reasons for disagreement given by the Disciplinary Authority makes it clear that a conclusion has already been arrived at after stating the Charge, indicating the predetermined mindset of the Disciplinary Authority.

33. In light of the above, the question whether the matter is to be remitted back to the Disciplinary Authority for fresh hearing from the stage of the issuance of the reasons for disagreement, or not, now remains to be answered.

34. On this aspect of the matter, learned counsel for the petitioner has placed reliance upon a judgment of the Supreme Court in *Punjab National Bank And Others v. Kunj Behari Misra* (supra), wherein, the Supreme Court has held as below:

"21. Both the respondents superannuated on 31st December, 1983. During the pendency of these appeals Misra died on 6th January, 1995 and his legal representatives were brought on record. More than 14 years have elapsed since the delinquent officers had superannuated. It will, therefore, not be in the interest of justice that at this stage the cases should be remanded to the disciplinary authority for the start of another innings. We, therefore, do not issue any such directions and while dismissing these appeals we affirm the decisions of the High Court which had set aside the orders imposing penalty and had directed the appellants to release the retirement benefits to the respondents. There will, however, be no order as to costs."

35. In the present case, the petitioner retired from service on 13.10.2013, on attaining the age of superannuation. Nineteen years have passed since the Chargesheet was issued. The penalty order was passed on 05.11.2001. Over fourteen years have elapsed since then. It may be possible that the entire record may not be available either with the authorities or the petitioner. In the view of this Court, no fruitful purpose would be served by remanding the case to the Disciplinary Authority to open up another innings. Therefore, taking into consideration the principles of law enunciated by the Supreme Court in *Punjab National Bank And Others v. Kunj Behari Misra* (supra), this Court does not consider it appropriate to remand the matter to the Disciplinary Authority.

36. In view of the above discussion, and for the aforesaid reasons, it is deemed just and proper to pass the following order:

The impugned order dated 05.11.2001, passed by the Disciplinary Authority, is hereby quashed and set aside.

37. The petition is allowed in the above terms. Rule is made absolute, accordingly. There shall be no orders as to costs.