
(2015) 01 BOM CK 0102

In the Bombay High Court

Case No : Writ Petition No. 1847 of 2007

Purushottam Ramlal Shukla

APPELLANT

Vs

Gayatri Devi

RESPONDENT

Date of Decision : 08-01-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2015) 2 ABR 18 : (2015) 3 ALLMR 32 : (2015) 1 BomCR 719 :
(2015) 3 MhLj 402

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : J.T. Gilda, Counsel, for the Appellant; C.S. Kaptan, Senior Counsel and R.V. Shah, Counsel, Advocates for the Respondent

Judgement

A.S. Chandurkar, J.—This Writ Petition filed under Article 226 read with Article 227 of the Constitution of India by the landlord, challenges the order dated 24.11.2006 passed by the Additional Collector, Nagpur whereby the appeal preferred by the respondents tenants under Clause 21 of the C. P. and Berar Letting of Premises and Rent Control Order, 1949 (for short the Rent Control Order) has been allowed. As a result of said order, the proceedings initiated by the landlord have been remanded to the Rent Controller for fresh inquiry with regard to grant of permission under Clause 13(3)(i), (ii) and (v) of the Rent Control Order. The landlord has been held ineligible for grant of permission under Clause 13(3)(vi) of the Rent Control Order.

2. The present litigation is long drawn and reference is being made to the relevant facts which are required to be considered while adjudicating the Writ Petition. The petitioner is the owner of premises that are situated at Dharampeth, Nagpur being Municipal Corporation House No. 194. The respondents are the tenants who have been let out two rooms admeasuring 22 ft. X 33 ft. for business purposes. There is also a frontage of 22 ft. On 18.01.1991 the petitioner had initiated proceedings under Rent Control Order by

approaching Rent Controller under the provisions of Clause 13(3) (i), (ii) and (v) thereof. On 29.03.1993 the Rent Controller granted permission to issue quit notice to the respondents. The tenants filed appeal under Clause 21 of the Rent Control Order. Along with said appeal an application for condonation of delay was also filed. By order dated 28.05.2001 the application for condonation of delay came to be rejected. The review application filed by the respondents was also dismissed on 30.08.2004. Both the aforesaid orders were challenged in Writ Petition No. 5941 of 2004. This Court on 17.01.2005 dismissed the Writ Petition. Thereafter the respondents preferred Letters Patent Appeal No. 21 of 2005 which came to be allowed on 28.06.2005. After setting aside the orders passed by the appellate authority as well as by the learned Single Judge, the application for condonation of delay came to be allowed. This order in turn came to be challenged by the landlord before the Supreme Court of India. On 20.02.2006 the Supreme Court of India permitted the landlord to amend the proceedings for eviction and to seek permission to issue quit notice on the ground of bonafide need. The appellate authority was also permitted to record evidence and thereafter decide the appeal.

3. Pursuant to aforesaid liberty as granted, the petitioner amended the original application and sought eviction of the respondents on the ground of bonafide need. It was pleaded that the landlord had two sons who were on the verge of completing their education. It was stated that in part of the premises the landlord's wife was running a lodge and hence the elder son decided to start a general store in part of the premises. The younger son wanted to start restaurant-cum-mess in part of the premises. The respondents amended their written statement and opposed the claim of the landlord. It was denied that there was any bonafide need on the part of the landlord. It was further stated that a large portion of the premises was lying vacant and was not being used. Similarly, it was stated that the landlord did not have need of the entire premises. It was then stated that if the permission as prayed was granted, then hardship would be caused to the tenants.

The landlord examined himself in support of aforesaid grounds. The respondents in turn examined respondent no. 5 on their behalf. The appellate authority thereafter on 24.11.2006 decided said appeal by holding that as the tenants did not have proper opportunity to contest the original proceedings. Hence, as regards grounds under Clause 13(3)(i), (ii) and (v) the proceedings came to be remanded to the Rent Controller. It further held that the landlord had failed to prove that he was in bonafide need of aforesaid premises. Hence, permission under Clause 13(3)(vi) of the Rent Control Order came to be denied. This order passed by the appellate authority has been challenged in the present Writ Petition. It is to be noted that on 19th and 20th November 2008 the Writ Petition had been partly allowed and the landlord was granted permission under Clause 13(3)(vi) of the Rent Control Order. The tenants being aggrieved by aforesaid judgment filed Letters Patent Appeal No. 410 of 2008. The Division Bench dismissed said Letters Patent Appeal while holding that the Writ Petition filed by

the landlord under Article 226 of the Constitution of India was not maintainable. The tenants thereafter filed Special Leave Petition before the Supreme Court of India. On 14.07.2014 the Supreme Court of India set aside the order dated 20.10.2010 passed by the Division Bench and remanded the proceedings to this Court. In the order dated 14.07.2014 it was observed thus:

"In the present case, we find that the High Court on the one hand while held that the writ petition was not maintainable, on the other hand dismissed the LPA. We are of the view that instead of dismissed the LPA, Division Bench should have referred the matter back to the Single Judge to decide whether the writ petition was maintainable and whether it was a fit case for interference under Article 227 of the Constitution of India."

It is in this background that the present Writ Petition has been heard.

4. Shri J.T. Gilda, learned counsel appearing for the landlord after referring to the earlier orders passed in the proceedings, submitted that in view of the order dated 14.07.2014 the writ petition would have to be decided in the light of observations made by the Supreme Court of India. He submitted that under the provisions of Article 227 of the Constitution of India this Court could exercise jurisdiction if it is found that the order passed by the subordinate authority has resulted in grave injustice or failure of justice. Relying upon the observations made in *Surya Dev Rai Vs. Ram Chander Rai and Others*, , it was urged that if the impugned order is shown to have been passed in clear ignorance or utter disregard of the provisions of law, then even errors of fact or of law could be corrected. In that regard he also placed reliance on the judgment of learned Single Judge in *Shankar Bhairoba Vadangekar since deceased through L.Rs. Dattatraya Shankar Vadangekar and others Vs. Ganpati Appa Gatare since deceased through L. Rs. Smt. Sushilabai Ganpat Gatare and others* 2001 (4) *Maharashtra Law Journal* 131, *Norman Joseph Ferreira and Another Vs. Arjandas Newandram, Heir and L.R. of Newandram Shivalomal and Others*, as well as *Ganpat Ragho Dhangar and others Vs. Ninaji Raoji Dhangar and another* 1980 *Maharashtra Law Journal* 263. He then submitted that there was sufficient material on record to hold that the landlord had proved his bonafide need. The permission had been sought on the ground that both his sons were on the verge of completing their education and hence it was necessary for him to settle them in life. As the landlord's wife was running a lodge, the purpose for which the tenanted premises were required would have supplemented the aforesaid activity. He further submitted that the landlord being the best judge of his needs, he was entitled to seek eviction of the tenant so as to settle his sons. He, therefore, submitted that the appellate authority was not justified in refusing permission to the landlord on the ground of bonafide need. In this regard he placed reliance on the decision in *Shamshad Ahmad and Others Vs. Tilak Raj Bajaj (Deceased) through LRs. and Others*, . He urged that the tenant in his written statement had merely denied the case of the landlord as regards bonafide need. In the reply it was merely pleaded that greater hardship would be

caused to the tenant if said permission is granted. He, therefore, submitted that the bonafide need of the landlord had been clearly established. On the aspect of hardship to the tenants, he urged that merely on the ground of length of tenancy relief could not be denied to the landlord. In this regard he placed reliance on Mohd. Ayub and Another Vs. Mukesh Chand, . He, thus submitted that the appellate authority having failed to take into account the relevant evidence that was available on record as well as the settled law as regards the matters to be considered while adjudicating the bonafide need of the landlord having been ignored, a case for interference under Article 227 of the Constitution of India had been made out.

5. On the other hand Shri C.S. Kaptan, learned Senior Counsel with Shri R.V. Shah, learned counsel appearing for the respondents opposed the writ petition. It was submitted that in view of the order dated 14.07.2014 passed by the Supreme Court of India, the scope for interference was quite limited. The learned senior counsel submitted that while exercising jurisdiction under Article 227 of the Constitution of India, the High Court could not act like a Court of appeal. Such jurisdiction could not be exercised to upset erroneous conclusion of facts. He placed reliance upon the judgment of learned Single Judge in Prabhudas Narayan Gedam and Others Vs. Municipal Council, to urge that in absence of any jurisdictional error, there was no scope to interfere under Article 227 of the Constitution. Relying upon the decision in Delhi Administration Vs. Gurdip Singh Uban and Others, , it was urged that merely because a party has lost before lower authority, the same could not lead to be presumption that injustice had been done to him. The same would depend upon the facts of each case. He further submitted that the view expressed in Surya Deo Rai (supra) had not been accepted by the Supreme Court in its subsequent decision in Radhey Shyam and Another Vs. Chhabi Nath and Others, .

On merits it was submitted that the appellate authority had on the basis of evidence before it come to the conclusion that landlord had failed to prove his bonafide need. The conclusion as drawn was after taking into account all the material that was available on record. This Court could not exercise jurisdiction merely because another view of the matter was possible. It was further urged that the landlord had not led any documentary evidence in support of his claim and therefore his case was rightly disbelieved by the appellate authority. Relying upon the decision in Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and Others, , it was submitted that only if the findings as recorded were either perverse or the conclusion as arrived at was such that no reasonable person could have arrived at the same, only then a case for interference would be made out. Such was not the position in the present case. He also placed reliance on the decision of learned Single Judge in Janba Daulatrao Borkar Vs. Rajesh Kumar Ramjiwan Agarwal, . He further submitted that it could not be expected that the landlord's son who was pursuing his engineering course was interested in running restaurant-cum-mess . It was also submitted that the provisions of Clause 13(8) of the Rent Control Order had not

been taken into consideration by the appellate authority. The aspect of partial eviction which could satisfy the need of the landlord was not examined. He submitted that the plea regarding partial eviction had been raised in the reply and was also referred to in the tenants deposition. He, therefore, submitted that as aforesaid aspect had not been taken into account, findings based on such adjudication were not available in the present case. He, thus, submitted that the appellate authority had rightly found that the landlord had failed to prove his case of bonafide need.

6. The learned counsel for the petitioner in reply submitted that the High Court under Article 227 of the Constitution could interfere with findings as recorded if the same are not supported by evidence on record. He submitted that said view taken by learned Single Judge in *Madhusudansingh Laxmansingh Chouhan and another Vs. Bhaskar Govind Deshpande*, had been affirmed by the Division Bench in *Bhaskar Govind Deshpande since deceased by Bhaskar Deshpande (since deceased) by L.Rs. Smt. Wasundharabai Deshpande and Others Vs. Madhusudansingh Chouhan and Another*, . He further urged that it was for the tenant to factually place on record relevant material if benefit of provisions of Clause 13(8) of the Rent Control Order was sought to be taken. Reliance in this regard was also placed on the decision in *Gopalsing Vs. Mumtaz Hussain Shamsuddin Bohra and others*, . He further submitted that as the appellate authority had found that the bonafide need of the landlord had not been proved, there was no question of recording any findings under Clause 13(8) of the Rent Control Order. He also urged that it was not necessary for the landlord to have dire necessity to prove his bonafide need. In this regard he relied upon the decision of learned Single Judge in *Mandakini Radhakrishna Damkondawar Vs. Nirmaladevi Chandrakant Pandit and others*, . He also submitted that there was shift in the approach of the Supreme Court as well as of this Court while considering bonafide need of a landlord. Said shift in approach was in favour of the landlord. In this regard he placed reliance on the decision of the Supreme Court in *The State of Maharashtra and Another Vs. Super Max International Pvt. Ltd. and Others*, . He, therefore, urged that in aforesaid background the order passed by the appellate authority could not be sustained and interference was called for in writ jurisdiction.

7. Before considering aforesaid submissions, it may be noted that the learned Counsel for the petitioner urged for considering the case of the landlord on the ground of bonafide need. No submissions were made with regard to grounds under Clause 13(3)(i), (ii) and (v) of the Rent Control Order.

It would therefore be necessary to consider the aspect of tenability of the writ petition as well as the scope for interference available under Article 227 of the Constitution of India while considering challenge to the impugned order. In the order of remand passed by the Supreme Court of India, this Court has been directed to decide whether the writ petition was maintainable and whether it was a fit case for interference under Article 227 of the Constitution of India. With

regard to the first issue regarding maintainability of the writ petition, the learned counsel for the petitioner relied upon decision of the Supreme Court in *Surya Dev Rai (supra)*. In paragraphs 37 and 38 of aforesaid decision the Supreme Court has observed that a writ of certiorari is directed against the acts, or proceedings of the subordinate Court and it can issue even if the lis is between two private parties. For holding so, the Supreme Court referred to earlier larger Bench decisions in *T.C. Basappa Vs. T. Nagappa and Another*, and *Province of Bombay Vs. Kusaldas S. Advani and Others*, . In reply to aforesaid submission, the learned Senior Counsel for the respondent submitted that the proposition laid down in *Surya Dev Rai (supra)* that judicial orders passed by civil Court could be examined and then corrected by the writ Court in exercise of its power under a writ of certiorari has been referred to a larger Bench. In the present case the order impugned is passed by the authority empowered to adjudicate the proceedings under the Rent Control Order. Though the view as taken in *Surya Dev Rai (supra)* as referred to above has been referred to a larger Bench, till such adjudication is made said view continues to operate. Moreover, in view of subsequent decisions of the Full Bench of this Court in *Advani Oerlikon Ltd. (supra)* and *Ramchandra Dagoji Rangari through LRs. (supra)* it is clear that the Writ Petition as filed under Article 227 of the Constitution of India is tenable.

8. It would now be necessary to consider whether any case has been made out for interfering under Article 227 of the Constitution of India. While doing so it would be necessary to refer to the law laid down by the Supreme Court in that regard:

a] In *State of Gujarat etc. Vs. Vakhtsinghji Sursinghji Vaghela and Others etc.*, , while considering the scope of interference under Article 227 of the Constitution of India it was held in paragraph 14 as under:

"Article 227 of the Constitution gives the High Court the power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or referred by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the subordinate tribunals within the limits of their authority and to seeing that they obey the law."

b] In *Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram*, in the context of proceedings under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, in paragraphs 16 and 20 it has been observed as under:

"16. It is well settled that the High Court can set aside or ignore the findings of fact of an appropriate court if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Courts below have come or in other words a finding which was perverse in law.

This principle is well settled.

20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence."

c] In *Achutananda Baidya Vs. Prafulla Kumar Gayen and others*, , in paragraph 10 thereof it was observed as under:

"10. The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior court, the High Court should not quash the judgment of the subordinate court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse."

d] Thereafter in *Koyilerian Janaki And Others Vs. Rent Controller (Munsiff), Cannanore And Others* (2000) 9 Supreme Court Cases 406, while considering the provisions of the Kerala Buildings (Lease and Rent Control) Act, in the backdrop of the position that the order of the appellate authority was made final, in paragraph 4 of said judgment it was observed as under:

"The proceedings in the present case arose under a special Act governing the landlord and tenant relationship and disputes. The Act does not provide any second appeal or revision to the High Court. The purpose behind for not providing such remedy is to give finality to the order passed under the Act. The power under Article 227 is exercisable where it is found by the High Court that due to a certain grave error an injustice has been caused to a party."

9. From the aforesaid it is, therefore, clear that interference under Article 227 of the Constitution of India is called for to keep the subordinate authority within the limits of its authority and to see that the law of the land is obeyed. In case there is any misdirection in law or if a conclusion is arrived at without there being any evidence on record, then even a finding of fact arrived at on said basis can be interfered with. The decision in *Raghunath B. Panhale (Dead) by Lrs.* (supra) also lays down the same law.

It is not in dispute that conclusions of fact even if erroneous cannot be upset unless such conclusions are found to be perverse or against the weight of evidence on record. As held in *M/s. India Pipe Fitting Co. (supra)* relied upon by the learned Senior Counsel for the respondent, the High Court cannot act as a Court of appeal in exercise of jurisdiction under Article 227 of the Constitution. However, in the very same decision it has been observed in paragraph 6 that interference could be justified in an appropriate case if it is found that the conclusion arrived at by the subordinate authority is either perverse or against the weight of evidence.

Considering the aforesaid position of law, it is not necessary to refer to other decisions relied upon by the learned counsel for the petitioner as regards the scope for interference under Article 227 of the Constitution of India.

10. Keeping aforesaid legal position in mind, the respective cases of the parties would have to be examined on the basis of material placed on record. In the application seeking permission to issue quite notice on the ground of bonafide need, the landlord came up with a specific case that both his sons who were taking education intended to start some business in the tenanted premises. While the elder son wanted to start a general store, the younger son wanted to start restaurant-cum-mess . It was further stated that there were several hotels and lodges in the area and the landlord's wife was already running a lodge. In his deposition the landlord referred to aforesaid need. In his cross examination it was suggested to the landlord that he had not filed any documents to indicate that he had two sons aged 27 years and 22 years respectively. He stated that he had sold two blocks about 4 to 5 years ago which blocks were admeasuring 8 X 10 ft. each.

11. So far as tenant is concerned, in his written statement he stated that he did not know whether the landlord had two sons. Besides general denial, it was stated that the need of the landlord was not bonafide and genuine. It was stated that tenant had spent an amount of Rs.4,00,000/in renovating the tenanted premises. It was further stated that the landlord was owning various other buildings that could be used for his bonafide requirement. It was then stated that if such permission was granted, greater hardship would be caused to the tenant.

The tenant examined himself and in his cross examination he admitted that he had no knowledge about the family members of the landlord or about occupation of said family members. He further stated that he was not aware whether any family members of the landlord were running lodging and boarding house. He specifically stated that he did not know anything about the landlord's sons. He referred to other business premises from where his business was being run.

12. In view of the order of remand, aforesaid evidence was examined only by the appellate authority. The consideration of aforesaid evidence and appreciation thereof has been done by the appellate authority in a cryptic manner. The appellate authority held that:

- a] The landlord had not filed any documents to show the education of his sons;
- b] The landlord had not filed any document to show that both sons wanted to start their respective business;
- c] one son wanting to start general stores and the other son wanting to start restaurant-cum-mess did not have direct match with their acquired qualifications.

Thereafter, in a cryptic manner, the appellate authority concluded that the landlord had failed to prove his bonafide need. It, therefore, allowed the appeal and held the landlord ineligible for grant of permission under Clause 13(3)(vi) of the Rent Control Order.

13. If the evidence and cross examination of the respective parties is considered, it is clear that while the landlord came up with a specific case regarding need of his sons, the tenant remained content by taking the stand of denial. In his cross examination he stated that he had no knowledge either about the landlord's family, their occupation or even about his two sons. The bonafides of the landlord were not specifically challenged. Though a plea was raised that the landlord had various other premises where business could be started, there was no evidence what so ever led by the tenant in that regard. The tenant was also not aware about the proceedings initiated against the other tenant for seeking possession of the other tenanted premises. This is the nature of evidence that was available on record.

14. The appellate authority however placed unnecessary emphasis on the fact that the landlord had not filed any document to show the education of his sons. It further held that there were no documents filed to show that the landlord's sons wanted to start business and further that said business did not have direct match with the acquired qualifications. When the tenant was not aware about the family members of the landlord or about his two sons, it could not be said that the tenant had placed on record any material to doubt the bonafides of the landlord. As held by the Supreme Court in *Sarla Ahuja Vs. United India Insurance Company Limited*, , there is always a presumption that the requirement of the landlord is bonafide and it is for the tenant to displace said presumption. In the present case, except for general denial there was no material placed on record by the tenant to doubt the landlord's bonafides.

15. As regards absence of documents to show that the sons wanted to start business, it is well settled that it is not necessary to have prior experience for starting any business and the same is not relevant while examining the bonafide need of the landlord. The learned counsel for the petitioner has rightly relied upon the decision of the learned Single Judge in *Dinesh s/o Balkrishna Dande* (supra). As regards the third reason for rejecting the application namely that in view of the qualifications of the sons the same did not have match with the business proposed to be started, it is to be noted that such was not even the case of the tenant. It was not the stand of the tenant that because both the sons were taking education they were not entitled to run the business. The appellate

authority has come to said conclusion without there being any factual foundation for the same in the pleadings. Moreover, as observed in *Sarla Ahuja* (supra), the tenant cannot dictate the manner in which the landlord should undertake his business/livelihood.

16. Hence, when aforesaid conclusions recorded by the appellate authority on the evidence available on record are examined in the light of the law laid down by the Supreme Court that has been referred to above, it is clear that:

- a] requiring the landlord to file documents to show his sons education is a perverse conclusion resulting from misdirection in law;
- b] requiring the landlord to file documents that his sons wanted to start business is in breach of settled legal position;
- c] observations that the sons qualifications did not have direct match with the business proposed to be started is again a perverse finding not based on any evidence what so ever.

Thus it is clear that the appellate authority while arriving at aforesaid conclusions disregarded the settled position of law. Findings have been recorded without there being any evidence on record and the landlord's bonafides have been doubted in absence of any contrary evidence in that regard. By coming to said conclusion the appellate authority has committed grave error thereby causing injustice to the landlord. There being manifest misreading of evidence resulting in improper exercise of jurisdiction, a clear case for interference under Article 227 of the Constitution of India has been made out. Considering the evidence on record, it is clear that the landlord had made out a case for grant of permission to issue quit notice under Clause 13(3)(vi) of the Rent Control Order. The landlord desired to settle his two sons for doing independent business and proceedings for eviction of another tenant had also been commenced. The business that was intended to be started was to supplement the lodging business being done by the landlord's wife. In absence of any contrary evidence to doubt the bonafides of the landlord, it would be difficult to maintain the findings recorded by the appellate authority that the landlord had failed to prove his bonafide need.

17. The other submission made by the learned Senior Counsel as regards examination of the matter in the light of provisions of Clause 13(8) of the Rent Control Order is required to be examined. In the application moved by the landlord it was specifically stated that the landlord required the entire premises for his sons bonafide occupation. In the written statement besides denial, there was no plea raised that the need of the landlord could be satisfied by granting him portion of the tenanted premises. In some what similar situation, this Court in *Gopalsing Rajput* (supra) had observed that in absence of any pleadings or evidence in support thereof, it would not be possible to permit the tenant to raise a plea regarding necessity of inquiry under Clause 13(8) of the Rent Control Order. As found above, there was no evidence led by the tenant even in that

regard. Moreover, the premises in question are two rooms admeasuring 22 X 33 ft. along with frontage. It is, therefore obvious that if both the sons are to be settled in separate business for each of them, there would hardly be any scope even otherwise to consider whether the need of the landlord could be satisfied by being granted part of the tenanted premises. Hence, aforesaid submission cannot be accepted.

As a result of aforesaid discussion, the petitioner is entitled to succeed. Hence the following order is passed:

- 1] The order dated 24.11.2006 passed by the Additional Collector Nagpur, in Rent Control Appeal No. 58/A71(2)/199394 refusing to grant permission under Clause 13(3)(vi) of the Rent Control Order is quashed and set aside.
- 2] The petitioner is granted permission to issue quit notice to the respondents under provisions of Clause 13(3)(vi) of the Rent Control Order.
- 3] Rule is made absolute in aforesaid terms with no order as to costs.