
(1995) 11 AHC CK 0103
In the Allahabad High Court
Case No : C.M.W.P. No. 28463 of 1995

Matthan Singh

APPELLANT

Vs

IInd Addl. District Judge and Another

RESPONDENT

Date of Decision : 30-11-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4(2), Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, Order 9 Rule 13
Constitution of India, 1950 — Article 12, 226, 227

Citation : (1996) AWC 517 Supp

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Pankaj Mithal, for the Appellant; S.C. and Rajeev Gupta, for the Respondent

Final Decision : Disposed Of

Judgement

D.K. Seth, J.—The present petition has been sought to be moved under Article 226/227 of the Constitution of India against the order dated 2nd September, 1995 passed by the learned IInd Additional District Judge, Meerut in Misc. Appeal No, 78 of 1992 arising out of the order dated 14th February, 1992 passed by the learned Civil Judge, Meerut in Original Suit No. 1225 of 1991.

2. Original suit No. 1225 of 1991 was Initiated by one Raghubir against Matthan Singh and others for permanent injunction restraining the Defendants from Interfering in the possession of the Plaintiff over the suit property. On the application for grant of temporary Injunction filed by the Plaintiff, the learned Civil Judge passed an Interim order on 28th November, 1991. After the Defendant had contested the said application, the interim order of injunction was vacated by order dated 14th February, 1992 passed by the learned Civil Judge in the said suit. Aggrieved, the Plaintiff preferred an appeal being Misc. Appeal No. 78 of 1992 in the Court of the District Judge, Meerut against the said order dated 14th February, 1992. The said appeal was ultimately transferred to the Second

Court of Additional District Judge. Meerut. The said Misc. Appeal No. 78 of 1992 was taken up for hearing on 29th May, 1995 when the Defendant-Respondent, Petitioner herein, was present in the Court Room. The counsel for the Petitioner, on account of his personal difficulty, had moved an application for adjournment which was dismissed, whereupon the counsel for the Petitioner had moved another application immediately for permission to withdraw from the appeal since he was unable to attend the Court so that the interest of his client may not suffer. The learned Additional District Judge did not pass any order on the said application and proceeded to hear the appeal in the presence of the Petitioner's counsel without giving opportunity to the Petitioner to engage any other counsel and the Petitioner, being an Illiterate rustic person, was unable to participate in the proceeding. He was neither heard nor argued the matter. By order dated 29th May, 1995, the appeal was allowed. in the order, it was recorded incorrectly that the Petitioner was also heard though he could not participate in the proceedings. in the circumstances, on 31st May, 1995, the Petitioner filed an application for recalling the order dated 29th May, 1995 to which the Plaintiff-Appellant, Respondent herein, filed his written objection on 25th August, 1995. Out of the said application for recalling, Misc. Case No. 20 of 1995 was registered. The said Miscellaneous case was dismissed by order dated 2nd September, 1995 on the ground that the order dated 29th May, 1995 was not an ex parte order. It is this order which is under challenge in the present petition.

3. When asked, the learned Counsel for the Petitioner could not specify as to under which provision, he proposed to maintain this petition. However, he contended that the petition under Article 226 is maintainable in the State of U.P. against the order passed by the Civil Court in civil proceedings in view of the U.P. Amendment made in Section 115 of the Code of Civil Procedure. It has been held that such a petition would be maintainable under Article 226 in case there is no appeal or revision provided in the CPC in the case of Jupiter Chit Fund (Pvt.) Ltd. v. Dwarika Diesh Dayal and Ors. 1979 ALJ 685 (FB). In the said judgment, the Full Bench had followed the decision in the case of Har Prasad Singh v. Ram Swamp 1973 ALJ 343 , while overruling the decision in the case of Phool Wati and Others Vs. Gur Sahai, .

4. In order to appreciate the situation, it is necessary to refer to Section 115 as amended in 1972:

The High Court in cases arising out of original suit of the value of twenty thousand rupees and above, and the District Court in any other case may call for the record of any case which has been decided by any court subordinate to such High Court or District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate court appears:

- (a) to have exercised a jurisdiction not vested in It by law, or
- (b) to have failed to exercise a Jurisdiction so vested, or
- (c) to have acted in the exercise of its Jurisdiction illegally and with material

irregularity, the High Court or the District Court may make such order in the case as it thinks fit.

5. After the CPC was amended by Act No. 104 of 1976 which came into force on 1st February, 1977. The same stood further amended by the CPC (Uttar Pradesh Amendment) Act No. 31 of 1978 which came into force on 1st August, 1978. The present Section 115 of the Code of Civil Procedure, as amended by the said U.P. Act No. 31 of 1978 reads as follows:

115. The High Court, in cases arising out of original suits or other proceedings of the value of twenty thousand rupees and above, including such suits or other proceedings instituted before August 1, 1978 and the District Court in any other case, including a case arising out of an original suit or other proceedings instituted before such date, may call for the record of any case which has been decided by any court subordinate to such High Court or District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate court appears:

- (a) to have exercised a jurisdiction not vested in it by law; or
- (b) to have failed to exercise a Jurisdiction so vested; or
- (c) to have acted in the exercise of its Jurisdiction illegally or with material Irregularity; the High Court or the District Court, as the case may be, may make such order in the case as it thinks fit.

Provided that in respect of cases arising out of original suits or other proceedings of any valuation, decided by the District Court, the High Court alone shall be competent to make an order under this section.

Provided further that the High Court or the District Court shall not under this section, vary or reverse any order including an order deciding an issue, made in the course of a suit or other proceedings, except where:

- (i) the order, if so varied or reversed, would finally dispose of the suit or other proceeding; or
- (ii) the order, if allowed to stand, would occasion a failure of Justice or cause irreparable Injury to the party against whom it was made.

Explanation.--In this section, the expression "any case which has been decided includes any order deciding an issue in the course of a suit or other proceeding.

6. Section 115 as applicable in Uttar Pradesh has been interpreted in the said case of Jupiter Chit Fund (supra) to the extent that only original orders passed by the Courts other than the District Court which is valued less than Rs. 20,000 and those original cases above the said value in which orders have been passed by District Court are amenable to Section 115, but no order passed by the District Court in exercise of appellate or revisional Jurisdiction can be questioned u/s 115. In the expression used in the said judgment, the proposition has been

laid down in the following manner:

33. With effect from 1st August, 1978, the revisional Jurisdiction was again bifurcated. The High Court was confined to cases arising out of original suits or other proceedings of the value of Rupees 20,000 or above, including such suits or other proceedings instituted before 1st August, 1978. The jurisdiction of the District Court was in respect of any other case including a case arising out of an original suit or other proceeding instituted before such date. The legislature has continued to use the phrase "cases arising out of original suits". The interpretation placed upon this phrase by the full Bench in *Har Prasad Singh and Others Vs. Ram Swarup and Others*, will apply. The revisional Jurisdiction would hence not extend to cases arising out of the disposal of appeals or revisions by the District Court. The proviso is also in the same terms as the proviso added in 1973 namely, it uses the phrase "cases arising out (of) original suits or other proceedings." As already seen, it will not cover cases arising out of disposal of appeals or revisions.

34. The words "or other proceedings" in the phrase "cases arising out of original suits or other proceedings" refer to proceedings of original nature. These words have been added in order to bring within the purview of the revisional jurisdiction orders passed in proceedings of an original nature, which are not of the nature of suits, like arbitration proceedings. This phrase cannot include decisions of appeals or revisions, because then the legislature will be deemed to have contradicted itself. The words "or other proceedings" have to be read ejusdem generis with the words "original suits." They will not include appeals or revisions.

35. The phrase "In any other case" used with reference to the District Court will refer to cases arising out of original suits of the value of less than Rupees 20,000 and also cases arising out of other proceedings of an original nature of a valuation below Rs. 20,000."

7. This case lays down the extent of Jurisdiction to be exercised by the High Court in exercise of Section 115 of the Code. But nowhere in this decision. It has been laid down that in cases where the exercise of Jurisdiction by the High Court u/s 115 of the Code is barred, in such cases, the Jurisdiction under Article 226 could be Invoked.

8. Similar question arose in the case of *Qamruddin v. Rasul Baksh and Anr.* 1990 AWC 308. In the said case, a suit for perpetual injunction restraining the Defendants Respondents from interfering with the possession of the Plaintiff and from carrying on any construction in the house in dispute in which an application under Order 39, Rules 1 and 2 of the CPC was filed. The learned Munsif granted an ex parte order of injunction, but on contest, the Injunction was vacated. An appeal was preferred before the District Judge under Order 43, Rule 1 wherein the order appealed against was set aside and injunction was granted restraining the Defendant-Respondent from making any construction during the pendency of the suit. Against the said order, a writ petition was moved. Entertaining the writ

petition, interim order was granted by the High Court and thereafter the writ petition has been allowed by quashing the order of the learned District Judge permitting the Defendant-Respondents to make construction at their own cost and risk and issued a writ of mandamus restraining the Plaintiff from interfering the Respondents in making construction which would be subject to the result of the suit. Against the said order, an appeal was preferred before the Supreme Court. While dealing with the same, the Supreme Court observed:

When a suit is filed before a Civil Court having Jurisdiction to entertain the same it may issue interim injunction and the party aggrieved may pursue Its remedy before the Appellate Court and if it is further aggrieved it may invoke the revisional jurisdiction of the High Court under the Code of Civil Procedure. Ordinarily an Interlocutory order passed in a civil suit is not amenable to extraordinary Jurisdiction of the High Court under Article 226 of the Constitution. More so when the aggrieved party has not exhausted the remedy available to it under the Code of Civil Procedure. The High Court in the instant case failed to realise that the Defendant-Respondents had not approached the High Court u/s 115 of the Code of Civil Procedure. The question whether an interim injunction should be granted or not is discretionary in nature, although the exercise of discretion is regulated by the principles set out in Order 39, Rules 1 and 2 of the Code of Civil Procedure. If the order of injunction is passed by a competent court having Jurisdiction in the matter, it is not permissible for the High Court under Article 226 of the Constitution to quash the same by issuing a writ of certiorari in the instant case the learned Single Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. A writ of mandamus cannot be issued to a private Individual unless he is under a statutory duty to perform a public duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus under Article 226 of the Constitution.

9. In view of the said judgment in the case of Qamruddin (supra), the question arose as to whether it had impliedly overruled the judgment in the case of Jupiter Chit Fund (supra) which was affirmed by the judgment of the Supreme Court in Vishesh Kumar Vs. Shanti Prasad, and Vishnu Awatar Vs. Shiv Autar and Others, .

10. The said question was dealt with in the case of Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others, . In the said case, while considering the above question, the Full Bench had addressed itself to the question as to whether a writ lies against a Civil Court's decision? in short whether an appellate order passed by the District Court or an order passed by it in exercise of its revisionary power conferred upon it by Section 115, CPC (As amended by U.P. Amendment Act, 1978) is amenable to writ Jurisdiction of this Court?

11. Admittedly the decision in the case of M/s. Jupiter Chit Fund (supra) was affirmed by the Supreme Court in the decision in the case of Vishesh Kumar (supra). in the case of Vishesh Kumar (supra) while upholding the view taken in

the case of Jupiter Chit Fund (supra), the Supreme Court laid down:

It seems to us that to recognise a revisional power in the High Court over a revisional order passed by the District Judge would plainly defeat the object of the legislative scheme. The intent behind the bifurcation of Jurisdiction--to reduce the number of revision petitions filed in the High Court--would be frustrated. The scheme would, in large measure, lose its meaning. If a revision petition is permitted to the High Court against the revisional order of the District Court arising out of a suit of a value less than Rs. 20,000, a fundamental contradiction would be allowed to invade and destroy the division of revisional power between the High Court and the District Court, for the High Court would then enjoy Jurisdictional power in respect of an order arising out of a suit of a valuation below Rs. 20,000. That was never intended at all.

12. In the said case, it was further held that a proviso cannot be permitted by construction to defeat the basic intent expressed in the substantive provision. The High Court in Jupiter Chit Fund (supra) had rightly laid down that the phrase "cases arising out of original suits" occurring in Section 115 does not cover orders passed in revision after considering the cases of Har Pratap Singh (supra) and Phoolwati (supra). Neither the case of Jupiter Chit Fund (supra) nor the case of Vishesh Kumar (supra) and Vishnu Autar (supra) has laid down that in such a case where the High Court does not have any power of revision in respect of an order passed by the Civil Court, writ Jurisdiction can be invoked. The said cases proceed on the basis that the High Court lacks revisional power in those cases. The decision in the case of Qamruddin (supra) clearly lays down the view that writ Jurisdiction cannot be invoked.

13. On the other hand, the decision in the case of Ganga Saran (supra) while dealing with the decision in the case of Qamruddin (supra) proceeded on the basis that the attention of the Supreme Court in Qamruddin's case was not drawn to the decision in the case of Jupiter Chit Fund (supra), Vishesh Kumar (supra) and Vishnu Autar (supra) and also to the fact that the case arose from U.P. where revision to the High Court did not lay u/s 115 from an appellate or revisional order. A plain reading of Qamruddin's case clearly Indicates that it had never come in conflict with the ratio decided in the cases of Jupiter Chit Fund (supra), Vishesh Kumar (supra) or Vishnu Autar (supra). Qamruddin's case proceeds on the question as to whether writ Jurisdiction can be invoked in respect of a civil suit between two private persons and had decided that it cannot be. One of the additional reason was that such an order could be revised by the High Court u/s 115 of the Code. in fact the power of revision of the High Court exists even without Section 115 of the Code, namely, under Article 227 of the Constitution which vests the High Court with the power of superintendence under which the High Court can exercise revisional power in respect of orders passed by the civil courts. Therefore, it cannot be said that there was no revisional power of the High Court at all and. therefore, writ Jurisdiction can be resorted to or invoked. in the case of Ganga Saran as well, this revisional power has been

referred under Article 226 or 227 "within the ambit of the well-established and recognised principles laid down by the Supreme Court as well as by various High Courts in that regard". While dealing with Qamruddin's case, the Full Bench in the case of Ganga Saran (supra) has laid down:

The opinion expressed by the Supreme Court in Qamruddin's case (supra) to the extent that a writ of mandamus cannot be issued to a private individual unless he is under statutory duty to perform a duty is in accord with well-established principles regarding writ of certiorari and mandamus and need no reiteration or elaboration at our hand....

where an aggrieved party approaches High Court under Article 226 of the Constitution against an order passed in civil suit refusing to issue injunction to a private individual who is not under statutory duty to perform public duty or vacating an order of injunction, the main relief is for issue of a writ of mandamus to a private individual and such a writ petition under Article 226 of the Constitution would not be maintainable. Following the decision of the Supreme Court in Qamruddin's case (supra) this Court cannot issue a writ of mandamus to a private party unless he is under a statutory duty to perform a public duty.

14. While answering question No. 2 as to whether writ is maintainable where no revision lies, the Full Bench answered:

In the affirmative only to this extent that where It is found from the order impugned that fundamental principle of law has been violated and further such an order causes substantial Injustice to the party aggrieved, the principle that ordinarily Interlocutory order passed in the civil suit is not amenable to extraordinary Jurisdiction of the High Court, will not preclude such a writ petition being issued by the High Court under Article 226 of the Constitution within the ambit of well-established and recognised principles laid down by the Supreme Court.

15. A judgment by the Full Bench is binding so long it is not overruled either by larger Full Bench or by the Supreme Court. The decision in the case of Ganga Saran (supra) is still a valid law. Therefore, the question which might be raised as anti-thesis to the ratio decided in the case of Ganga Saran (supra), namely, that the observation of the Supreme Court in the case of Vishesh Kumar (supra) where the object of U.P. Amendment of Section 115 was reflected as to reduce the number of revisions and mutual exclusion of the revisional Jurisdiction of the High Court and the District Court has not been attended to and that the existence of Article 227 under which in exercise of power of superintendence, the High Court could very well revise a non-revisable order has not been consciously attended to cannot be raised now.

16. This aspect was considered by the Hon''ble A. K. Banerjee. J., in the case of Sri Kunj Behari and another Vs. Sri Krishna Dutt and another, , wherein it was observed:

It is well settled that for interpreting the words of statute the Intention of the legislature, which can be gathered from the objects and reasons for which the provision has been enacted, must be borne in mind. The amendment in Section 115, CPC was necessitated as is apparent from the statement of objects and reasons appended to 1970 Amendment Act, to help in reducing the pressure of work on the High Court. For that purpose legislature had in its wisdom laid down that the decision of an appeal or revision by the District Court was not amenable to Section 115, Code of Civil Procedure

17. The other question whether the Civil Courts, who are not parties to the lis or dispute between two private Individuals in a civil suit, while exercising Judicial function, can be called "State" within the meaning of Article 12 of the Constitution in order to render it amenable to writs apart from the principle of existence of alternative remedy in the form of Article 227 of the Constitution of India can also not be raised so long the decision in the case of Ganga Saran (supra) holds the field.

18. Yet in another case viz. Ram Singh v. Special Judge 1993 All CJ 902, the Hon"ble S. R. Singh, J. after dealing with case of Ganga Saran (supra) and Qamruddin (supra) had held that "I am also of opinion that the High Court while exercising its writ Jurisdiction against an appellate or revisional order can issue a writ of certiorari/ mandamus not only against the Subordinate Courts but it may also issue any order or direction not necessarily in the nature of writ, which It considers necessary to be issued in order to effectuate its certiorari Jurisdiction."

19. It was further held that "I am also of opinion that the High Court while seized of a writ petition under Article 226 of the Constitution can also pass any order including an order in the nature of injunction against a private individual in exercise of its inherent power."

20. The above view was buttressed by His Lordship "with the principle of interpretation of the fundamental document, namely, the Constitution which is regarded as a living organism well equipped to suit the ever changing social political and economic needs of the people."

21. The judgment in the case of Ram Singh (supra) did not address itself to the existence of Article 227 or Section 105 of the Code which are complete answer to the questions raised. Neither the object and purpose of the U.P. Amendment of Section 115 as was reflected in the case of Veshes Kumar (supra) was attended to.

22. There is no second opinion that CPC is self-sufficient and a complete Code in itself. The Civil Courts do not need the help of Article 226. The judicious principle of self-restraint and a workable efficacious system through Article 226 would be over-crowded beyond capacity while on the other hand, the object and purpose of U.P. amendment of Section 115 for reduction of pressure on High Court would become frustrated. All these reasons which has reasonable nexus on the question has not been considered in the case of Ram Singh (supra). Even then this

decision cannot overcome the ratio decided in the case of Ganga Saran (supra).

23. In the case of Hajizulla and Ors. v. Nth Addl. District Judge, Varanasi and Ors. 1995 (1) AWC 92, Hon'ble P. N. Nag. J. referring to the judgment in the case of Ram Singh (supra) had held that:

With respect, I was unable to follow this judgment on this aspect in the face of the aforementioned judgment of the Full Bench Ganga Saran's case which clearly lays down that writ cannot be issued against a private person.

and had, in support of his view quoted the following passage from the judgment in the case of Smt. Parvatibai Subhanrao Nalawade Vs. Anwarali Hasanali Makani and others etc., :

Before closing this judgment, we would like to emphasise that in case relating to immovable properties which are governed by the ordinary civil law the High Court should not exercise Its special Jurisdiction under the Constitution unless the circumstances are exceptional. This aspect has been discussed by this Court earlier on several occasions.

24. However, even in the case of Ganga Saran (supra), the scope is very limited and confined only to infraction of fundamental principle of law causing substantial injustice to the party aggrieved only within the ambit of well established and recognised principle laid down by the Supreme Court, namely, whether a writ of mandamus could be issued in a dispute between two private individuals. in the present case, it does not appear that any fundamental principle of law has been violated nor it can be said that the present case comes within the ambit of well-established and recognised principles laid down by the Supreme Court or other High Courts in the matter of invocation of writ Jurisdiction. It is not shown to me that the Respondents in this petition are under any statutory obligation to perform public duty for which writ Jurisdiction can be invoked. Therefore, in the facts and circumstances of the present case, the writ petition is not maintainable.

25. The learned Counsel, however, while posed with the said question of maintainability, he had pointed out that he had also sought to make this application under Article 227 as well and had drawn my attention to the inscription in the cause title, namely. "Under Article 226/227, Constitution of India" and submitted that he may be permitted to maintain this application under Article 227 of the Constitution of India.

26. On the basis of the said submission, the present petition is being treated as a petition under Article 227 of the Constitution and decided as such.

27. In the present case, the application under Order 9, Rule 13 read with Section 151, CPC was dismissed as not maintainable on the ground that the order was not an ex parte order though the learned Counsel upon dismissal of the application for adjournment had filed an application seeking to withdraw his Vakalatnama, but no order was passed on the said application. The learned Advocate for the Petitioner did not participate and had withdrawn himself from

the proceedings and admittedly no opportunity was given to the Petitioner for engaging some other lawyer. In absence of an order on the application for withdrawal of the Vakalatnama by the learned Advocate, the Petitioner also could not be supposed to appear in person. In such circumstances, there is no other alternative but to come to an irresistible conclusion that the hearing of the case and disposal thereof in the manner as obtained in the present case is virtually and in effect an ex parte order. Therefore, it cannot be said that application under Order IX, Rule 13 is not maintainable. Over and above, the said application under Order IX, Rule 13 was inscribed also u/s 151. The said application could not have been rejected in the peculiar facts and circumstances of the case.

28. In the case of *Smt. Kalindri Devi v. Bailoo and Ors.* AIR 1994 All 9, it was held that the decision given in absence of the Petitioner is technically an ex parte decree amenable to be set aside. In the said case, the learned Counsel had reported "no instructions" and did not participate in the hearing. The paikar who was the husband of the Defendant-Appellant though present in the Court did not take steps for further defence of the case, though the trial court had granted some short time to him to properly instruct some counsel. Even in such circumstances, it was held that the decree passed was an ex parte one. It was further held in the said case that the learned Counsel "did not apply for withdrawal from the case and under Sub-rule (2) of Rule 4 of Order III of the Code of Civil Procedure, his power to represent, that is to say, to appear, act and plead on behalf of the Defendant-Appellant in Court, must be deemed to have continued. However, Mr. S. P. Mehrotra invited my attention to a decision of the East Punjab High Court in *Ruprani Devi v. Christopher Southern Lewis*. AIR 1949 EP 86; wherein it was held that if a counsel reports "no instructions", it cannot be said that the party, whom he represents, is present in the Court. The result is that although Sri Ganga Ram Talwar was duly authorised to appear, act and plead on behalf of the Defendant-Appellant and his authority to do so continued, yet he reported "no instructions" which means that he refused to appear for the Defendant-Appellant although he could. The result is that technically the Defendant-Appellant was absent although her husband, who was her palrokar and doing everything for her, and her counsel, duly authorised to appear, act and plead on her behalf, were both present in Court and could have, If they had chosen to do so, participated in the trial and defended the case. Therefore, the decree was technically passed ex parte and was liable to be set aside under Order IX, Rule 13 of the CPC on an application made in that behalf is sufficient cause for non-appearance was made out."

29. In the case of *Rafiq and Another Vs. Munshilal and Another*, , it was held that a party should not suffer in the present adversary legal system because of some non-action, inaction or misdemeanour on the part of the advocate. In the said case, the learned Counsel engaged by the Petitioner was not present and the appeal was dismissed in default. The Supreme Court therein took the view that a party should not suffer for the Inaction, deliberate omission, or misdemeanour of

his counsel. The party may be a villager or may belong to a rural area or may have no knowledge of the Court's procedure.

30. In the facts and circumstances of the present case, to my mind, it appears that the Petitioner cannot be blamed for the situation that emanated on account of withdrawal of his counsel engaged. Therefore, the order passed is clearly an ex parte order.

31. A long time has lapsed. It is of no use sending the case back for decision on the application under Order IX, Rule 13 of the Code of Civil Procedure. The facts disclosed. in my opinion, make out a sufficient cause for setting aside the ex parte decree. In view aforesaid, the order impugned should be set aside.

32. In the facts and circumstances of the present case and in the interest of justice, the application under Order IX Rule 13, CPC is hereby allowed and the ex parte decree is hereby set aside. The appeal is restored to file. The learned lower appellate court is hereby directed to dispose of the appeal after giving notice to both the parties an opportunity of hearing as expeditiously as possible preferably within a period of 6 months from the date a certified copy of this order is produced before it. The application is thus disposed of. There will, however, be no order as to costs.