

(1986) 02 KAR CK 0029

In the Karnataka High Court

Case No : Writ Petition No's. 5458 and 5459 of 1979

Govindji Punshi and Another

APPELLANT

Vs

The Tahsildar, Savanur, Savanur District, Dharwar and
Another

RESPONDENT

Date of Decision : 19-02-1986

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 13 (2), 15, 15 (2), 6, 6 A

Citation : (1986) 62 STC 399

Hon'ble Judges : R.S. Mahendra, J;K.S. Puttaswamy, J

Bench : Division Bench

Advocate : W.K. Joshi, for the Appellant; S. Rajendra Babu, High Court
Government Advocate, for the Respondent

Judgement

Mahendra, J.—On a reference made by one of us (Puttaswamy, J.), being of the opinion that the ruling of this Court in Ganesha Narayana Hegde Doddamane v. Commercial Tax Officer [1977] 40 STC 407; (1977) 2 Kar LJ 508 needs reconsideration these cases were posted before us for disposal.

2. The petitioners were partners of a firm called "Kantilal Padamshi & Co." of Hubli. This firm was carrying on business in cotton, cotton seeds, etc., and was also a commission agent. The firm was a registered "dealer" both under the Karnataka Sales Tax Act, 1957 (hereinafter referred to as the KST Act), and the Central Sales Tax Act, 1956 (hereinafter referred to as the CST Act). The firm was assessed to taxes for different periods both under the KST and CST Acts. But before the taxes due and payable by the firm could be recovered, the firm came to be dissolved. Thereafter, the Commercial Tax Officer, II Circle, Hubli, Dharwar District (hereinafter referred to as the C.T.O.) served demand notices on the firm demanding payment of a sum of Rs. 1,22,529.56 which included taxes due and payable and the penalty levied u/s 13(2) of the KST Act. Payments not having been made by the firm, he issued recovery certificate to the Tahsildar, Savanur, who attached the properties of the petitioners by his order, exhibit A, made on

22nd February, 1973, and notified the sale of the attached properties (exhibits B and C). The petitioners have challenged in these writ petitions exhibits A, B and C.

3. Sri W. K. Joshi, learned Advocate, appearing for the petitioners, submitted that a partner is not liable to pay pre-dissolution liability of the firm relying on *Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer*, ; . In any event, he argued the payment demanded includes penalty levied and the petitioners cannot be made liable to pay penalty.

4. Sri S. Rajendra Babu, learned Government Advocate, appearing for the revenue argued to sustain the action taken by the authorities as according to him partners are jointly and severally liable to pay the pre-dissolution liabilities of the firm and what is collected under the Act for default in paying the amounts though called "penalty" is in reality interest and the petitioners cannot therefore escape their liability to pay the amounts payable by the firm.

5. The question that arises for our consideration in these cases is where a firm is assessed to tax, are the partners - after dissolution of the firm - liable to pay the taxes due from the firm.

6. In *Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer*, , Lal, J., has taken the view that partners of a firm will not be personally liable for payment of sales tax, payable by the firm and the liability only extend to the assets of the firm that may be found in their possession. *Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer*, fully supports Sri Joshi's submission.

7. In *Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer*, , this Court has relied on the rulings of the Supreme Court in *State of Punjab Vs. Jullunder Vegetables Syndicate*, and *V.V. Ali Koya Haji Vs. The Assistant Commissioner of Sales Tax (Assessment)*, Sales Tax Office and Another, These decisions, according to Sri Joshi, support the view taken in *Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer*, and heavily relied on them in support of his case.

8. *State of Punjab Vs. Jullunder Vegetables Syndicate*, was a case under the East Punjab General Sales Tax Act, 1948. The Jullundur Vegetables Syndicate was assessed to sales tax in the year 1953 but that order was set aside for want of jurisdiction. Fresh proceedings were then started for assessment but the firm was dissolved before the commencement of those proceedings. The firm was thereafter assessed and the order of the Sales Tax Officer was confirmed in further proceedings with some modifications. On a reference, the Punjab High Court set aside the assessment on the ground that the East Punjab General Sales Tax Act, 1948, did not provide a machinery for assessing a dissolved firm in respect of its pre-dissolution turnover. On appeal, the Supreme Court after analysing the relevant provisions of that Act held "that there was no provision in the statute expressly authorising the assessing authority to assess a dissolved

firm" and further held "that such a power could not be gathered by necessary implication from the provisions of the Act" and by reason of the language and sections of the Punjab Act, a dissolved firm could not be assessed. State of Punjab Vs. Jullunder Vegetables Syndicate, is therefore an authority only for the proposition that a dissolved firm cannot be assessed to sales tax unless the statute under which the assessment is made authorises the assessment either expressly or by necessary implication.

9. The other decision relied on in Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer, is V.V. Ali Koya Haji Vs. The Assistant Commissioner of Sales Tax (Assessment), Sales Tax Office and Another, Ali Koya was a partner of a firm, namely, M/s. V. V. Alikoya Haji, running a flourishing business and was a dealer registered under the Kerala General Sales Tax Act, 1963. The sales tax department had to recover from this firm a sum of Rs. 2,34,448.77 for the years 1963-64, 1964-65 and 1965-66 by way of sales tax and surcharge. The sales tax authorities issued a notice to the firm M/s. Kanji Morarji - with whom the petitioner, Alikoya, was working as a clerk on a salary of Rs. 150 per month - directing them to pay to the department the salary due to the petitioner as he was in arrears of sales tax. The petitioner challenged the notice. The question for consideration before the court was whether for realising the arrears of tax due from a firm, can steps be taken u/s 25 of the Act against the money due and payable to a partner of the firm. The court in interpreting section 25 of the Act, which provided for further mode of recovery, held that "under section 25, notice can be issued only if the money is due to the dealer and to nobody else. A partner of a firm, no doubt, will not be the dealer. The dealer is the firm and the firm itself. Hence, no assets of the partner of a firm can be proceeded against under the further mode of recovery provided for by section 25 of the Act" and as the notice in this case was issued to proceed against the money due to the petitioner, a partner, and not to proceed against the money due to the dealer and therefore the court held that "no such notice u/s 25 of the Act can be issued".

10. State of Punjab Vs. Jullunder Vegetables Syndicate, or V.V. Ali Koya Haji Vs. The Assistant Commissioner of Sales Tax (Assessment), Sales Tax Office and Another, is therefore no authority to the proposition that tax due and payable by a firm cannot be recovered or realised from a partner either before or after the dissolution of the firm. It may be pointed out that in V.V. Ali Koya Haji Vs. The Assistant Commissioner of Sales Tax (Assessment), Sales Tax Office and Another, the Kerala High Court has further pointed out that section 21A of the Act, in unmistakable terms declares that on the discontinuance of the business of a firm or where a firm is dissolved the partners of the firm and their legal representatives are jointly and severally liable for the amounts due and payable by the firm.

11. In Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. K. Kelukutty, on which Sri Joshi relied the facts were these :

There were two businesses, a business in timber and a business of saw dust.

Both the businesses were carried on by the same partners, one as a partnership firm called Messrs. K. Kelukutty and the other called by name Messrs. K.K.K. Sons Saw Mills said to be a separate partnership firm. The question for consideration before the Supreme Court was whether when the partners constituting a partnership firm carrying on one business constitute thereafter another partnership carrying on a separate and distinct business are there two distinct partnership firms in whose hands the turnover of the two businesses falls to be respectively assessed or is there in law only a single partnership firm liable to assessment on the turnover of both businesses. The Court held thus :

"It is permissible to say that no partnership agreement creates and defines the relation of partnership and therefore identifies the firm. If that conclusion be right, it is only a further step to hold that each partnership agreement may constitute a distinct and separate partnership and therefore distinct and separate firms. That is not to say that a firm is a corporate entity or enjoys a juristic personality in that sense. The firm name is only a collective name for the individual partners. But each partnership is a distinct relationship. The partners may be different and yet the nature of the business may be the same, the business may be different and yet the partners may be the same. An agreement between the partners to carry on a business and share its profits may be followed by a separate agreement between the same partners to carry on another business and share the profits therein. The intention may be to constitute two separate partnerships and therefore two distinct firms. Or to extend merely a partnership, originally constituted to carry on one business, to the carrying on of another business. It will all depend on the intention of the partners. The intention of the partners will have to be decided with reference to the terms of the agreement and all the surrounding circumstances, including evidence as to the interlacing or interlocking of management, finance and other incidents of the respective businesses."

This decision is of no assistance to the petitioners.

12. The KST and CST Acts specifically provide for assessing a dissolved firm is not disputed by the petitioners. But what is disputed is that a partner is not liable to pay the amounts due and payable by a dissolved firm.

13. We may, at this stage, notice the KST Act and certain provisions that are relevant for appreciating the questions in controversy.

14. Section 5 of the KST Act, provides that every dealer shall pay for each year tax on his taxable turnover at the rate specified on such turnovers and the tax shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed, section 6 provides for the levy of purchase tax in certain circumstances specified therein. u/s 6A burden of proving that any transaction or any turnover is not liable to tax is on the dealer. Section 6B provides for the levy of additional tax, section 6C provides for the levy of surcharge, section 7 provides for the liability to taxation on the sale or purchase,

section 8 exempts the tax payable under this Act on the sale of goods specified in the Fifth Schedule, section 8A authorises the Government to notify exemptions and reduction of tax and section 9 provides for the application of the Act to non-resident dealers. Sections 5 to 9 are in Chapter III under the heading "Incidence and levy of tax".

15. The term "dealer" as defined in section 2(k) means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes - an industrial, commercial or trading undertaking of the Government of Karnataka a firm, a society, a club or an association which carries on such business. Section 10 deals with registration of dealers, commission agents under the Act, section 10A deals with the procedure for registration u/s 10. Section 11 deals with the licensing of agents. Sections 10 and 11 are in Chapter IV under the heading "Registration and grant of license".

16. Section 12 deals with the filing of returns by the dealers and assessment to be made by the assessing authority. Section 13 deals with the payment and recovery of taxes, section 14 deals with the recovery of tax from certain other persons, section 15 deals with the tax payable on transfer of business, partition of a joint family liable to pay tax, etc., section 16 deals with the assessment of the legal representatives on the death of a dealer and section 17 deals with the composition of tax. Sections 13 to 19 are in Chapter V under the heading "Returns, Assessment, Payment, Recovery, Composition and Collection of Tax". Chapter VI deals with appeal and revision. Chapter VI-A deals with levy of tax on purchase of sugarcane and miscellaneous provisions are in Chapter VII.

17. There are three stages in the imposition of tax. The first stage is the declaration of liability, i.e., that part of the statute which determines what persons in respect of what properties tax is levied. The second stage is that part of the statute that provides for the assessment. The assessment only particularises the exact amount which a person liable has to pay. The liability does not depend upon the assessment. The *ex hypothesi* has already been fixed. The third stage is that part of the statute which provides the method or mode of payment, recovery and collection if the person taxed does not voluntarily pay - *Whitney v. Commissioners of Inland Revenue* (1925) 10 Tax Cas 88. The first part of the statute contains the charging provisions, the second part contains the provisions for computation of tax and the third part contains provisions for payment, recovery and collection of tax. In other words, the provisions in the first part are the charging provisions and the provisions in the last two are the machinery provisions for computation and collection of tax.

18. In *Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others*, the Supreme Court examined whether under the Bombay Sales Tax Act, 1953, and the Bombay Sales Tax Act, 1959, a dissolved firm can be assessed or reassessed to sales tax in respect of its pre-dissolution turnover. The Supreme Court has

after examining the Bombay Act, 1953, observed thus :

"We are concerned in this case to determine not whether a particular turnover can be brought to sales tax but whether if the turnover was liable to be charged to sales tax, the firm can be assessed to tax after its dissolution. In other words, we are concerned with a provision which prescribes the machinery for the computation of tax and not with a charging provision of the Sales Tax Act."

19. On the principle governing interpretation of machinery provisions in a taxing statute, the Supreme Court in *Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others*, referred with approval, the observations of the Privy Counsel in (1940) 8 ITR 442 (Privy Council) that in interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, "*utres valeat potius quam pereat*"; the observation of the Supreme Court in *India United Mills Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, that "a machinery section should be so construed as to effectuate the charging sections" and the observation in *Whitney v. Commissioners of Inland Revenue* (1925) 10 Tax Cas 88 that "a statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable" and held that a dissolved firm can be assessed on its pre-dissolution turnover to give meaning and content to the charging sections and to prevent the use of the resourcefulness and ingenuity which go into well-timed dissolution of firms a convenient instrument of tax evasion.

20. The principle governing the interpretation of a machinery provision therefore is that that interpretation or construction which makes the machinery workable should be followed and the machinery provisions should be so construed as to effectuate the charging provisions. Let us now apply these principles and examine the provisions of the KST Act.

21. The word "firm" is a short collective name for the individuals who constitute the partners and the name under which they trade is their firm name. The firm name is not the name of a corporation but is a short name for A, B, C and C who are carrying on the business in partnership. Under the law of partnership a firm has no legal existence apart from its members. But under the tax laws - Income Tax, sales tax, etc., a firm is recognised as a distinct assessable entity distinct from its partners who can be assessed individually. It is on that basis that the provisions of a tax law are structured into a scheme providing for the assessment of partnership income. It does not confer a corporate personality to the firm. Beyond the area within which that principle operates, the partnership law holds the domain.

22. As observed by the Supreme Court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. K. Kelukutty*, "in every case when the assessee professes that it is a partnership firm and claims to be taxed in that status, the first duty of the assessing officer is to determine whether it is,

in law and in fact, a partnership firm. The definition in the tax law defines an "assessee" or a "dealer" as including a firm. But for determining whether there is a firm, the assessing officer will apply the partnership law, subject of course, to any specific provision in that regard in the tax law modifying the partnership law. If the tax law is silent, it is the partnership law only to which he will refer. Having decided the legal identity of the assessee, that it is a partnership firm, he will then turn to the tax law and apply its relevant provisions for assessing the partnership income".

23. Section 25 of the Indian Partnership Act, which deals with the liability of partners for acts of the firm reads thus :

"Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."

This section makes the liability of the partners, joint and several. During the continuance of the partnership everyone of the partners is jointly and severally liable to the acts of the firm. The debts of the firm can be satisfied from the share of the partners in the partnership property and also from his personal property. The only exception is the one provided in section 30 of the Partnership Act which provides that a minor can be admitted to the benefits of a partnership and only his share is liable for the acts of the firm but he is not personally liable for such acts. The partners are agents and sureties of the firm. They are the agents of the firm for the business of the firm and sureties for liquidation of the liabilities of the firm. In other words what is called the properties of the firm and what are called the liabilities of the firm are the debts and liabilities of the partners. The Supreme Court in *Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala*, has held that a partnership firm under the Partnership Act, 1932, is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest.

24. The KST Act recognises a firm as a distinct assessable entity and the firm is liable to pay tax on its turnover u/s 5 and is assessed to tax. The partnership in question was assessed to tax. The partners, dissolved the firm in the year 1972 even before the tax assessed and penalty levied was paid by or recovered from the firm. Mr. Joshi's argument is that after dissolution of the firm, the partners are not liable to pay the tax and penalty, payable by the firm. In other words his submission is that the liability of the firm to pay sales tax and penalty comes to an end on the dissolution of the firm. If Mr. Joshi is right in this submission then a firm which incurs the liability and is assessed to tax - and penalty is also imposed - may with little ingenuity evade its liability by the voluntary act of dissolution. In other words, after a firm is assessed, before the recovery proceedings are taken the partners of the firm may voluntarily dissolve the firm and earn their freedom from taxation. This could never have been the intention

of the legislature. The intention is always to recover the tax payable under the Act.

25. As we have already noticed section 25 of the Partnership Act makes every partner jointly and severally liable for all acts of the firm done while he is a partner except in the case of a partner who is a minor as provided in section 30 of the Partnership Act. The parties are sureties for the liquidation of the debts and liabilities of the firm. If that is so, it is clear that the petitioners who were partners of the firm, when the firm incurred the liability under the Act, are jointly and severally liable to liquidate the said liability u/s 25 of the Partnership Act.

26. We are therefore satisfied that even prior to the substitution of sub-section (2) of section 15 the partners of the firm were liable jointly and severally to pay the tax and/or penalty payable by the firm on its pre-dissolution turnover.

27. Let us next consider the scope and effect of section 15(2) in the KST Act which came to be substituted by Act 9 of 1964.

Section 15. Tax payable on transfer of business, etc. -

(1)

(2) When a firm liable to pay the tax, or penalty is dissolved the assessment of the tax and imposition of penalty shall be made as if no dissolution of the firm had taken place, and every person who was at the time of dissolution a partner of the firm and the legal representative of any such person who is deceased, shall be jointly and severally liable to pay the tax or penalty assessed or imposed.

(3)

28. Mr. Joshi argued that the firm was assessed before the substitution of sub-section (2) of section 15 and therefore his clients cannot be made liable to pay the liabilities of the firm. Sri Rajendra Babu argued that sub-section (2) of section 15 is not a charging section but a machinery provision providing for the recovery apart from being retrospective and, therefore, the petitioners are liable to pay the amounts payable by the firm and relied on R.C. Hiremath (Patil) Vs. The Judicial Magistrate First Class, II Court, Hubli,

29. Sub-section (2) of section 15 authorises the assessment of a dissolved firm on its pre-dissolution turnover and also makes every person who was a partner on the date of dissolution liable jointly and severally to pay the tax assessed or penalty imposed on the firm. Section 15(2) does not by itself create a charge for the tax. This provision only provides for the recovery and collection of the tax assessed and the penalty imposed on the firm. This provision provides a machinery for making the charge levied effective. The provisions of a taxing statute providing for assessment of liability and providing for payment, collection, recovery, etc., are not charging provisions, but are machinery provisions for effectuating the charging provisions is indisputable in view of the decision of the Supreme Court in Murarilal Mahabir Prasad and Others Vs. Shri

B.R. Vad and Others, . In R.C. Hiremath (Patil) Vs. The Judicial Magistrate First Class, II Court, Hubli, , a Division Bench of this Court has also taken the view that section 15(2) is only procedural and not substantive.

30. It is not the case of the petitioners that the firm was not liable and was not assessed to tax. It is not their case that the firm had paid the amounts due and payable before its dissolution or that they were not partners when the firm was dissolved. That being so, the tax assessed and the penalty imposed had remained unpaid when the firm was dissolved. The firm though assessed to tax prior to the substitution of sub-section (2) of section 15 in the year 1964, the amount payable by the firm had remained unpaid when the firm was dissolved in the year 1972. This provision being a machinery provision providing for the procedure to recover the liabilities incurred by the firm is attracted for enforcing payments and payable by the firm. To make this provision applicable, it is not necessary that it should be retrospective. It is applicable to all the proceedings pending as on the day it came into force apart from the proceedings taken thereafter. Sub-section (2) of section 15 has made explicit what was implicit in the Act prior to its substitution by Act 9 of 1970. In R.C. Hiremath (Patil) Vs. The Judicial Magistrate First Class, II Court, Hubli, this Court has also held that sub-section (2) of section 15 is given retrospective effect by the Mysore Sales Tax (Amendment) Act (9 of 1970). We are therefore satisfied that the petitioners who were partners of the firm when the firm came to be dissolved are liable to pay the tax assessed on the firm.

31. Sri Joshi argued that the penalty leviable under the Act cannot be recovered from the petitioners.

32. Section 13 is in Chapter V dealing with the filing of returns, making of assessments, payment, recovery, composition and collection of tax. Sub-section (1) of section 13 provides that the tax under this Act or any other amount due shall be paid in such manner and in such instalments, if any, and within such time, as may be prescribed and sub-section (2) of section 13 provides that if default is made in making payment in accordance with sub-section (1) the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax under this Act; and the person or persons liable to pay the tax under this Act shall pay a penalty specified therein.

In Gurappa Veerappa Mensinakai Vs. The Additional Commercial Tax Officer, Third Circle, Hubli and Others, on which strong reliance is placed by Sri Joshi. The facts are these :

The petitioner was a firm. After dissolution of the firm it was assessed in respect of the pre-dissolution transactions and on default in paying the tax the assessee became liable to pay penalty. In view of the decision of this Court in S. S. Navalgi v. Commercial Tax Officer, Jamkhandi [1971] 28 STC 580 it was assumed by all the no tax penalty was recoverable. Act 5 of 1972 passed by the State

Legislature provided for validation of all assessments made after the dissolution of the firm. Thereafter, the Tahsildar having jurisdiction proceeded to recover the tax and the penalty from the petitioner. The competence of the authorities to recover penalty payable u/s 13(2) was challenged by the petition on the ground that the validating provisions do not validate the penalty payable by the petitioner. Venkataramiah, J., as he then was, held that the validating provisions do not specifically refer to the validation of penalties payable under the Act and sustained the submission made on behalf of the petitioner. Penalty levied not having been validated following a Division Bench decision of this Court in *State of Mysore v. Babulal Dungarchand & Co.* [1973] 32 STC 598 the respondents therein were directed to forbear from recovering from the petitioner the penalty claimed u/s 13(2) in respect of sales tax payable for the assessment year 1963-64.

33. The validating of the tax levied and/or the penalty recoverable under the Act is not challenged in these petitions before us. The argument is that what is sought to be recovered u/s 13(2) is "penalty" and cannot therefore be recovered from the petitioners. The decision in *Gurappa Veerappa Mensinakai Vs. The Additional Commercial Tax Officer, Third Circle, Hubli and Others*, is therefore distinguishable and is of no assistance in determining the question in controversy. A Division Bench of this Court in *Sha Jayantial Khesti v. Additional Commercial Tax Officer* (1966) 2 Mys LJ 614 has held that section 13(2) provides for an automatic levy of interest. This Court has further held that the liability is a statutory liability and is more or less in the nature of payment of interest on the amounts due as tax. Another Division Bench of this Court in *Patel Volkart (P.) Ltd. v. Commissioner of Commercial Taxes in Karnataka* (S.T.R.P. No. 64 of 1981 decided on 29th January, 1982) (printed *infra*) examining the very provision has held that the amount payable by a defaulter is really the interest payable on the amount of tax withheld by the defaulters and the rate of interest is fixed in the section itself. In *Ghelabhai Devji v. Assistant Commissioner of Commercial Taxes* (printed at page 418 *infra*) it was argued that the decision of this Court in *Volkart's* case (printed *infra*) requires reconsideration. The Division Bench of this Court to which one of us, Puttaswamy, J., was a member after analysing section 13 and applying the progressive rule of construction of statutes has held that what is provided in section 13(2) is only interest and not penalty and reaffirmed the view taken in *Volkart's* case (printed *infra*). It is, therefore, clear from the decisions referred to above that the word "penalty" is used in section 13(2) as payable on default being made to pay tax due, what is payable in reality is interest on the amount remaining unpaid at the rates specified therein. The petitioners cannot therefore escape their liability to pay the statutorily payable interest - though called as penalty on default having been committed in paying the tax levied.

34. From the above discussion, it is clear that the decision in *Ganesha Narayana Hegde and Others Vs. Commercial Tax Officer*, does not lay down the law correctly and we therefore overrule the same.

35. In the result, these writ petitions fail and are accordingly dismissed and the rule issued is discharged with no order as to costs.

36. Petitions dismissed.