

(2011) 03 MAD CK 0220

In the Madras High Court

Case No : C.R.P. (NPD) No. 1878 of 2010 and M.P. No. 1 of 2010

R. Natarajan

APPELLANT

Vs

The State Chief Election Officer, State Election Commission
and Others

RESPONDENT

Date of Decision : 15-03-2011

Acts Referred:

Constitution of India, 1950 — Article 227

Evidence Act, 1872 — Section 102, 103

Tamil Nadu Panchayats (Election) Rules, 1995 — Rule 51, 63(1), 64(2), 66, 66(1)

Tamil Nadu Panchayats Act, 1994 — Section 259, 259(1), 259(2)

Citation : (2011) 2 LW 259

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : B. Ramamoorthy, for the Appellant; I. Paranthaman, for R 1, Shanthi Rakappan, G.A. for R 2 and Ravikumar, for R 3, for the Respondent

Final Decision : Dismissed

Judgement

S. Tamilvanan, J.—This Civil Revision has been preferred under Article 227 of the Constitution of India, challenging the Order and Decretal

Order, dated 16.09.2009 made in E.O.P. No. 7 of 2008 on the file of the Panchayat Election Court/District Court, Tiruvarur, declaring the third

Respondent as elected President of the Athichozhamangalam Village, Tiruvarur District, in the election held on 13.10.2006 as invalid and direct the

Respondents 1 and 2 herein to re-count the votes polled in the president election for Athichozhamangalam Village and declare the result again.

2. It is an admitted fact that on 13.10.2006, Panchayat election was conducted for elect-ing election the President for Athichozhamangalam village

Panchayat. The Petitioner and the Respondents 3 to 5 herein had filed their nominations before the second Respondent, Chief Election

Officer/Block Development Officer, Koradacherry, Tiruvarur District and after the election was over, the votes were counted on 18.10.2006. The

Petitioner herein has submitted that there are two wards for the Athichozhamangalam village Panchayat and the total number of votes polled were

540 and two postal votes were also received, out of which, one postal vote was polled in favour of third Respondent and the other was polled in

favour of the fifth Respondent. The third Respondent was announced to have polled 182 votes and declared elected by the second Respondent.

The Petitioner was announced to have secured 178 votes, the fourth and fifth Respondents respectively secured 131 votes and 29 votes, as

announced by the second Respondent herein. The Petitioner has further stated that during the counting, there was barbed wire fencing, between

the candidates or their agents and the place of counting. According to the Petitioner, the third Respondent was shown undue favour by the second

Respondent and his subordinates, as he was supported by the ruling party.

3. It is seen that the Petitioner has raised 23 grounds in the revision, however, most of the grounds are similar or over lapping. The main grounds

raised by the Petitioner is that the Election Court failed to see that the Petitioner had given his written request for recounting of votes under Rule 66

of the Tamil Nadu Panchayat (Election) Rules, 1995. According to the Petitioner, even the written request for re-counting was not received by the

second Respondent and there was no recount, though written request was given by the Petitioner herein. According to the Petitioner, the written

request given by the Petitioner herein before the second Respondent was returned on the ground that the Petitioner could approach only the

Election Court. The Petitioner has further stated that one Aruldas, son of Venu-gopal, Sl. No. 244, D. No. 111, Saravanan, son of Ramadass, Sl.

No. 322, Door No. 151 and Devibala, Sl. No. 232, Door No. 151 had voted in the election on 13.10.2006, in which, the Petitioner contested as

one of the candidates and the very same three persons subsequently voted in Arasur village Panchayat Elections, Coimbatore District, that was

brought to light, as per the evidence adduced by P.W.2. According to the Petitioner, the aforesaid 3 persons are close relatives of the third

Respondent and they came to Athichozhamangalam village and voted in the panchayat President election, though they were residing in Arasur

village, Coimbatore.

4. The Petitioner has further stated that the Panchayat Election Court has given a wrong finding that the Petitioner had not given any representation

to the Election Officer, the second Respondent herein for re-counting the votes on 18.10.2006. According to the Petitioner, the second

Respondent refused to receive the written request given by him for re-counting. The Petitioner has further stated that though the written request for

re-counting was rejected by the second Respondent, the same was not considered by the Election Court. According to the Petitioner, Election

Court has given an erroneous finding that the Petitioner had not given any written request for re-counting. Merely because other candidates have

not objected the method of counting, the Election Court could not have given a finding that the objection raised by the Petitioner was not

acceptable. It is further stated by the revision Petitioner that the Election Court went wrong in giving a finding that the said Aruldas, Saravanan and

Devibala could not have voted in two places, since the marking of ink was not available in their fingers in the subsequent election in Arasur Village.

As per the evidence of P.W.2, the said three persons voted for the second time only on 15.10.2006 in Arasur Village, Coimbatore District.

According to the learned Counsel for the Petitioner, the reasons given by the Court below for dismissing the Election O.P are unsound,

unsustainable and untenable in law and facts.

5. Mr. B. Ramamoorthy, learned Counsel appearing for the Petitioner mainly contended that there was only a difference of 3 votes between the

Petitioner and the third Respondent, apart from one postal vote. As per the evidence of P.W.2, the aforesaid Aruldas, Saravanan and Devibala

have been stated as voters of ward number 1, Athichozhamangalam village at D. No. 111 and 151 respectively and they voted accordingly, on

13.10.2006. The very same three persons subsequently voted, as per the voters list relating to the second ward of Arasur village, Sulur Panchayat

union, Coimbatore District on 15.10.2006.

6. According to the learned Counsel appearing for the Petitioner, fraud has been played in favour of the third Respondent and therefore, it would

attract Section 259(b) of Tamil Nadu Panchayats Act, 1994 and Rules 66 and 67 (c) to declare the Panchayat Election invalid. Learned Counsel

appearing for the Petitioner further drew the attention of this Court to Section 259(1)(b) of the Tamil Nadu Panchayats Act, 1994, which stipulates

the grounds for declaring election to be void, subject to the provisions of Sub-section (2), if the District Judge is of the opinion that any corrupt

practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent.

7. Sub-section (2) of Section 259 of the Tamil Nadu Panchayats Act, 1994 reads as follows:

If in the opinion of the court, a returned candidate has been guilty by an agent of any corrupt practice, but the court is satisfied -

(a) that no such corrupt practice was committed at the election by the candidate, and every such corrupt practice was committed contrary to the

orders, and without the consent of the candidate;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practice at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then, the court may

decide that the election of the returned candidate is not void.

8. According to the learned Counsel appearing for the Petitioner, there is corrupt practice committed, permitting the aforesaid three persons to

vote, which would be sufficient to declare the election invalid. In support of his contention, the following decisions were cited by the learned

Counsel appearing for the Petitioner:

1. Vadivelu Vs. Sundaram and Others,

2. P. Dharmalingam v. Arumugham @ Sattu 2010 (6) CTC 18

3. M. Kalavathy Vs. K. Chitra, Block Development Officer, Also Returning Officer,

9. The Hon'ble Supreme Court in Vadivelu Vs. Sundaram and Others, , relying on the decisions, Satyanarain Dudhani v. Uday Kumar Singh and

Ors. 1993 (Supp.) 2 SCC 8, Shri Jitendra Bahadur Singh Vs. Shri Kirshna Behari and Others, and D.P. Sharma Vs. Commissioner and Returning

Officer and Others, , has held that Rule 63 (1) (h) dealing with rejection of ballot papers, which provides that in order to reject ballot papers, it

should be one not bearing "both the distinguishing mark and/or the signature of the Presiding Officer". Therefore, a harmonious construction of Rule

51 and 63 would show that in order to reject a postal ballot paper, the same should have lacked both the features, viz., the signature of the

Presiding Officer as well as the distinguishing mark of the polling station. In the said case, it was evidenced that due to some mistake or

inadvertence of the Presiding Officer did not sign the ballot papers and in the absence of the signature under the circumstances could not invalidate

the ballot paper, which bore the distinguishing mark of the polling station. Therefore, it was held that the Commissioner went wrong in declaring

that the votes as invalid. This Court is of the view that the said decision is not directly applicable to the facts of the case on hand.

10. The Honble Apex Court, while interpreting the scope of Section 259 of the Tamil Nadu Panchayats Act, 1994 has decided under what

circumstance Election Tribunal can order for re-counting of votes, observing that secrecy of votes is sacrosanct in democratic process of Election

and which cannot be disturbed on mere allegations of illegality or irregularity. Accordingly, held that person who seeks recount should allege and

prove improper acceptance of invalid votes and improper rejection of valid votes. If the Court is satisfied about the truthfulness of such allegations,

it can order recount of votes. However, re-count of votes can be ordered when purity of election is tarnished materially affecting result of election

to prejudice the defeated candidate. However, the defeated candidate, as per the announcement of the Election Officer, could have given his

application in writing for re-counting, before the returned candidate is declared.

11. It is a settled proposition of law that person who seeks recount must allege and prove the improper acceptance of invalid votes and improper

rejection of valid votes by the Election Officer.

12. The revision has been preferred under Article 227 of the Constitution by the Petitioner. When there is error of jurisdiction and fragrant violation

of law laid down by the Hon'ble Supreme Court, High Courts, this Court can set aside such order, in order to do justice to the parties in the

revisional jurisdiction under Article 227 of the Constitution.

13. In *P. Dharmalingam v. Arumugham @ Sattu* 2010 (6) CTC 18, this Court (S. Tamilvanan, J), has held that burden of proof is upon the

Petitioner to prove his allegations and when there was no written application given by the Petitioner before the Election Officer, seeking re-counting

of votes, at the appropriate time, as contemplated under Rule 66 of the Panchayat Rules, there would be no error or infirmity in the order passed

by the Election Tribunal, rejecting the plea for re-counting, so as to warrant any interference by this Court under the Revisional Jurisdiction.

14. In *M. Kalavathy Vs. K. Chitra*, Block Development Officer, Also Returning Officer, , this Court (*V. Ramasubramanian, J*), has held that re-

counting of votes could be ordered very rarely and on the specific allegations in the pleadings that illegality or irregularity was committed while

counting. If it is proved that purity of the election has been tarnished, which materially affected the result of the election whereby the defeated

candidate is seriously prejudiced, the Court can resort to re-count of votes be ordered under such circumstances to do justice between the parties.

A recount should not be ordered merely because the margin of votes is narrow. The onus to prove the allegations for recount of the ballot papers

would be on the election Petitioner and which requires proof of a very high standard. It is also not in dispute that the preservation of the secrecy of

the ballot is a sacrosanct principle in democracy.

15. In the instant case, learned Counsel appearing for the Petitioner mainly contented that three persons, by name Aruldas, Saravanan and

Devibala, residing at Arasur Village, Sulur Panchayat Union, Coimbatore District were permitted to vote for the Panchayat Election conducted for

Athichozhamangalam Village, Koradacherry Panchayat Union, Tiruvarur District. It is not in dispute that the three names were available in the

voters list with other details for Athichozhamangalam village.

16. Ms. Padmavathi, the Commissioner, Panchayat Union, Sulur, Coimbatore District was examined as P.W.2. She has deposed that the election

for Arasur Village was conducted only on 15.10.2006, subsequent to the Athichozhamangalam village panchayat election, that was conducted on

13.10.2006. She has further deposed in her evidence that as per the voters list of Ward No. 2, Arasur Village, Sl. No. 46 relates to the voter,

Saravanan, son of Ramadass, Sl. No. 47 relates to Devibala,, wife of Saravanan and Sl. No. 95 relates to Aruldas, son of Venugopal and she has

also produced the counter foil to show that votes were polled in the name of the said three persons in the subsequent election, that was held for

Arasur Village. However, in her cross-examination, the witness has stated that

election for Athichozhamangalam village, Tiruvarur District was conducted on 13.10.2006, prior to the election for Arasur village, Coimbatore District. According to her, at the time of the said three persons were casting their votes in Arasur Village, there was no identification mark of black ink found on their fingers for casting their votes. A suggestion was also put to the said witness during cross-examination that the said three persons had casted their vote at Athichozhamangalam village on 13.10.2006, and hence, the persons voted on 15.10.2006 in Arasur Village would be different persons, by way of impersonation, for which the reply by the witness (PW2) is that she does not know the personal identity of the persons, voted in the election on 15.10.2006 for Arasur Village, Coimbatore District. Had it been possible to identify that the very same persons polled their votes, subsequently in the other village, P.W.2, being the election officer, could have prevented them from voting in Arasur Village Panchayat.

17. Learned Counsel appearing for the Petitioner submitted that the aforesaid three persons are close relatives to the third Respondent herein, however, the learned Counsel has not disputed the fact that the said persons are also relatives to the Petitioner herein. Admittedly, the election for Athichozhamangalam Village, Tiruvarur District was conducted on 13.10.2006, earlier to the panchayat election conducted for Arasur Village, Coimbatore District on 15.10.2006 and the names of Aruldas, Saravanan and Devibala were found in the voters list with door number, their residential address, ward number and other details for Athichozhamangalam village election. As contended by the learned Counsel appearing for the contesting Respondents, P.W.2, Election Officer, Sulur Panchayat Union, Coimbatore District could not say that the very same persons had voted in the Athichozhamangalam Village panchayat election. The witness has categorically admitted that she could not say whether there was any impersonation or not. Even the Petitioner has not raised any allegation of impersonation in the polling of Athichozhamangalam village. If there was impersonation, nothing could have prevented the Petitioner or his agent from preventing the persons from voting and taking penal action against such per-sons committing the offence of impersonation. Hence, there could be no impersonation in Athichozhamangalam village panchayat election.

18. As the names of the said three persons were available in the voters list of Athichozhamangalam village, with their residential address and other details. It is not the case of the Petitioner that some other persons had casted their votes by way of impersonation, the same was also not a ground for allowing the election petition. Similarly when the said persons are admittedly relatives of the Petitioner as well as the third Respondent, the returned candidate, it could not be legally presumed that they could have voted only in favour of the third Respondent and not for the Petitioner or other candidates. There is every possibility that they could have voted in favour of the Petitioner, third Respondent or any other candidates, according to their wishes, for the reasons best known to them. In such circumstances, it could not be presumed legally that they could have voted only in favour of the third Respondent herein.

19. Had there been impersonation in casting any vote on 13.10.2006 at Athichozhamangalam village, the Petitioner could have given a written complaint to the Election Officer and also lodge a criminal complaint on the spot. The Petitioner has not stated that there was any impersonation in voting. When the said three persons have two different addresses, one at Athichozhamangalam village and another at Arasur, based on the presumption that they could have voted in favour of the third Respondent, the Court below cannot set aside the Election, on the ground that there was a corrupt practice of the returned candidate or his agent or any other person with his consent u/s 259 of the Act. As per the oral and documentary evidence available on record, on 13.10.2006, when the said three persons had right to vote in Athichozhamangalam village, as they were stated as voters in the voters list of Athichozhamangalam village, ward number 1, in the year 2006, hence, it cannot be directly construed as corrupt practice, committed by the returned candidate, the third Respondent herein.

20. The evidence of P.W.2 would show that the said three persons were also shown as voters in Arasur Village, Coimbatore District and as per the evidence of P.W.2, votes were polled on 15.10.2006 in the Panchayat Election of Arasur Village, Coimbatore District. The said three persons had exercised their right of voting in Athichozhamangalam on 13.10.2006, few days prior to their casting votes in Arasur. Merely on the ground

that there were votes polled on 15.10.2006 in the names of the aforesaid persons, based on the voters list of Arasur Village, Coimbatore Dis-trict,

the earlier election held for Athichozhamangalam Village cannot be held invalid. There is no bar for the said Aruldas, Saravanan and Devibala in

casting their votes, based on the voters list of Athichozhamangalam panchayat election held on 13.10.2006.

21. So far as the recounting of votes is concerned, the Petitioner could have raised his objection in writing. In the typed set filed here, a typed

letter, dated 18.10.2006 is available, which is said to be the letter given by the Petitioner to the second Respondent, after the counting of votes and

the second Respondent refused to receive the same. There is no proof available on the side of the Petitioner to show that the written request had

been given to the second Respondent on 18.10.2006 and that he refused to receive the same.

22. Mrs. Shanthi Rakappan, learned Government Advocate appearing for the second Respondent submitted that no such written request was

given by the Petitioner to the second Respondent, as alleged by him. When there is denial of written representation on 18.10.2006 for re-counting,

the Petitioner has to establish the factum and the burden cannot be shifted on the Respondents.

23. Had the second Respondent refused to receive the written request for re-counting, the Petitioner or his agent could have asked the second

Respondent to acknowledge the written representation and also the rejection in the alleged typed letter. Admittedly, the Petitioner has not filed any

proof to show that he had given any written request or representation before the Election Officer, the second Respondent herein on 18.10.2006.

24. It is clear that the names of Aruldas, Saravanan and Devibala were found in the voters list of Athichozhamangalam village, Tiruvarur District as

well as the Arasur Village, Coimbatore District. The said three persons have polled their votes on 13.10.2006 in Athichozhamangalam village and

votes were polled in their names on 15.10.2006 in Arasur village, as per the evidence of P.W.2. As per the records, the said three names were

also available in the voters list of Arasur village. The Petitioner has not raised any impersonation in polling their votes in Athichozhaman-galam

village and they had rights to vote in Athichozhamangalam village on 13.10.2006, being the voters in the village. However, there is no evidence to

show that the very same persons themselves, subsequently polled their votes on 15.10.2006 in Arasur village and further, there is no evidence to

show that the said three persons had voted only in favour of the third Respondent herein, on account of the corrupt practice committed by the third

Respondent or his agent or any other person acted so with his consent.

25. This Court, relying on the decision of the Hon''ble Supreme Court in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, , P.K.K.

Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, , T.A. Ahammed Kabeer Vs. A.A. Azeez and Others, , held in V. Dharmalingam v.

Arumugham @ Sattu (cited supra), that the burden of proof is upon the Petitioner, in respect of written application, said to have been to the

Election Officer, seeking re-counting of votes.

26. It is clear, as per Rule 66 (1) of Tamil Nadu Panchayats (Election) Rules, 1995, after the completion of the counting and recording in Form 22,

the total number of votes polled by each candidate under Sub-rule (2) of Rule 64, the Returning Officer shall announce the same. After such

announcement and before the declaration of the result of the election, a contesting candidate or in his absence his election Agent, may apply in

writing to the Returning Officer for a re-count of all or any of the votes already counted stating the grounds on which he demands such re-count.

As per Sub-rule (2) of Rule 66, on such application being made, the Returning Officer shall decide the matter and may allow the application in

whole or in part, or may reject it in toto if it appears to him to be frivolous or unreasonable. In the instant case, the Petitioner submits that he had

applied in writing for re-count and his written request was not received by the Election Officer, the second Respondent herein on 18.10.2006. The

Petitioner cannot establish the plea, without any proof or acknowledgement-for the alleged written request made on the date of counting.

27. Sub-rule (2) of Rule 66 of Tamil Nadu Panchayats (Election) Rules, 1995 reads as follows:

After the counting of the votes recorded in all ballot papers contained in all ballot boxes has been completed, the Returning Officer shall have the

result of such counting entered in Part II of Form 20 and it shall be signed by the counting supervisor and the Returning Officer. The Returning

Officer shall, then, make the entries relating thereto in a result sheet in Form 22.

28. As per Section 103 of Indian Evidence Act, 1872, the burden of proof lies on the person who wishes the Court to believe in its existence, any particular fact, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the instant case, the Petitioner has stated that he had submitted a written request for re-counting on 18.10.2006 and the second Respondent refused to receive the same, hence, he wishes the Court to believe that he had asked the second Respondent for re-counting in writing. Hence, the burden is upon the Petitioner to establish the fact that he had given written request and that the second Respondent refused to receive the same. Had the second Respondent refused to receive the written request, the Petitioner or his agent could have asked the Election Officer, the second Respondent to make an endorsement for the refusal in the original written request. If it was received, he could have obtained endorsement in the identical copy for having submitted his written request, when there is a denial of written request by the Election Officer.

29. In the instant case, the Petitioner has simply produced a typed copy before the Court below with the date 18.10.2006, without any proof to show that he had given the same, seeking re-counting of votes, immediately after the announcement of votes in favour of each candidate and before the declaration of result of the election. In such circumstances, in view of Sections 102 and 103 of Indian Evidence Act, this Court is of the view that the plea of the Petitioner that he had given request for recounting, that was not received by the Election Officer, the second Respondent herein cannot be accepted. Hence, recounting of votes pleaded by the Petitioner before the Court below is not legally acceptable under Rule 66 of Tamil Nadu Panchayats (Election) Rules, 1995.

30. The next question is whether the Petitioner is entitled to seek an order for declaring the panchayat election to be void, as per Section 259(1)(b) of the Act, subject to the provisions of Sub-section (2), if the District Judge is of the opinion that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent, on that ground the Court can declare the election to be void, for which the mere allegation of corrupt practice is not sufficient. The allegation of corrupt practice by any returned

candidate, as contemplated u/s 259 of the Act has to be established by a candidate, who seek an order to declare the election void.

31. In the instant case, the third Respondent was declared elected on the ground that he has secured three regular votes and one postal votes more

than the Petitioner herein. P.W.2, who was the Election Officer for the panchayat election held at Arasur village could not identify that the aforesaid

Aruldas and two others, who had voted in Athichozhamangalam panchayat election, Tiruvarur District on 13.10.2006. In fact, as per her evidence,

she does not know whether there was any impersonation in the election for Arasur Village, Coimbatore District.

32. So far as the Athichozhamangalam Village, Tiruvarur District is concerned, admittedly no impersonation was alleged by the Petitioner. The

allegation of the Petitioner is that the said three persons having voted in Athichozhamangalam panchayat election held on 13.10.2006,

subsequently, voted in the Arasur panchayat election, Coimbatore District held on 15.10.2006. As the name of the said persons were available in

the said voters list of Athichozhamangalam village with their residential address and other details, their votes could not be objected to by the

Petitioner or other candidates. Merely because the very same three names are available in the voters list for Arasur village, Coimbatore District and

votes have been polled in the said names on 15.10.2006, as per the evidence of P.W.2, it would not vitiate the earlier election, that was conducted

on 13.10.2006 for Athichozhamangalam village. In the absence of any proof that they had voted fraudulently in favour of the third Respondent, the

Court cannot legally presume that there was corrupt practice committed by the third Respondent, returned candidate, as contemplated u/s 259 of

the Act.

33. It is a well settled proposition of law that merely there was marginal votes between the returned candidate and the rival candidate, there could

not be any order for re-counting, in the absence of written request made by a rival candidate, as contemplated under Rule 66 of the Tamil Nadu

Panchayats (Election) Rules, 1995. The Courts cannot decide that there was fraud played by the returned candidate, merely on assumptions and

presumptions. In the instant case, there is no legally acceptable evidence to show that the third Respondent had played fraud and committed

corrupt practice, in order to succeed in the election.

34. (i) It is made clear that for re-counting of votes, as per Rule 66 of Tamil Nadu Panchayats (Election) Rules, 1995 a contesting candidate or in

his absence, his election agent could have applied in writing for recount to the Returning Officer, after the completion of the counting and

announcement of votes polled, by each candidate and before the declaration of result of the Election.

(ii) Mere allegation that such candidate had given written representation and the Election Officer refuse to receive the same cannot be sustainable,

unless there is proof to show that written request was given for re-counting, after the completion of counting and announcement of votes polled, by

each candidate before the declaration of the result.

(iii) Mere raising of allegation of corrupt practice against the returned candidate, without establishing the same is not sufficient u/s 259(1)(b) of the

Act to declare the election void.

(iv) Merely because there is a narrow margin of polled votes between the returned candidate and the rival candidate, in the absence of compliance

under Rule 66 of Tamil Nadu Panchayats (Election) Rules, 1995, re-counting is not mandatory.

35. As stated by the learned Counsel appearing for the second Respondent, the third Respondent, has secured three regular votes and also one

postal vote and totally he secured four votes more than his rival candidate, the Petitioner herein and therefore, the Court is of the view that the

alleged corrupt practice against the returned candidate, the third Respondent herein has not been established by the Petitioner to declare the

election void, as contemplated u/s 259 of the Act, hence, the Civil Revision Petition is liable to be dismissed.

36. In the result, this Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is also dismissed. However, there is no

order as to costs.