

(1953) 02 RAJ CK 0004
In the Rajasthan High Court
Case No : Writ Application No. 651 of 1952

Maharaja Kishangarh Mills Ltd.	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 26-02-1953

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(6), 226, 226(1), 31(1)
Industrial Disputes Act, 1947 — Section 10(1), 10(3)

Citation : AIR 1953 Raj 188 : (1953) 2 LLJ 214 : (1953) RLW 569

Hon'ble Judges : Ranawat, J; Dave, J

Bench : Division Bench

Advocate : C.L. Agrawal, for the Appellant; C.B. Bhargava, Dy. Govt. Advocate and D.M. Bhandari, for Respondent (No. 3), for the Respondent

Final Decision : Allowed

Judgement

Ranawat, J.—This is an application under Article 226 of the Constitution of India by Maharaja Kishangarh Mills Ltd., Kishangarh, against the State of Rajasthan, Mr. D. O. Sharma, Judge of the Industrial Tribunal and Kishangarh Mill Rashtriya Mazdoor Congress. The petitioner is a public limited company owning Textile Mills at Kishangarh, which manufactures cotton yarn and cotton cloth. Respondent 3 is a Union of the labourers of the Mills.

2. It is alleged on behalf of the petitioner that for some time past the Mills were running at a heavy loss and as there was no hope of running them at a profit the petitioner closed the Mills on 19-10-1952, which resulted in unemployment of labour. The Government of Rajasthan, it is said, intervened and the petitioner agreed to work the Mills subject to the condition that an expert, who had been appointed to hold an inquiry into the affairs of the Mills, should complete the inquiry within 10 days and that if the finding of the expert would be that it would be uneconomical to run the Mills in the present conditions the Mills would be closed, or if the inquiry did not finish within 10 days" time the working of the Mills would again be stopped. On a request made by the petitioner the

Government of Rajasthan secured the services of Mr. Dutta to inquire into the affairs of the Mills and to report how far the working of the mills was economical under the present conditions.

Mr. Dutta submitted his report to the Government but the Government did not supply it to the petitioner. However, the petitioner thought that the result of the inquiry made by Mr. Dutta supported the view that under the present condition the working of the Mills could not be undertaken without heavy losses. As it is said it was absolutely impossible to work the Mills without incurring losses the petitioner was forced to close down the Mills again on 19-11-1952. Thereafter, it is said, the Mill labourers indulged in irresponsible and violent activities to the prejudice of the petitioner. The Government of Rajasthan by their notification No. P. 25 (1)/(Lab) 1 of 25th November constituted an Industrial Tribunal for the District of Jaipur and appointed Mr. D. C. Sharma as a Member of such Tribunal. This Tribunal was constituted of one Member only. By a further notification of the same date, which is as follows, a reference was made to the Industrial Tribunal:

"No. P. 25 (1) Lab./52/2. Whereas an Industrial dispute exists between M/s. the Maharaja Kishangarh Mills Ltd., Kishangarh, and their workmen sponsored by the Kishangarh Mill Rashtriya Mazdoor Congress, Kishangarh, in respect of the matters specified in the schedule hereto annexed;

And whereas the Government of Rajasthan considers it desirable to refer the dispute to an Industrial Tribunal for adjudication.

Now, therefore, in exercise of the powers conferred by Clause (c) of sub-s. (1) of Section 10 of Industrial Disputes Act, 1947 (Act No. 14 of 1947) the Government of Rajasthan is pleased to refer the said dispute for adjudication to the Industrial Tribunal constituted u/s 7 of the said Act by a Notification of the State Government in the Department of Labour No. F. 23 (1) Lab. /52/1., dated 25-11-1952."

3. The Government then made an order u/s 10(3), Industrial Disputes Act of 1947 enjoining it on the petitioner to withdraw the lock-out at once. The petitioner, it is said, did not resort to lock-out but closed down the Mills on account of heavy losses. The reference made by the Government to the Industrial Tribunal is, it is said, beyond the scope of the Industrial Disputes Act and the order to work the Mills amounts to an infringement of the fundamental rights of the petitioner under Articles 19(1)(g) and 31(1) of the Constitution of India, The petitioner, therefore, prayed that a writ of mandamus or other appropriate direction be issued declaring the reference to the Industrial Tribunal to be illegal and restraining the respondents from forcing the petitioner to work the Mills and from holding any proceedings under the Industrial Disputes Act, 1947, in connection with the reference, which has been made by the Government to the Industrial Tribunal.

4. Both the Government and the Kishangarh Mill Rashtriya Mazdoor Congress filed their replies. The Government admitted having made a reference to the

Industrial Tribunal as alleged by the petitioner but denied any knowledge that the petitioner had closed the Mills on account of losses. It was said that virtually the petitioner had resorted to a lock-out, even though the petitioner had in his notice to the labourers expressed that the closing down of the Mills was on account of losses. Similarly, the reply filed on behalf of the labourers of the Mills is that the petitioner had resorted to a lock-out in order to force the labourers to accept lower wages and the closing down of the Mills was only a subterfuge to enable the petitioner to coerce the labour to accept adverse terms of employment.

5. The first question that has arisen in this case is whether the reference made by the Government to the Industrial Tribunal is "ultra vires". It is conceded by the learned Government Advocate that if the petitioner had closed down his Mills on account of losses the reference would suffer with the defect of being beyond the scope of the Industrial Disputes Act, because a reference under the Industrial Disputes Act can only be made when there is any industry in existence and in the case of the closing down of an industry there can be no industrial dispute within the meaning of the Industrial Disputes Act.

6. In order to decide whether the reference in the present case is within or without the jurisdiction of the Government, it becomes necessary to determine the further question whether in the present case the petitioner had closed down his business temporarily or whether he had resorted to a lock-out to coerce the labour to come down on their knees, while giving it the colour of closing the Mills, in other words, whether it is a subterfuge. The second question is purely a question of fact and both parties are at variance in their pleadings so far as this question is concerned. Affidavits have been filed by both sides in support of their pleadings. It is difficult to come to a correct finding on such questions of fact in the present proceedings under Article 226 of the Constitution of India. The matter can very well be enquired into by the Industrial Tribunal where the parties will have ample opportunities to lead their evidence and to put their point of view before the Tribunal which is competent to hear and decide such issues. In -- *Jaya Bharat Tile Works, Samalkot, Madras State Vs. The State of Madras and Others*, Subba Rao J. has observed as follows:

"Whenever, a question arises whether a closure is in fact illegal lock-out or a subterfuge adopted by employers to bring the employees to their knees the Industrial Tribunal has to decide that question. For, if it is a lock-out or an illegal labour practice the Tribunal certainly will have jurisdiction to go into the question."

7. We are in respectful agreement with the observations of the learned Judge. The petitioner has also not disputed the jurisdiction of the Industrial Tribunal to go into this particular question but it has been urged on his behalf that this Court might decide this question in order to avoid further litigation between the parties. As has already been observed above we do not think it necessary at this stage to go into this question ourselves, when it is competent for the Industrial Tribunal to enquire into it and to decide it. The petitioner made an application asking the

Government to produce a copy of the report of Mr. Datta relating to the affairs of the Mills and the copy of the said report was laid by the learned Government Advocate before the Court for its perusal.

Though the learned Government Advocate did not agree with the findings of Mr. Dutta, it was however admitted that according to Mr. Dutta the working of the Mills under the existing circumstances involved a loss of more than a lakh of rupees every month to the management. This fact has been made the foundation of the claim of the petitioner that the mills had been closed down on account of heavy losses. Until an inquiry is made by the Industrial Tribunal on this question nothing can be said one way or the other but it can be said that the report of Mr. Dutta does support the petitioner in his allegations. How far that report is correct, it would be for the Tribunal to decide. We would therefore leave this question for the Industrial Tribunal to determine and would not venture at this stage to decide the question whether the reference to the Industrial Tribunal in the present case is or is not within the scope of the Industrial Disputes Act.

8. The next question that has been urged on behalf of the petitioner is that the order of the Government to run the mills is illegal. The petitioner, it is urged, should not be forced to incur losses by running the mills. The fundamental rights of the petitioner under Articles 19(1)(g) and 31(1) of the Constitution of India, it is said, are infringed and he is entitled to an appropriate writ or direction to restrain the Government from adopting coercive measures against him. It is further argued that the language of Section 10(3), Industrial Disputes Act does not justify issue of an order against the petitioner in the present case.

On the other hand, the learned Government Advocate and Mr. Bhandari have both argued that, until it is decided by the Industrial Tribunal that the mills had been closed down on account of the losses, it cannot be said that the reference is illegal and till then the reference should be taken to be in accordance with the provisions of the Industrial Disputes Act. Consequently, it was open, it is said, to the Government to make an order u/s 10(3), Industrial Disputes Act enjoining it on the petitioner to work the mills.

9. The order of reference of the Government shows that the dispute in the present case is said to be in respect of the following matters:

"(1) Whether the notice of lock-out dated 18-11-52 put up by the Maharaja Kishangarh Mills Ltd., Kishangarh, for reasons of losses is justified?

(2) What relief the labour is entitled to if the Mills were closed on account of economic losses?

(3) What relief the labour is entitled to if the Mills were closed on unjustified grounds?"

10. Questions 2 and 3 relate to the effects of the finding on question 1. They are both therefore dependant on question 1 which is the main point for determination of the Industrial Tribunal in respect of the reference. As regards

the first point the notice of 18-11-1952 put up by the petitioner is said by the Government to be a notice of lock-out but it has been contended on behalf of the petitioner that the notice is not that of a lock-out but it is that of a closure. It appears that the Government took that notice to be one of lock-out and not of closure, even though the notice purported to be one of closure. Probably, it all depends on the manner in which that notice is to be looked at. The case of the labour is that even though the notice has been couched in such a language as to make it appear to be a notice of a closure the other circumstances which have not been given in the notice itself would make that notice to be one of lock-out.

We have already discussed above this point and we have refrained from giving a decision on this question ourselves, leaving the question for the determination of the Industrial Tribunal. It is, however, evident from a perusal of the order of reference of the Government that no dispute other than the stopping of the mills, whether as a closure or as a lock-out, has been referred to the Industrial Tribunal. The main issue which would come before the Industrial Tribunal would relate to the propriety of the action of the petitioner in stopping the functioning of the mills. Section 10(3), Industrial Disputes Act is as follows:

"Where an industrial dispute has been referred to a Board or Tribunal under this section, the appropriate Government may by order prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference."

11. It is true that a lock-out itself may be the subject-matter of a dispute which might be referred to an Industrial Tribunal u/s 10(1) or 10(2), Industrial Disputes Act. It is also clear that Section 10(3), Industrial Disputes Act leaves it within the discretion of the Government to prohibit the continuance of a strike or lock-out in connection with a dispute which might have been referred by it to an Industrial Tribunal. Where, therefore, a lock-out or a strike has been resorted to by any one of the parties to an industrial dispute and where such strike or lock-out is in connection with such dispute an order u/s 10(3) might be made for prohibiting the continuance of such strike or lock-out. But where the strike or lock-out is not in connection with any dispute but is itself a dispute it cannot be said that an order u/s 10(3) could be made within its meaning.

In order that the strike or lock-out may be in connection with a dispute it is necessary that the strike or lock-out should be something different from the dispute itself. A strike or lock-out which is the subject-matter of the dispute itself cannot be termed to be a strike or lock-out in connection with such a dispute within the meaning of Section 10(3). A strike or lock-out which is itself a dispute would not justify an order u/s 10(3) for its prohibition because the language of Section 10(3) requires that a strike or lock-out should be in connection with a dispute, in order that an order for its prohibition might be made by the Government. Where the strike is not in connection with a dispute but is itself a dispute the matter is quite different and would not justify an order of prohibition. The discretion of the Government therefore which has been exercised in the

present case in making an order of prohibition is beyond the scope of Section 10(3).

In the present case, the report of Mr. Dutta Whose services were secured by the petitioner through the good offices of the Government to examine the affairs of the mills supports the position taken up by the petitioner that the working of the mills is uneconomical in the present circumstances. It may be that the opinion of Mr. Dutta might be incorrect. Still "prima facie" this is something which does lend support to the contention of the petitioner. It is not improbable that the Industrial Tribunal might ultimately come to the conclusion that the working of the mills in the present circumstances is bound to result in losses to the petitioner. In such an event the working of the mills during the pendency of the enquiry would mean heavy losses to the petitioner.

It is also not clear as to how long the Industrial Tribunal might take in disposing of the reference. There is, therefore, a possibility for the petitioner to suffer heavy losses if the order which has been made by the Government u/s 10(3), Industrial Disputes Act is allowed to stand. In other words, there is certainly much room for an apprehension to the petitioner that he might suffer heavy losses in the event of his being forced to work the mills. In view of Mr. Dutta's report the apprehension in this behalf of the petitioner cannot be termed to be a mere idea without any foundation. In such a case, therefore, the law did not contemplate that an order u/s 10(3), Industrial Disputes Act should be made.

This is why the language requires that a strike or lock-out in order that it might be prohibited should be in connection with some dispute and the dispute for purposes of Section 10(3) should be something different from the strike or lock-out itself. Where the strike or lock-out itself is the dispute the law did not contemplate that an order for its discontinuance should be made under Is. 10(3).

12. We have been referred in this connection to the observations of Kania C. J. in -- AIR 1949 150 (Federal Court) which are as follows: "The main dispute related to the lock-out and the claim of the workmen to payment of wages during the period of the alleged lock-out. It seems to us clear that the question whether the employers were justified in locking-out their workmen would be an industrial dispute covered by the words "dispute which is connected with the employment or non-employment and with the terms of employment of such workmen". The payment of wages during the period of such lock-out would also be clearly an industrial dispute."

13. It may be pointed out that these observations are relating to the definition of an industrial dispute and we agree that an industrial dispute may be a strike or a lock-out itself. In that case, the question did not arise relating to the interpretation of the language of Section 10(3) and the observations of the Hon"ble Chief Justice cannot be read in connection with the provisions of Section 10(3). They are confined to the definition of an industrial dispute and they cannot be taken to throw any light on the meaning of Section 10(3). We have

carefully considered the language used in Section 10(3) and in our opinion an order prohibiting a strike or lock-out can only be made where such strike or lock-out is in connection with a dispute, which should be, in order that the strike or lockout might be in its connection, something different from the strike or lock-out itself.

14. This may further be explained by taking an illustration. Supposing, for instance, there is a dispute between the employer and the employees about their wages and the employer resorts to a lock-out the lock-out can be said to be in connection with a dispute of wages but the lock-out cannot be said to be in connection with any dispute where it is itself a dispute.

15. The learned counsel of the petitioner at the time of the hearing of this case went to the length of asserting that the petitioner is prepared to place the mills at the disposal of the Government or some other responsible authority for being worked, provided he was assured that he would not be saddled with any losses on account of such working. The opposite party however could not make up its mind to accept the offer made by the learned counsel of the petitioner on behalf of the mills. This assertion to some extent may be taken to disclose the "bona fides" of the petitioner. In such a case when a petitioner apprehends heavy losses he cannot be forced to work the mills which might entail losses to him.

Under Article 31(1) of the Constitution of India no person can be deprived of his property save by authority of law. To force the petitioner to work the mills with the result that he would be made to suffer losses amounts to depriving him of property. In such a case the petitioner, it is apparent, apprehends that he shall have to incur losses every month and this cannot be anything different from depriving him of his property. The provisions of Section 10(3), Industrial Disputes Act, as we have already discussed, do not authorise the Government to make a prohibitory order in such circumstances. The purpose of the Industrial Disputes Act is to harmonise the relations between the employer and the employees and it is not contemplated by the Act that the employer or the employee should be deprived of their property.

16. The learned counsel of the petitioner has also invoked the provision of Article 19(1)(g) of the Constitution of India in his favour in asserting that it is open to him to close down the mills temporarily or permanently. He is at liberty to carry on the trade or occupation and he is also at liberty to close it down. In support of his contention -- Indian Metal and Metallurgical Corporation Vs. Industrial Tribunal, Madras and Another, has been cited wherein the following observations appear:

"If a citizen has got a right to carry on business, we think it follows that he must be at liberty not to carry it on if he so chooses. A person can no more be compelled to carry on a business than a person can be compelled to acquire or hold property." p. 101.

17. In reply to this the learned counsel on the other side has urged that the

provisions of Article 19(1)(g) of the Constitution of India apply to citizens of India only and as the petitioner is a corporation he cannot be included within the definition of a "Citizen". He is not therefore entitled to claim the rights guaranteed under Article 19(1)(g) of the Constitution of India.

18. We may refer to certain observations of the learned Judges of the Supreme Court in -- "Chi-ranjitlal Chowdhury v. Union of India", AIR 1951 S C 41 (D). In his judgment Fazl Ali J. has remarked as follows:

"The company and the shareholders are in law separate entities, and if the allegation is made that any property belonging to the company has been taken possession of without compensation or the right enjoyed by the company under Article 19(1)(f) has been infringed, it would be for the company to come forward to assert or vindicate its own rights and not for any individual shareholder to do so."

19. The learned Judge has further said in the judgment that the question has been elaborately dealt with by Mukherjee J. and that he did not wish to add anything to what had been said by him." Mukherjee J. in the same case in his judgment observed as follows:

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are not applicable to natural persons. An incorporated company therefore can come up to this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own."

20. Kania C. J. agreed with the observations of Mukherjee J. These observations were with reference to the fundamental rights under Article 19 of the Constitution of India, which are available only to the citizens of India. It can therefore be safely taken that corporations like natural persons can claim fundamental rights under Article 19 of the Constitution of India and they cannot be deprived of such rights on the grounds that they cannot be included within the definition of "citizens". The definition of "citizen" is comprehensive and it cannot be assumed that a corporation is not a citizen. Certain doubts were expressed in this connection by Rajamannar C. J. in -- The Sree Meenakshi Mills Ltd. Vs. The State of Madras and Others, but in -- Indian Metal and Metallurgical Corporation Vs. Industrial Tribunal, Madras and Another, the same Court on an application of a company came to the conclusion that its rights under Article 19(1)(g) had been infringed. In other words, the corporation was taken to be a citizen in the meaning of Article 19(1)(g) of the Constitution of India,

21. We are also referred in this connection to the decision of a Division Bench of the Punjab High Court in -- The Jupiter General Insurance Co. Ltd. Vs. Rajagopalan and Another, in which it has been held that a corporation is not a citizen. The decision proceeds on the construction of Articles 5 and 39 of the Constitution of India. In the meaning of Article 39 obviously a corporation is not a

citizen, because the provisions of this Article refer to the maintenance of persons of either sex. The language of Article 5 has not been discussed by their Lordships of the Supreme Court in the decision referred to above but in view of the observations appearing in that judgment the language of Article 5 shall have to be construed liberally so as to include within its meaning a corporation. It may be pointed out here that the observations of the learned Judges of the Supreme Court were not brought to the notice of the Punjab High Court at the time the case -- *The Jupiter General Insurance Co. Ltd. Vs. Rajagopalan and Another*, was decided. In our opinion, the observations of the learned Judges of the Supreme Court cannot be lightly ignored.

22. Having regard to the observations of their Lordships of the Supreme Court which have been referred to above we are of the opinion that fundamental rights guaranteed by the Constitu-tion to citizens are available to corporations as well, except where the language of the provision and the nature of the rights compels an inference to the contrary. The fundamental rights in the present case of the petitioner would be regarded as infringed by the order of the Govt. prohibiting it from closing down the mills, in case he be regarded as having closed the business on account of apprehension of losses. The business of the petitioner is not of the nature of a public utility service, or he has not taken any assistance from the Government to start his business. Under these circumstances, interference by the Government ins the matter of the continuance of his business cannot be deemed to be reasonable in the meaning of Article 19 of the Constitution of India.

23. Lastly, it has been argued by the opposite side that the discretionary powers which are vested in the Government u/s 10(3), Industrial. Disputes Act cannot be subject to the control of this Court. In other words, it is stressed that a writ of "mandamus" cannot issue in such a case. We might here refer to the observations in --"*J. R. Garfield v. United States*", (1908) 211 U. S 249 (G), which are as follows:

"It is insisted that "mandamus" is not the proper remedy in cases such as the one now under consideration, but we are of opinion that "mandamus" may issue if the Secretary of the Interior has acted wholly without authority of law. Since -- "*Marbury v. Madison*" (1803) 1 Cra 137 (H), it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the Courts. The subject was under consideration in -- "*Noble v. Union River Logging R. Co.*" (1893) 147 U. S. 164 (I), and Brown J. delivering the opinion of the Court, cites many of the previous cases of this Court, and, speaking for the Court says:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts, that were laid before him, was "ultra vires", and beyond the scope of his authority. If he has no-power at all to do the act complained of,

he is as much subject to an injunction as he would be to a "mandamus" if he refused to do an act which the law plainly required him to do. As observed by Bradley J. in -- "Board of Liquidation v. McComb" (1876) 92 U. S. 531 (J). But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have a "mandamus" to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of "mandamus" and injunction are somewhat correlative to each other".

We think this principle is applicable to this case, & that there was jurisdiction to issue the writ of "mandamus." "

24. The decision in the aforesaid case was followed in -- "United States of America; Ex Re-latione Lucy Ann Turner v. Walter L. Fisher" (1911) 222 U. S. 202 (K).

25. In answer to the above American authorities the counsel on the opposite side has put his reliance on certain observations appearing in the judgment of -- Kr. Jyoti Sarup Vs. Board of Revenue, Uttar Pradesh, Lucknow and Another, The following are the observations:

"In my judgment, the correct rule is that "mandamus" will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action.

It may be that while an officer may, in certain extraordinary circumstances, be compelled by "mandamus" to exercise his discretion one way or the other and not just simply refuse to act at all, yet after he has honestly and reasonably exercised his discretion, "mandamus" will not lie where the act is truly discretionary, to control that discretion, as to the particular manner of performance, even though the discretion be erroneously exercised for there is no method of review or correction provided by law to control such a discretion. The writ of "mandamus" can never be used as a substitute for appeal or what has been called in America a "writ of error".

26. In our opinion, a writ of "mandamus" does [lie to control administrative acts where such acts interfere with the private rights of citizens and where the exercise of such executive acts is arbitrary and illegal. In the present case, the order of the Government u/s 10(3), Industrial Disputes Act is not within the scope of the provisions of law and is not warranted under the law. In such a case where it infringes the fundamental rights of the petitioner it is open to this Court to grant relief by issuing an appropriate writ or direction. The scope of Article 226 of the Constitution of India is wider than the scope of prerogative writs under the English Law. In cases where fundamental rights are infringed, it is the

duty of this Court to safeguard them.

27. We have held that the order of the Government u/s 10(3), Industrial Disputes Act is not covered by the provisions of that section. But for a moment if it is assumed for the sake of argument that the Government was authorised to make such an order within the meaning of Section 10(3), the order in the present case would nevertheless amount to an unreasonable infringement of the fundamental rights of the petitioner under Article 19(1)(g) of the Constitution of India, because the business of the petitioner is not a public utility concern and "prima facie" the petitioner reasonably apprehends a loss of more than a lakh of rupees every month in running his business. It is true that the closing down of the business of the petitioner results in unemployment to labour but this would not by itself be a sufficient ground for forcing the petitioner to work his concern when in his opinion it cannot be so worked without losses. This matter is to be enquired into by the Industrial Tribunal and unless that Court decides against the petitioner, "prima facie" the petitioner cannot be ordered to work the mills in spite of losses.

28. The application partially succeeds and we would declare that the order of the Government by which the petitioner has been ordered to run the mills during the pendency of the inquiry is illegal and would order issue of a direction to the Government to refrain from enforcing its order for continuing the working of the mills. The proceedings relating to the reference made by the Government shall continue and the prayer of the petitioner for declaring the reference illegal is dismissed. The parties shall bear their own costs.