
(1995) 03 MAD CK 0136

In the Madras High Court

Case No : Writ Petition No"s. 11363, 11364 and 13488/90

K.P. Abdul Majeed

APPELLANT

Vs

Collector of Customs and Central Excise, Trichy

RESPONDENT

Date of Decision : 17-03-1995

Acts Referred:

Customs Act, 1962 — Section 111, 112, 135

Citation : (1996) 56 ECC 56 : (1995) 79 ELT 554

Hon'ble Judges : Raju, J;K.A. Swami, J

Bench : Division Bench

Judgement

Raju, J.—Writ Petition Nos. 11363, 11364 and 13488 of 1990 are dealt with together since they involve for consideration overlapping issues and the counsel also argued the matter in common.

2. Writ petition Nos. 11363 of 1990 and 11364 of 1990 have been filed by one and the same petitioner. Writ petition No. 11363 of 1990 has been filed challenging the order of the second respondent - Tribunal seeking for the issuance of a writ of certiorarified mandamus to call for and quash the order made in No. S/254/1990, dated 4-5-1990 in C/Stay/254/90-MAS in C/121/90-MAS and C/Stay/255/90-MAS in A. No. G/115/90-MAS. Writ petition No. 11364 of 1990 has been filed seeking for the issuance of a writ of certiorarified mandamus to call for and quash the order of the first respondent - Collector of Customs and Central Excise, Trichy in No. C. No. VIII/10/179/87-Cus. Adj. Order No. 3089 (Collr), dated 30-11-1989.

3. The petitioner in these writ petitions was issued with an order of detention, dated 10-10-1988 by the Government of Tamil Nadu, detaining him in exercise of the power conferred u/s 3(1)(iv) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the Act) with a view to preventing him from dealing with smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods. Having regard to the nature and stage of proceedings pending before the Authorities, we

would consider it inappropriate to deal with the facts of the case at length. Suffice it to notice that pursuant to a search conducted at Room No. 68, S. M. Lodge, Coimbatore, on 25-4-1987 by the Officers of the Customs Department, five persons were found in the Room with Gold stated to be of foreign origin. On interrogation by the Authorities of the said persons and further investigation into the matter the involvement of the petitioner in these writ petitions came to the notice of the Authorities, which necessitated the submission of a Report resulting in the order of detention, dated 10-10-1988. In addition thereto, the first respondent Collector of Customs and Central Excise also initiated adjudication proceedings by issuing a notice dated 30-3-1988, calling upon the petitioners and others including the petitioner in Writ Petitioner No. 13488 of 1990, to which a reference will be made separately hereinafter to show cause as to why the gold and the cloth couches used for packing the gold and seized should not be confiscated to the Government under the provisions of the Customs Act, 1962 and the Gold Control Act, 1968 and why penalty should not be imposed on them for contravening the provisions of the said Acts. After considering the explanation submitted by the petitioners and conducting an enquiry, the Collector of Customs and Central Excise, Trichy, by his order, dated 30-11-1989 ordered the confiscation of gold weighing 10,498.500 grams valued at Rs. 30,44,555 seized in the case, absolutely to the Government u/s 111(d) of the Customs Act, 1962 read with Section 67 of Foreign Exchange Regulation Act, 1973 and Section 71(1) of the Gold (Control) Act, 1968. In addition thereto penalties to the tune of Rs. 25 lakhs u/s 112 of the Customs Act, 1962 and Rs. 10 lakhs u/s 74 of the Gold (Control) Act, 1968 were also imposed in so far as the petitioners in these writ petitions are concerned. It may also be noticed that arising out of the same incident and facts, one S. Rajagopal had also been levied under the very same proceedings a penalty of Rs. 15 lakhs u/s 112 of the Customs Act, 1962 and Rs. 10 lakhs under the Gold (Control) Act, 1968.

4. The petitioner in Writ petition No. 11363 of 1990 appears to have filed earlier a Writ petition No. 2229 of 1990, seeking for the issuance of a writ of certiorari to quash the proceedings dated 30-11-1989. The said writ petition and two other writ petitions filed by the other two persons, came to be dismissed by S. Ramalingam, J. by a common order on the ground that the plea and charge of bias made against the Collector of Customs as also the Tribunal has no basis and cannot be accepted. It was also held that the petitioners have an effective alternative remedy by way of an Appeal, which cannot be allowed to be by-passed. Though the petitioners in these writ petitions filed Writ Appeal No. 444 of 1990, the same was dismissed on 19-4-1990 on an endorsement made by the counsel as "withdrawn and may be dismissed". Thereupon the said petitioners filed an appeal before the Tribunal (second respondent). Along with the Appeal, the petitioners also sought for waiver of pre-deposit of the penalties of Rs. 25 lakhs and Rs. 10 lakhs respectively levied under the Customs Act, 1962 and Gold (Control) Act, 1968, as noticed supra. The Tribunal by its order, dated 4-5-1990 was also pleased to pass a conditional order, directing to make a pre-deposit of

Rs. 10 lakhs in respect of the proceeding under the Customs Act, 1962 and Rs. 50,000/- in respect of the proceedings under the Gold (Control) Act, 1968 on or before 31st July, 1990 and report compliance thereof, so that the Appeals could be considered and disposed of on merits. It is challenging the said order of the Tribunal, dated 4-5-1990. Writ petition No. 11363 of 1990 has been filed and in addition the petitioner also has chosen to file Writ petition No. 11364 of 1990, challenging the order of the Collector of Customs and Central Excise (first respondent) made on 30-11-1989, notwithstanding the fact that he has also filed an Appeal before the Tribunal and it is during the pendency of the said Appeal, the waiver of pre-deposit has been sought for and a conditional order came to be passed, as noticed supra.

5. So far as the said S. Rajagopalan, who was also found to be involved in the very same occurrence under consideration also filed an Appeal before the Tribunal, challenging the very same order, dated 30-11-1989 of the Collector of Customs and Central Excise, Trichy, in so far as it levied penalties of Rs. 15 lakhs and Rs. 10 lakhs under the relevant provisions of the Acts. Pending Appeal, the said petitioner also sought for waiver of the pre-deposit and by an order dated 12-6-1990, the Tribunal has passed a conditional order to make a pre-deposit of Rs. 3 lakhs in respect of the proceedings under the Customs Act, 1962 and Rs. 10,000 under the Gold (Control) Act, 1968 on or before 31st August, 1990 and report compliance of the said order to facilitate the hearing and disposal of the Appeals on merits. It is challenging the said order that the Writ petition No. 13488 of 1990 came to be filed. It may also be noticed at this stage that the Government of Tamil Nadu has passed an order of detention dated 10-10-1988 against the petitioner in Writ petition No. 13488 of 1990 u/s 3(1)(iv) of the Act.

6. So far as the order of detention is concerned passed against the petitioner in Writ petition Nos. 11363 and 11364 of 1990, Writ petition No. 8414 of 1991 had been filed by the petitioner and a Division Bench of this Court, consisting of Arunachalam and Maruthamuthu, J. by an order dated 3-10-1991 allowed the claim of the petitioner by quashing the order of detention on the only ground that the Advisory Board had not considered and disposed of the representations of the petitioner.

7. Mr. M. R. M. Abdul Kareem, learned Senior Counsel made his submissions on behalf of the Petitioner in Writ Petition Nos. 11363 and 11364 of 1990. Learned Counsel appearing for the petitioner in Writ Petition No. 13488 of 1990 was content with merely adopting the submissions of learned Senior Counsel appearing for the petitioner in Writ petition Nos. 11363 and 11364 of 1990 contended that the Collector of Customs and Central Excise, Trichy as also the other Authorities of the Department have formed an opinion about the guilt of the petitioner and made reports to the Government, resulting in the detention order referred to above and while that be so, such authorities, who have earlier formed an opinion about the guilt of the petitioner, cannot be said to be independent Authorities, entitled to exercise jurisdiction in the matter of

adjudication proceedings. In substance, learned Senior Counsel contended that the Collector of Customs and Central Excise, Trichy, who passed the adjudication order would be a biased officer and Authority, having regard to the opinion formed by him and that therefore, the principles of natural justice have been grossly violated and the orders of the Collector of Central Excise and Customs, Trichy are liable to be quashed on this short ground alone. It was also contended by learned Senior Counsel that the said order of detention and the action on the part of the Authorities have been approved even by the Union of India and that the Departmental Officials including the Government of India would therefore, be thoroughly disentitled to deal with the case of the petitioner for the purpose of adjudication, since according to learned Senior Counsel, an independent and unbiased approach cannot be expected of from such an Authority or Authorities functioning under the Union of India. As a matter of fact, it is found from the very order passed by this Court on the earlier occasion that the Petitioner went to the extent of questioning the competency in this regard of the Tribunal also, since according to the learned senior counsel, one of the Members was formerly the Member of the Customs and Central Excise Department and therefore, he cannot be said to be a competent authority to deal with the case independently as is expected of such an authority. It was also contended that the Criminal Court, viz., the Chief Judicial Magistrate, Coimbatore and Nilgiris, before whom the Department prosecuted the petitioners and others, in C.C. No. 76 of 1990 has acquitted the petitioner and others by his judgment dated 16-12-1991 holding that they were not guilty of the charges and that therefore, the impugned proceedings, dated 30-11-1989 and that of the conditional order of the Tribunal in regard to the waiver are liable to be quashed. Argued the learned Senior Counsel further that in view of the above infirmity which goes, according to learned Senior Counsel to the root of the matter of the charges themselves, the adjudication order, dated 30-11-1989 would be totally without jurisdiction and a nullity, being violative of principles of natural justice and there was absolutely no need or necessity to file an Appeal before the Appellate Tribunal and nothing precludes the petitioner even at this stage from approaching directly this Court challenging the very order of adjudication. To a specific query put to learned Senior Counsel about the petitioner having invoked the appellate remedy and the pendency of the Appeal, it was contended for the petitioner that the invocation of the appellate powers of the Tribunal is no just or sufficient ground to preclude the petitioner from invoking the powers of this Court under Article 226 of the Constitution of India to challenge the order, which according to the learned senior counsel in substance is a nullity. As for the conditional order passed, it was contended that having regard to the fact that the order of adjudication is without any authority, the Tribunal committed an error in passing such an order, and instead it should have passed an order waiving the pre-deposit of the entire amount without any stipulations whatsoever.

8. As noticed supra, learned Counsel for the Petitioner in Writ Petition No. 13488 of 1990 merely adopted the submissions of learned Senior Counsel.

9. Mr. K. Jayachandran, learned Additional Central Government Standing Counsel appearing for the Department contended that the petitioners are not entitled to invoke the extraordinary jurisdiction of this Court, they having already invoked the appellate jurisdiction of the Tribunal by filing appeals and thereafter, also sought for waiver of the pre-deposit under the relevant provisions of the Act and that on this short ground alone, these writ petitions are liable to be summarily rejected. It was also contended that the plea of bias or want of independent and unbiased approach on the part of the Authorities, has no merit whatsoever and that acceptance of such a plea would be grossly unjust apart from the fact that a similar plea urged earlier has been rejected by this Court and in view of the conclusion of this Court in the earlier round of litigation the Petitioner is precluded from re-agitating the very same issue, both on the grounds of principles of equitable estoppel as well as the principles of constructive res judicata. As for the conditional order passed on the applications for waiver of the pre-deposit, it has been contended that the impugned orders of the Tribunal themselves come to be passed, extending undeserved indulgence and that no such orders, as a matter of fact, could have been granted of all. It was also brought to the notice of this Court that on account of the non-compliance of the conditional orders relating to the pre-deposit insofar as the Petitioner in Writ Petition Nos. 11363 and 11364 of 1990 is concerned, the Appeals themselves came to be dismissed, as also for [default] of appearance, on 31-7-1990. Thereupon the petitioner appears to have brought to the notice of the Tribunal the information about the filing of the Writ Petition No. 11364 of 1990 and the pendency of the same before a Division Bench of this Court and in those circumstances, by order dated 13-3-1992, it was held by the Tribunal that the petitions are dismissed as withdrawn with liberty to the petitioner to renew their request for relief within a month after the disposal of Writ Petitions, if so desired.

10. Learned counsel for the appellant Petitioner invited our attention to some of the judicial pronouncements, to which a reference will be made hereafter before actually considering the legal submissions made on behalf of the petitioner.

11. The decision reported in *Pritam Singh and Another Vs. The State of Punjab*, is one wherein Supreme Court while considering the scope of Section 403 of the Code of Criminal Procedure, 1898 held that the effect of a verdict of acquittal recorded by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence and that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. It was also held that in the teeth of an acquittal at the first stage the prosecution was precluded from taking any steps to challenge the same at the second trial. We accordingly see no relevance or application of the said principles to the case on hand to foreclose the right of the Department to initiate and pursue the adjudication proceedings.

12. The decision in *Amba Lal Vs. The Union of India (UOI) and Others*, is that of

the Supreme Court, wherein it has been held that the onus of proving the ingredients as also the necessary charge for the seized articles in question, which were smuggled into the country was on the Department. In our view in the teeth of an order of adjudication on an appreciation of the factual contentions of the evidence on record, it is for the petitioners to pursue their remedies before the Appellate Tribunal to find out whether the alleged charges have been established in the manner required in law and the stage to urge such contentions before this Court cannot be stated to have reached as on date.

13. In the decision reported in *Manipur Administration Vs. Thokchom, Bira Singh*, , the Supreme Court was concerned with the question as to whether an accused acquitted in previous trial on same set of facts can be proceeded against on the same facts in a ... trial initiated in the teeth of the principle of issue-estoppel. As noticed earlier, the scope and object of a prosecution and the nature of powers and the object of adjudication proceedings are distinct and separate and the principles in the said decision can have no relevance to substantiate the claim made by the petitioners before us.

14. In the decision reported in *Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*, , the Supreme Court has held that the existence of alternative remedy is no bar to writ petition, where it is alleged that the Tribunal acted under the provision of law, which was ultra vires or where it is alleged that it acted in violation of the principles of natural justices. In our view, the ratio laid down in the said decision will have no application to the peculiar facts and circumstances of the case as also of the stage of the proceedings as would be noticed separately hereinafter.

15. In the decision reported in *Bimla Dewan v. Lieutenant Governor of Delhi* AIR 1982 (SC) 1251 the Supreme Court was concerned with a challenge made to the detention orders passed against the detenus concerned therein under the National Security Act (65 of 1980). The Apex Court only held that where some of the grounds of detention related to instances of criminal prosecution against the detenus and in many of them the detenus were acquitted the order of detention would be invalid as none of these instances in which the detenus were acquitted could legitimately be taken into consideration for detaining the detenus u/s 3(2) of the National Security Act. We are not concerned in this case with and challenge to an order of detention and the principles laid down therein, cannot be extended to the case on hand to forestall or foreclose the right of the Department to initiate adjudication proceedings, merely because the Criminal Court acquitted the petitioners.

16. In the decision reported in *N. Jayathilakan Vs. Additional Secretary, Venkataswami, J.* (as the learned Judge then was) held while complying with and following an earlier Division Bench order in *Kanniah Lal Jethaji v. Central Board of Excise and Customs* [W.A. No. 106 of 1977, dated 30-6-1977] that Sections 112 and 135 of the Customs Act contemplate two separate proceedings for the same act or omission, that it cannot be contended that they will not be taken

simultaneously and that neither the acquittal in criminal proceedings would absolve a party from being proceeded against for purpose of levying penalty u/s 112 of the Customs Act nor the passing of an order of confiscation of personal property could be said to be attracting the principles of double jeopardy.

17. In the decision reported in *Kartar Singh v. State of Punjab* 1994 CrL J 3139, the Apex Court while dealing with the constitutional validity of the Terrorist and Disruptive Activities (Prevention) Act (31 of 1985) TADA, held that, though the by-passing of the provisions of the Act, encouraging recourse to the provisions of Article 226 of the Constitution of India would defeat the very object and scheme of the Act or the intendment of the Parliament, at the same time, it cannot be said that the High Courts have no jurisdiction to interfere with the same and that though the High Courts have very wide powers under Article 226 of the Constitution of India, the very vastness of the powers imposed on it the responsibility to use them with circumspection and in accordance with the judicial consideration, and well considered and established principles. It was also emphasised therein, while striking down Section 22 of the TADA, that the evidence regarding the identification on the basis of a photograph cannot be the same as that of the evidence of test identification parade. On the facts and circumstances of the case before us, we had that the conclusion arrived at in the adjudication proceedings is not based on any identification on the basis of photographs alone, but on ever so many details and other evidence and the correctness of findings recorded on the basis of such evidence is normally and initially to be left to the consideration of the Appellate Authorities constituted under the Act and in this case, the Tribunal, before whom the Appeals have already been filed.

18. We have carefully considered the submissions of learned counsel appearing on either side in the light of the facts and circumstances of the case as also the judicial pronouncements relied upon in support thereof. We are of the view that the challenge made to the impugned proceedings does not merit countenance in these writ petitions. So far as the plea based on the alleged bias and lack of required independence and impartiality having vitiated the order of adjudication and also the justification sought to have recourse to this court directly to challenge the order of adjudication, we are of the view that the submissions of learned senior counsel are not well merited. As a matter of fact such submissions as have been urged in this case, if countenanced would lead to startling and absurd results of leaving no right or remedy for the officers and the Department against persons like the petitioners, in a give situation. As noticed earlier also the learned senior counsel goes to the extent of even contending that the conclusions arrived at by the officers of the Department to prosecute the petitioners as also to approach the detaining authority for passing detention order against them would demonstrate a pre-conception of mind and therefore not only the adjudicating Authority in this case but no other officers of the department as also the Government of India could ever deal with the case on hand in view of their so-called bias cannot be accepted at all by us. As referred

to earlier, on the earlier occasion also, the petitioners went to the extent of even challenging the competency of the Tribunal, on the ground that one of the members of the Tribunal happened to be an erstwhile officer of the department of the Government of India. It is not the case of the petitioner that [some] member of the Tribunal who had earlier been an officer of the department [had] anything to do with the case of the petitioner at any stage or played any active role in it. But to contend that having been an officer of the department, which proceeded against him that by itself would constitute a disqualification to be a member of the Tribunal even to hear the appeal before the Tribunal would be far-fetched a stand to withstand the scrutiny of reason and if countenanced would lead to a monstrous situation and render the petitioners virtually immune from - any action for their acts of commission or omission otherwise punishable in law. None of the authorities, including the adjudicating Authority have been attributed with any personal bias or personal interest in the matter against the petitioner. Such authorities have been handling the case of the petitioners at different stages under different enactments in exercise of the respective powers conferred upon those authorities under various enactments. Merely because the competent authority has been conferred with powers to deal with a situation under more than one act for varying and different purposes, playing different roles assigned to them under such enactments having recourse to one or other such provisions of law or one or other of the enactments cannot be itself said to constitute a sufficient ground or Justification in law from denying such officer or authority playing their ordained and designated role, as the competent authority to exercise powers or take action under totally a different provision of the same or different enactments to meet a different contingency or achieve different object or result. Even assuming that the doctrine of bias has any application to this case without accepting the proposition advanced by the learned senior counsel for the petitioners, we are of the view that the case on hand would come within the well accepted exception to the doctrine on the principle of necessity. If the grievance of the petitioners has to be countenanced as projected on the ground of bias, there is no scope for substitution of even any other person or authority to deal with the case of the petitioners in respect of the adjudications proceedings and in such cases courts have been countenancing the need for natural justice necessarily yielding and giving way to the need or dictates of necessity to avoid the very machinery of enforcement of law coming to a grinding halt and a total breakdown. Even otherwise as noticed earlier the fact that the very same issue raised on the earlier occasion in W.P. No. 2229 of 1990 has been rejected by this Court and the appeal filed thereon had also been withdrawn and got dismissed without obtaining any leave to challenge the very order on placed the same grounds are also circumstances strongly against the petitioners, in reagitating the same issue once again before us. While that be the position the Petitioners would not only be estopped from reurging the very same issue but also bound by the principles of constructive res judicata disentitled thereby to urge the issue once over again. For all the reasons stated above, we are of the view that there are no merits in the submissions of learned senior counsel in this regard.

19. The further plea raised on behalf of the petitioners that the judgment of the Criminal Court in C.C. No. 76 of 1990 in the file of the Chief Judicial Magistrate, Coimbatore Nilgiris acquitting the Petitioners would render them immune from being proceeded against by way of adjudication proceedings also does not merit our acceptance. It is by now well settled by the weight of overwhelming authority of judicial pronouncements of this Court as well as that of the Apex Court that the acquittal in a Criminal Prosecution per se is no justification to exonerate or absolve the persons concerned who were acquitted in Criminal proceedings of their liability under other provisions of law as in this case the liability to be proceeded against in adjudication proceedings for confiscation as to the levy of penalty, u/s 112 of the Customs Act, 1962 and Section 74 of the Gold (Control) Act, 1968. The object of criminal proceedings and the object of the adjudication proceedings are not only distinct and separate but the nature of powers exercised by the Criminal Court and of the adjudicating authorities under the respective Acts cannot also be said to be one and the same so that the exercise or use of one can by any stretch of imagination be said to be in derogation or to be destructive of the other. Consequently, we are unable to accept the plea based on the verdict of acquittal recorded by the Criminal Court in favour of the petitioners in this regard.

20. Equally untenable and devoid of merit are the submissions based on the questions of alternative remedy. This is not a case, where the consideration is as to whether the petitioners should be permitted to choose out of the two remedies available for them, the one an ordinary statutory remedies or the other an extraordinary constitutional remedy. On the other hand the proceedings have reached a stage under which the Petitioners had invoked their statutory remedies and not only filed their Appeals before the Tribunal but also have moved the Tribunal for order relating to waiver of the pre-deposit stipulated under the special enactments and obtained orders from the Tribunal subject to certain terms and conditions. Normally in such cases where the petitioners have also invoked the statutory remedies by approaching the Appellate Tribunal, this Court cannot desist from discouraging such persons from approaching this Court simultaneously for the same relief by invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. The petitioners cannot be permitted to approbate and reprobate acting according to their whims and fancies. Unless in a given case the constitutional validity of the Act or any provision of an Act or a statutory rule is involved for consideration which cannot be legitimately undertaken by the Appellate authorities functioning under the Act for determination, being creatures of the statute itself, there is no scope for allowing such simultaneous vindication of rights. The petitioner who [had] earlier moved the statutory authorities cannot be allowed to bye-pass and abandon the proceedings so instituted merely because it is more opportune for him to pursue the extraordinary remedy than the appellate remedy which he has chosen to avail of, of course circumscribed by certain restrictions in the matter of pre-deposit, when particularly as a matter of fact, the petitioners could equally obtain

effective relief before the Tribunal in the very statutory appeals filed by them on the very same ground which are now sought to be urged in these Writ Petitions. The lack of jurisdiction or violation of principles of natural justice alleged, on the ground of bias did not find Favour of our acceptance and has been rejected supra. Therefore, it is no longer open to the petitioners to give a go bye to the statutory remedies availed of on such grounds or to justify their action in simultaneously invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India to challenge the very proceedings which are the subject matter of appeal before the Tribunal constituted under the Act.

21. The further plea on behalf of these petitioners that the Tribunal ought to have granted an unconditional order with regard to the waiver of pre-deposit also does not appeal to us as of any merit. We are not making any observations on the merits of the contentions otherwise in respect of the factual findings recorded by the authority below in view of the pendency of the appeal before the Tribunal. Though the Tribunal has chosen to reject the appeal in the case of the petitioner in W.P. Nos. 11363 and 11364 of 1990 by the subsequent orders passed permission has been granted to the petitioners to have the same moved for further orders on and after the disposal of these Writ Petitions. On going through the order of the Tribunal where conditional orders of waiver of pre-deposit has been made, we do not find any patent error of law or perversity of approach in them and therefore we do not propose to interfere with the orders depicting conditional deposit except modifying the same having regard to the pendency of the Writ Petitions all along in this Court, so as to enable the petitioners to comply with the conditional orders of the Tribunal by granting four weeks" time from this date. It is open to the petitioners to comply with, within a period of four weeks the conditional orders relating to the waiver of the pre-deposit and thereupon move the Tribunal for disposal of their appeals on merits and in accordance with law.

22. Except this modification, the orders impugned in these Writ Petitions do not call for any interference in our hands. The Writ Petitions therefore fail and shall accordingly stand dismissed. However, on the facts and circumstances of the case there will be no order to costs.