(2013) 02 GUJ CK 0043

In the Gujarat High Court

Case No : Special Civil Application No. 15531 of 2003

Harishbhai N. Patel APPELLANT

Vs

National Horticulture Board and Another RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 19, 226, 227

Citation : (2013) 2 GLR 1595

Hon'ble Judges : G.R.Udhwani, J

Bench : Single Bench

Advocate : Ashish M. Dagli, for the Appellant; P.M. Dave, for the Respondent

Judgement

G.R. Udhwani, J.—Petitioner is an agriculturist. Respondent No. 1, National Horticulture Board, floated a scheme to develop high quality horticultural farms in identified belts and make such area vibrant with horticultural activity which in turn will act as hubs for developing commercial horticulture by adopting high-tech horticulture techniques. Under the scheme, the agriculturists were required to submit their projects and on its approval, were eligible to receive, as back ended capital investment, a subsidy. In the foreword of project, which has been relied upon by the learned Counsel for the respondents, it has been stated thus:
2. National Horticulture Board (for short ''N.H.B.'') was set up by the Government of India in 1984 as an autonomous society under the Societies Registration Act, 1860 with a wide mandate to promote integrated development of horticulture, to help in co-ordinating, stimulating and sustaining the production and processing of fruits and vegetables and to establish a sound infrastructure in this field. N.H.B. is accordingly laying special emphasis on post-harvest management and marketing aspects of horticultural produce.

3. Since its inception, N.H.B. has taken up various programmes/schemes. 7th Plan Schemes marked the beginning of this endeavour with thrust on post-harvest management and marketing during 8th Plan. The present compendium of New Schemes is a set of interventions, to achieve high quality commercial

production, create post-harvest infrastructure and cool-chain facilities through back-ended capital investment subsidy. It will lead to increased productivity with emphasis on quality which in turn will result encouraging entrepreneurship in every aspect of horticulture industry and exports.

The relevant provisions of the Scheme are:

I. Objectives of N.H.B.

The broad objectives are to:

Develop high quality horticultural farms in identified belts and make such areas vibrant with horticultural activity which in turn will act as hubs for developing commercial horticulture.

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3. Horticulture Scenario

Horticulture includes fruits, vegetables, root and tuber crops, mushroom, honey, floriculture, medicinal and aromatic plants and nuts, etc. The sector has established its importance in improving land use, promotion crop diversification, generating employment and above all providing nutritional security to the people besides supplementing to their income.

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The total operational holdings under Agriculture is 190 million hac. whereas area under Horticulture is only 14.82 million ha. (7.84%). Out of the total percentage of Agro Exports, fruits, vegetables, flowers and processed products contributes only 5.59%. It has been estimated that post harvest losses of horticulture produce are very substantial which needs urgent attention. Coupled with this, each intermediary in the chain of final cost is getting 2.5 times more than the actual price realised by a small farmer. Though, the country is the 2"1'' largest producer of Horticulture produce in the World, our per capita consumption of fruits & vegetables for one billion population is very low. Indian consumption of plant nutrients per kg./ha. is also well below most of the advanced countries and Indian farm yields, particularly for fruits and vegetables are also well below the International level.

During the 7th and 8th Five Year Plans couple of schemes were implemented by the National Horticulture Board. However, the benefit/impact of these Schemes was seen only in few States/sectors. Therefore, an urgency was felt to formulate new strategies with the back up of attractive schemes which would give boost to each and even'' segments of horticulture industry, all over the country. In view of the above. National Horticulture Board formulated innovative schemes which have been made more broad-based and entrepreneur driven. The Government of India, Department of Agriculture and Co-operation have approved these Schemes which are as under:

1. Capital Investment Subsidy Scheme for Construction/Expansion/Modernisation of Cold Storages and Storages for Horticulture produce:

(Approved vide letter No. 12-18/98-Hort dated 13-12-1999)

2.(i) Development of commercial horticulture through production and post-harvest management

(ii) Technology development and transfer for promotion of horticulture

(iii) Market information service for horticultural crops

(iv) Establishment of Nutritional Garden in Rural Areas

(v) Horticulture Promotion Service

(vi) Strengthening Capabilities of N.H.B.

(Approved vide letter No. 12-14/98-Hort dated 15-5-2000)

The salient features of these schemes, their components, pattern of assistance and eligible organisations are given in Annexure-1. The detailed guidelines of the schemes are given in the subsequent chapters.

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Scheme-1

Development of Commercial Horticulture Through Production and Post-Harvest Management:

1. Objectives

* To develop high quality horticultural farms in identified belts and make such areas vibrant with horticultural activity which in turn will act as hubs for developing commercial horticulture by adopting high-tech horticulture techniques

* To develop post-harvest management infrastructure,

* To improve linkages between horticulture producers and marketers;

* To create integrated network for marketing of horticulture produce;

* To increase producer''s share in consumer''s price;

* To encourage networking of schemes for resource mobilisation with all other related agencies/organizations; both of Government of India and the respective States/U.T''s. Governments. Financial institutions and private agencies engaged in the field of horticulture promotion in the country (also refer Scheme-3

Technology Development and Transfer Items 5 and 6)

2. Eligible Projects

Projects with any of the following broad criteria pertaining to high quality commercial production of horticulture produce, shall be eligible for financial assistance from N.H.B. as back-ended capital investment subsidy:-

* high density plantations, which include adoption of appropriate p''ant density/ canopy management, quality planting material, support and management system with appropriate inputs;

* micro-propagation (Tissue Culture), for mass production of true-to-type, in possible shortest time, disease-free;

* Hi-tech cultivation under controlled climatic conditions i.e. in Poly houses, Green houses, net-houses, etc.;

* rainfed production through efficient water management techniques, mulching for soil moisture conservation, use of barriers in soil to reduce percolation, irrigation by drip, sprinklers, fertigation, and water harvesting structures etc.

* nursery management for quality seed/plant production of vegetables, flowers, ornamentals, fruit etc.;

* Hybrid Seed production;

* Organic farming;

* Hydroponics for year-round quality production;

* Use of plastics in horticulture;

* Bio-technology;

* Genetically Modified Organisms (G.M.Os.)

Projects based on further scientific advancements in various related fields will also be eligible for finance. In addition, projects falling under the following other broad categories shall also be eligible to avail the capital investment subsidy scheme of N.H.B.:

* Development of infrastructure for production, post-harvest handling, processing and marketing.

* Development of markets and introduction of new primary processing of products.

* Development of horticulture ancillary industry for improved packaging, equipments, plastics, corrugated boxes, horticulture machinery tools, etc.

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6. Submission of proposals for release of subsidy:

The promoter will submit the project proposal directly to the N.A.B.A.R.D./Bank/ F.I./N.C.D.C. as per the guidelines of the lending institution.

N.A.B.A.R.D./F.I./Bank/N.C.D.C. will furnish a very "oriel profile/fact sheet of the project along with a copy of sanction letter and release of 50% of term loan indicating the following details to the N.H.B. HQ at Gurgaon with a copy to Assistant Director. N.H.B. posted in the respective State:-

(i) Name, address and location of the project/beneficiary

(ii) Promoter''s profile

(iii) Name of the associate bank(s)/F.Is.

(iv) Nature/main activities under the projects

(v) Item-wise financial projections

(vi) Means of finance including N.H.B. subsidy

(vii) Brief coverage on technical feasibility and financial viability.

(viii) Other relevant information, if any.

7. Procedure for sanction of project and release of subsidy by N.H.B.

* After receiving the sanction letter and release of 50% of the loan. 50% of the subsidy amount will be released to N.A.B.A.R.D./Bank/F.I./N.C.D.C. in advance for keeping the same in the Subsidy Reserve Fund Account of the concerned Borrower, to be adjusted finally against loan amount of the Bank on completion of the project.

* Upon completion of the project, the concerned N.A.B.A.R.D./F.I./Bank/N.C.D.C. would inform N.H.B. that the project has been completed within the overall guidelines of N.H.B. and shall make a request to N.H.B. for joint inspection of the project, in the presence of the promoter. The remaining 50% of the subsidy amount would be disbursed to the N.A.B.A.R.D./Bank/F.I./N.C.D.C, after the satisfactory report of the inspection of the project.

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8. Other Conditions

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* N.H.B. reserves the right to modify, add. and delete any term/condition without assigning any reason thereof

* N.H.B.''s interpretation of various terms will be final.

* As and when required, pre and post inspection would be undertaken by N.H.B. representatives) to find out the physical (and financial progress.

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1.1. The petitioner started and completed its project respectively on 2-4-2002 and 20-12-2002 and submitted report produced at Annexure-B. The relevant provisions in the petitioners project were as under:

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3. Type of project:

Agriculture Plantation of Saragva (Drumsticks) Mango & Lemon.

4. Water requirement:

Promoter has acquired Agriculture Land and has developed three borewell in the farm.

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Product:-

Saragva: Plant grows very fast and without any difficulty same shall be planted which has a ready market available. A doubt was created that by planting Saragva in the land, it adversely affects the fertility of the land but the same is not correct.

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4. Drip Irrigation System:-

Promoter has scientifically calculated the maximum utilization of scare availability of water by setting up Drip Irrigation system by putting P.V.C. pipelines in throughout the farm. Based on requirement and actual need Dena Bank has financed Rs. 6 lacs by way of Term Loan for such system total costs incurred on this account works out to Rs. 9.16 lacs.

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8. Project Viability:-

On reforming to all the project details as to profitability, interest charges, cash flow it has been observed that all the performance indicators shows better results on account of this Agricultural activities.

1.2. On submission of project, inspection was carried out, report of which is produced at Annexure-C. Amongst authorities inspecting the project were Sr. Deputy Director, Horticulture Officer, State Hort. Dept, Sabarkantha and Branch Manager of Dena Bank. The nature and main activities indicated in the project report in its clause (4) were as under:

Production of Multiplex variety in the 20 hector of land under the Hi-Tech cultivation with drip irrigation system 22222 Nos of plants in square system of plantation in the distance of 3 x 3 mt.

1.3. The other relevant clauses in the project report are as under:

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(B) High-Tech Components

Technical justification to qualify the project as Hi-tech commercial horticulture in view of the following broad criteria with detailed comments.

The project is for production of drum-stick multiplex variety, early bearing and high yielding variety. The project includes for improved package of practices like drip irrigation system is connected with storage tank and micro nutrients management by using soluble fertilizers. The project is situated on the road side and thereby help for transporting of the farm produce for sale. The production of the Drum stick is being sold out at Calcutta and Bombay Market with the help of local dealer to fetch good prices. The promoter is collecting water from other well through bore wells and collecting in the one well and after mixing the fertilizers and essential nutrients giving to the crop through drip system.

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(D) In case of expansion project, detail (physical & Financial/of the existing project).

New Project

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(F) Ownership of land as per current title whether in the name of the individual or project in case of own land copy of the title/papers be obtained. It may be clearly verified that subsidy for the same price of land has not been availed from N.H.B. in the past

It has been verified that

As per the land record this land belongs to Harishbhai Sathabhai Patel And his family member''s name totalling 20 hectare and subsidy for the same land has not been availed mom N.H.B. in she past. The Survey No. of the land is 179, 178, 73, 64, 65 and 66.

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10. Present commercial status of the project clearly mentioning the market crop:

The condition of the drumstick crop is very good and healthy at the time of inspection. The promoter is selling the drum stick produce in the Ahmedabad, Calcutta and Mumbai Market at presently though local broker.

11. Total volume of annual production of the horticulture commodities (Mt.)

There approximate production is expected in the current year 450 Mis. in 20 hectare of Land And there approximate market value would be Rs. 45 lacs only in the first year from the crop.

1.4. The N.H.B. recommended the back ended subsidy in the sum of Rs. 9.9 lacs in favour of the petitioner. The committee formed by the 1st respondent, however did not approve it for want of application of "hi-tech components". The impugned order to this effect is produced at Annexure-D. The petitioner made representations produced at Annexure-E and F. He represented that the area in which the project was situated had rocky, predominantly dry land having no irrigation facility. He also pointed out the efforts put in by him by developing necessary infrastructure and use of network of "Drip Irrigation System" as hi-tech item in India.

1.5. These representations were replied on directions being issued by this Court vide order dated 4-1-2003 in the present petition. The said representation came to be rejected by orders produced at Annexure-G, now stating that petitioners project was not eligible:

1. For want of high-tech components since you had not used new/improved varieties of Drumstick. Mere use of drip irrigation would not qualify for consideration as hi-tech cultivation. The use of other appropriate techniques/ technology such as Vermicompost and Mulching etc.

2. That the scheme of the Boards applicable only for commercial horticulture but the drumstick production in your project is not of commercial level. That the two projects referred by you in your Special Civil Petition, one of Mr. Babubhai Patel and another Mr. Chhaganbhai M. Patel were with regard to a commercial crop i.e. Pomegranate which happens to be a produce of commercial horticulture.

1.6. The petitioner has produced the projects of Babubhai Khemabhai Patel and Chhaganbhai Motibhai Patel at Annexure-I contending that the projects of such similarly situated persons have been approved by the 1st respondent. There is no dispute that the projects of these two persons have been approved.

2. The respondents in their affidavit-in-reply have come out with the case that the scheme was applicable only for commercial horticulture hi-tech components and techniques. After referring to the objectives of the scheme, the points on which the petitioners project was rejected vide Annexure-R1 have been reiterated. In the affidavit-in-reply, the respondents have also taken a stand that the scheme is credit linked but it is essential that credit is an integral source of finance for setting up the project and not a means of reimbursement after completion of the project. It is stated that on examination of the papers of the petitioner, it was found that the project activities of the petitioner existed before appraisal was conducted by Dena Bank, inasmuch as, appraisal note submitted by the Bank contains information about proceeds from current sale of Drum-sticks, the crop, for cultivation of which the subsidy was applied, and thus the project being an old one, was not eligible for subsidy.

3. It is in the above background that arguments advanced by the parties, are required to be appreciated. The broad submission of the learned Counsel for the petitioner is that the respondents were not within their rights to reject the project for want of application of "hi-tech components", as the petitioner had applied "irrigation by drip" which admittedly falls in the eligibility criteria as mentioned in clause (2) of the scheme (Annexure-A). He would further submit that it was nowhere stated that the scheme is meant only for new projects. It was submitted that, if the petitioner qualified for the project as above, it could not have been rejected on the above grounds. It was also argued that since the ground that the scheme was inapplicable to existing project was never stated in the impugned order, it cannot be pressed into service in this writ petition. It was submitted that the petitioners project qualified for subsidy and by rejecting it and approving the project of similarly situated persons, the respondent had adopted a pick and choose attitude in violation of Arts. 14 and 19 of the Constitution of India.

4. Learned Counsel appearing for the respondents while relying upon various provisions of the scheme, would submit that, in view of the language used in the scheme, the benefit is available only to new projects. It was submitted that even the petitioner knew that scheme was meant for new project, and therefore, during the inspection, it was stated and recorded in the report that it was a new project for which the petitioner was expecting subsidy.

4.1. Referring to the projects of the individuals, who according to the petitioner, were similarly situated, it was submitted that the said persons had submitted a project for pomegranates and not drumsticks and they were new projects inasmuch as in their project itself, it was apparent that they were not able to generate income for next three years. It was also contended that as per report itself the petitioner appears to be selling the produce upto Calcutta, as also in Ahmedabad and such facts, according to the learned Counsel were reiterated in the pleadings i.e. two rejoinders filed by the petitioner. However, it was also pointed that there was contradiction in the pleadings on the aforesaid facts, inasmuch as after reiterating that the produce was being sold, the petitioner denied the said aspect in the second affidavit-in-rejoinder. It was argued that vermi compose and mulching were the necessary techniques which were required to be adopted for the project like that of the petitioner to be eligible. It was submitted that for production of drumsticks "drip irrigation" was not essential. It was also contended that in the rejoinder, the petitioner submitted that vermi compose and mulching were not the necessary techniques required for the purpose and yet in subsequent rejoinder he came out with a case that the material used was vermicompose for producing drumstick.

4.2. Learned Counsel for the respondents would submit that scheme, of which the petitioner seeks benefit is in the nature of the policy of N.H.B., and in view of settled legal position, the policies are not upon to judicial review under Arts. 226 and 227 of the Constitution of India.

5. Since, the last mentioned argument raises an important issue regarding scope of powers of the High Court to review a policy decision under Arts. 226/227 of the Constitution of India, it is required to be dealt with first.

5.1. It is well settled that it is not open for the Courts to review policies of the State/public bodies. The High Court thus would not have to say as to what should be the contents of the policy, purpose, object etc. However, the authority invested with the powers to implement the policy is still bound by constitutional provisions. The policy may confer certain benefits upon the beneficiaries satisfying the conditions mentioned therein, and if such conditions stand satisfy, it will not be permissible for an authority to deny a benefit to one individual and confer similar benefit to another. An executor of the policy also cannot refuse a benefit on surmises and conjectures or on the grounds not germane to or not available from the policy itself. It cannot be argued that even the decision based upon such policy are immune from a review, if apparently such decision violate constitutional rights of a person. While the High Court cannot review a policy by re-writing it, the same is not true for the policy implementing authorities. Policy has to be read at its face value and must be given effect to without adding or omitting any word or phrase from it. If it is noticed that under the guise of a policy, what is sought to be done is misuse of unfettered, unbridled or unguided discretion claimed to have been vested in an authority by the policy which has resulted into colourable exercise of powers or discrimination, favouritism or nepotism, the High Court, under Arts. 226/227 of the Constitution, has ample power to review such surreptitious decisions. Therefore, what is required to be reviewed in the present petition is not the policy, but decision taken by the respondents allegedly in consonance with the policy.

5.2. It is true that as per Clause (8) of the condition of the policy Annexure-A, N.H.B. has reserved a right to modify, add and delete any terms and conditions without assigning any reasons thereof and its interpretation of various terms are contemplated to be final. An Executive may exercise such powers and assign reasonable and proper meaning to various terms, phrases, clauses in the context of the scheme itself and cannot go beyond it and bring something which is not contemplated in the policy. Importation of such unwritten material or reading something which is not there in the policy and rejecting the project on that basis is nothing but arbitrary and unreasonable exercise of discretion. No finality of discriminatory or illegal acts can be claimed under such right to interpret. Therefore, it is required to be examined as to whether the respondents were within their rights to reject the petitioners project on the basis of reasons assigned by them, as also as to whether such reasons are discernible from the policy itself or the respondents have travelled beyond the scope of policy.

5.3. The reason assigned by the first respondent for rejection of the petitioners project, is non-application of "hi-tech components" and "non-use of new/ improved varieties of drum stick", "ineligibility on account of mere use of irrigation by drip" for consideration as "hi-tech cultivation" and that "use of other appropriate techniques/technology, such as vermi compose and mulching, etc., was necessary" and that the scheme of the board was applicable only for "commercial horticulture'''' and that "drum stick production in the petitioners scheme was not of commercial level" and that two projects referred to by the petitioners were with regard to pomegranate, which happened to be a produce of commercial horticulture.

6. It is not in dispute that petitioners project applied the technique of irrigation by drip. It is also not in dispute that starting and completion date of the project of the petitioner and other two above-referred individuals respectively was in the year 2002 and 2003 with the only difference that whereas the petitioners project was for "drumsticks, mango and lemon", those of other two individuals was for "pomegranates". It is also not in dispute that like the petitioner, from amongst above two individuals, Mr. Chhaganbhai Motibhai Patel also, applied "irrigation by drip" as the only technique for the eligibility of his project and his project was approved.

7. As noticed above, one of the permissible hi-tech components for eligibility of the project under the scheme is "irrigation by drip", and as seen above, one of the project with "irrigation by drip" has admittedly been approved by first respondent. Admittedly, the scheme at Annexure-A, nowhere categorizes and co-relates a particular nature crop with the specified "hi-tech components" as a condition precedent for the project to be eligible. In other words, admittedly nowhere the scheme declares "irrigation by drip" as "non-essential" for the crop like drumstick. Thus, this reason for rejection has not emerged from the scheme itself but from personal mis-conception of the 1st respondent and thus the decision on that basis is not germane to or in consonance with the scheme.

8. Further, the scheme admittedly, does not define "new/improved varieties of drumstick". Hence, this reason is also, neither germane to; nor is it in consonance with the scheme. Admittedly, the scheme also does not contemplate use of a combinations of "hi-tech components", and therefore, the reason that mere use of drip irrigation alone would not qualify for consideration as hi-tech cultivation and that the petitioner was required to use other appropriate techniques/technology such as vermi compose and mulching, etc., is also not germane to or is not in consonance with the scheme. It may be recalled that no such requirement was insisted upon in case of Mr. Chhaganbhai Motibhai Patel, whose project was admittedly approved by first respondent, which contemplated "use of irrigation by drip" as the only hi-tech components for his project. Therefore, such insistence in the present case, was arbitrary and discriminatory.

9. Further, admittedly, the scheme neither defines "commercial horticulture" nor does it categorise the eligible and ineligible horticulture crop. Thus, there is no material in the scheme on the basis of which it can be said that pomegranate falls under the category of "commercial horticulture" and drumstick doesn''t.

10. Further, on one hand, it was argued that it is not permissible for the High

Court to review a policy under Arts. 226/227 of the Constitution of India; whereas on the other, it was contended, while drawing attention of this Court to various clauses of the scheme, that the scheme was not meant for "new projects". Admittedly, there is no such specific rider in the scheme and it is not for the High Court under Arts. 226/227 of the Constitution of India to interpret various clauses and draw a conclusion that the scheme was not meant for new project.

11. It may be recalled that the date of commencement and completion of the project presented by the petitioner and those by others admittedly fell before the sanction of the project of other two individuals. In other words, in case of the two individuals also, the production had commenced before approval of their project. Thus, an old project of the two individuals was felt "good" for benefit under the scheme by first respondent, but that of the petitioner wasn''t for the reasons best known to the respondents. Faced with this situation, an attempt was made to distinguish the project of the other two individuals and that of the petitioner on the ground that whereas two individuals had not sold their produce; the petitioner had sold it, and therefore, the petitioner project was old. Learned Counsel for the respondents is unable to justify this argument from the provisions of scheme. Even this Court is unable to find any provision in the scheme, distinguishing between old/new projects.

12. The argument that since subsequently new scheme was framed, replacing the scheme at Annexure-A, writ if issued, would be futile, is a misconceived argument in view of the undisputable fact that the petitioner required a treatment in consonance with. Art. 14 of the Constitution of India. Article 14 postulates equality before law and equal protection of law which undisputedly is a fundamental right guaranteed under Part III of the Constitution. The facts of this case eloquently demonstrate arbitrary and unwarranted decision of the first respondent in rejecting the petitioners project on the grounds not germane to the scheme Annexure-A. It is settled law that fundamental right cannot be waived, and therefore, equally true is the fact that it cannot be frustrated on the ground that the document which conferred such a right has been withdrawn. Right to be considered under the scheme at Annexure-A undoubtedly was a fundamental right. The petitioner approached this Court immediately on violation of such right, and the respondents had a knowledge of the pendency of the petition and they also had a knowledge that, in the event of issuance of the writ, they would be required to execute or comply with it. Considering the fact that such knowledge was available with the respondents, the replacement of the scheme was always subject to the writ of this Court in this petition. Further, if despite such knowledge the scheme was replaced, it was at the cost and the consequence of the respondents and petitioner cannot be made to suffer only on the ground that the respondents have replaced the scheme. In the result, the petition succeeds and is therefore allowed. Rule is made absolute with no order as to costs. Direct Service is permitted.