
(1993) 03 BOM CK 0072
In the Bombay High Court
Case No : Writ Petition No. 942 of 1988

Raghunath Vishnu Patil

APPELLANT

Vs

R.N. Gavande and Others

RESPONDENT

Date of Decision : 11-03-1993

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 2(4), 79

Citation : (1994) 2 LLJ 213

Hon'ble Judges : Ashok Agarwal, J

Bench : Single Bench

Advocate : C.D. Nargolkar and R.J. Kochar, for the Appellant; C.W. Bora and S.K. Talsania, instructed by Crawford Bayley and Co., for the Respondent

Judgement

Ashok Agarwal, J.—The petitioner, at the relevant time, was a bus conductor in the B.E.S.T. undertaking. He was a member of the B.E.S.T. Kamgar Union and also the Depot Secretary of the Colaba Depot Union. An incident took place on the April 19, 1982. The day was declared a "Maharashtra Bandh Day". The petitioner is alleged to have assaulted a co-worker, one Shri P.M. Patil, who, at the material time, was also a bus conductor. A report in respect of the incident was made by Shri Misal, who is a Bus Inspector. Based on the report, a departmental inquiry was initiated against the petitioner. On May 18, 1982 a charge-sheet was framed for breach of Standing Order 20(r), 20(b) and 20(f). By Standing Order 20 (r) the petitioner was charged with the assault on a fellow employee. Under Standing Order 20 (b) he was charged with abetting, inciting, instigating a strike and under Standing Order 20 (f) he was charged with slowing down the performance or wrongful interference with the work of the undertaking.

2. A departmental enquiry was conducted during the period May 28, 1982 and July 27, 1982. Five witnesses were examined in support of the charges. The witnesses included Shri P.M. Patil, the bus conductor, who was the victim of the assault. The petitioner examined himself in his defence.

3. The Inquiry Officer, by his judgment and order dated August 30, 1982, held

that the petitioner was guilty of the first and the third charge viz. the breach of Standing Order 20 (r) and 20 (f). In regard to the charge under Standing Order 20 (b) he was exonerated as there was no evidence in support of the charge. By a further order passed on the very same day the petitioner came to be dismissed from service.

4. The petitioner preferred a departmental appeal and by an order dated October 12, 1982, the Appellate Authority being the Senior Traffic Assistant, affirmed the action of the Inquiry Officer and dismissed the appeal. The petitioner preferred a second departmental appeal and by an order dated January 2, 1983 the Deputy General Manager dismissed the same.

5. Arising out of the very same facts, which led to the aforesaid departmental inquiry, the petitioner was prosecuted in a Criminal Court. By a judgment and order dated March 23, 1984 the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay acquitted the petitioner. At the trial, the prosecution inter alia examined, amongst other witnesses, Shri P.M. Patil, who is alleged to have been the victim of the assault. In the criminal trial, however, he rescinded from his statement made in the departmental inquiry only to a limited extent though on a vital particular. He deposed to his being assaulted. He, however, stated that the petitioner had not assaulted him, but he threw a stone which hit the bus. In view of this evidence, the trial Magistrate proceeded to acquit the petitioner of the offence punishable u/s 332 of the Indian Penal Code.

6. In the meanwhile, the petitioner, on February 15, 1983 applied to the Labour Court u/s 79 read with Section 42(4) of the Bombay Industrial Relations Act for reinstatement with full back wages and continuity of service with effect from August 30, 1982 being the date of the order of dismissal. The application was numbered as BIR No. 47 of 1983 of the Court of the 8th Labour Court, Bombay. The petitioner examined himself in support, and the management examined the Inquiry Officer in rebuttal. By his Part-I Award passed on October 29, 1986 the learned Judge of the Labour Court found that the enquiry held against the petitioner was fair and proper. By his Part-II Award dated February 26, 1987, the learned Judge found that the findings of the Inquiry Officer were in no way perverse. He further found that the order of dismissal was just and proper. Consequent upon the said findings, the application of the petitioner was dismissed.

7. Being aggrieved, the petitioner preferred an appeal to the Industrial Court being Appeal (IC) No. 32 of 1987 wherein, by a judgment and order dated December 22, 1987, the learned President of the Industrial Tribunal found that the domestic inquiry against the petitioner was fair and proper and in accordance with the principle of natural justice, the findings recorded by the Inquiry Officer holding the petitioner guilty of misconduct under Standing Order 20 (r) and 20 (f) could not be described as perverse and the petitioner was not entitled to the relief of reinstatement with continuity of service and full back wages as prayed by him. Consequent upon the findings, the appeal was dismissed with costs.

8. Taking exception to the aforesaid orders, the petitioner has preferred the present petition.

9. Shri Nargolkar, the learned counsel appearing in support of the petition, has strenuously urged that there has been a serious infraction of the principle of natural justice in the matter of conducting the departmental enquiry against the petitioner. He has pointed out that the report of Shri Misal, the Bus Inspector, on the basis of which the inquiry was initiated and the charge-sheet was framed, was not furnished to the petitioner. Similarly, the petitioner was not furnished with the notes of the proceedings of the inquiry. Since the petitioner was not given copies of the notes of evidence, he was handicapped in the matter of cross-examining the witnesses. According to Shri Nargolkar, the order of dismissal, which is based on a defective inquiry, cannot be sustained. Placing reliance on the order of acquittal passed by the Criminal Court, he submitted that no reliance can be placed on the evidence of Shri P.M. Patil, who had contradicted himself in his deposition in the inquiry and at the criminal trial. He strenuously submitted that the findings of the departmental inquiry, as affirmed by the Labour Court and the Industrial Court, are liable to be quashed and the petitioner is entitled to the relief of reinstatement with full back wages and continuity of service with effect from the date of the impugned order of dismissal.

10. Shri Talsania, the learned counsel appearing on behalf of the management, has adopted the reasons which have been given by the Labour Court and the Industrial Court and has contended that the petition is devoid of merit and the same is liable to be dismissed. According to him, there has been no infraction of the principles of natural justice. He submitted that so far as the report of Shri Misal is concerned, the same was not relied upon by the Inquiry Officer. It did not form a part of the proceedings and hence non-supply of the report did not cause any prejudice to the petitioner. Shri Talsania conceded that it would have been better if the notes of the proceedings had been furnished to the petitioner. The petitioner is a graduate and is well conversant with English. Though copies were not supplied, he was given inspection. While the evidence was being recorded, the petitioner made notes. He has cross-examined each witness at length. In the circumstances, no prejudice can be said to have been caused to the petitioner. As far as order of acquittal is concerned, Shri Talsania pointed out that the same is passed on March 23, 1984. The evidence of the petitioner was recorded in the Labour Court on April 2, 1986 i.e. after a period of over two years from the date of the order of acquittal. Despite this, the petitioner made no reference to the order of acquittal and did not raise any issue arising out of the acquittal. The order of acquittal is relied upon for the first time in the present writ petition. The reliance on the order is by way of an after-thought and is not germane to the issue involved in the petition. An order of a Criminal Court cannot bind a disciplinary inquiry. Thus, according to Shri Talsania, the petition is devoid of merit and the same deserves to be dismissed.

11. On facts, the controversy centres around a very narrow compass. It is

common ground that, the incident in question occurred on April 19, 1982. That day was declared to be a "Maharashtra Bandh Day". Shri P.M. Patil was the bus conductor on route No. 65 Ltd. which was proceeding from Museum to King Circle. The time was about 2.00 a.m. The petitioner, who is also a bus conductor, was supposed to report at the Colaba bus depot at 4.45 a.m. He, as also certain other passengers, boarded the bus proceeding to King Circle. When the bus reached near Handloom House, conductor of the bus approached a group of passengers who had boarded from Museum and asked for tickets. Upon this, one of the passengers from the group, abused and assaulted him. His cash bag and ticket box was snatched away. By this time the bus arrived at Boribandar stop. The conductor got down as the assailants started running away. He chased them. When the conductor reached near the Times of India office, the assailants threw down his ticket box and cash bag and ran away. The conductor picked up his bag and box and took the bus to the Azad Maidan Police Station and lodged his complaint with the Police Station Officer on duty. In the meanwhile, Shri S.S. Mulla, a Security Guard of the Bombay Municipal Corporation found the petitioner moving about in suspicious circumstances in the vicinity of a road between the Bombay Municipal Corporation office and the Times of India office. Thinking that he is a thief, he apprehended the petitioner and took him to the Azad Maidan Police Station. At the Police Station Shri P.M. Patil identified the petitioner as one of his assailants. It was, thereafter, revealed that the petitioner was also a bus conductor in B.E.S.T. The police arrested the petitioner and charged him with an offence u/s 332 read with Section 114 of the Indian Penal Code. This is the case on the basis of which the petitioner was proceeded against in the departmental enquiry.

12. As far as the petitioner is concerned, he. has conceded that, on the relevant day i.e. on April 19, 1982, he was on early morning duty commencing from 4.45 a.m. According to him, he had gone to the Colaba depot at about 00.45 a.m. According to the petitioner he was proceeding to the Museum Bus Depot. At about 2.45 a.m. he boarded a 65 Ltd. bus from Museum Bus Station. There were about 35 passengers in the bus. When the bus reached near Azad Maidan, the bus was stoned. The passengers travelling in the bus got down from the bus, the petitioner also got down. The duty conductor came down and asked the passengers why they were throwing stones on the bus. A quarrel ensued between the conductor and the passengers. The petitioner informed the conductor that the stones were being thrown prior to the passengers having alighted. Some members of the public tried to snatch the cash bag and the ticket -box of the conductor. The conductor started shouting for the police. Upon this, the passengers and other pedestrians started running on all sides. The petitioner, in order to avoid being involved, started walking fast away from the bus and entered in a lane situated between two buildings of the Bombay Municipal Corporation Office for going towards V.T. side. Near the gate of the Municipal Corporation building he was accosted by the watchman on duty. He was brought to the police station by the watchman as he thought that he was a thief.

13. The above narration shows that it is common ground that the petitioner, alongwith certain other passengers, was travelling in a 65 Ltd. bus proceeding from Museum to King Circle. It is further commonround that an incident took place near V.T. bus stop. Stones were pelted at the bus and an assault was mounted on the bus conductor and the petitioner was taken to the police station by the Security Guard on suspicion that he was a thief. The narrow controversy is on the question whether at the relevant time the petitioner had assaulted the bus conductor?

rf 14. During the disciplinary proceedings as many as six witnesses were examined against the petitioner. The material witness examined was P.M. Patil, the victim of the assault. The petitioner has examined himself in his defence. As far as the evidence of P.M. Patil is concerned, he has deposed before the Inquiry Officer that he identified the petitioner as one of his assailants. This is the direct evidence in respect of the assault. The evidence of the other witnesses is corroborative in nature. On appraisal of the evidence of P.M. Patil and the other witnesses, as also the evidence of the petitioner, the Inquiry Officer has given his findings. The said findings were affirmed in two departmental appeals. The said findings were scrutinised both by the Labour Court as also by the Industrial Court. All the authorities have accepted the findings of fact arrived at by the Inquiry Officer that the petitioner is guilty of assaulting his co-worker. The findings are essentially findings of fact and unless the same are shown to be either perverse or have been arrived at in violation of the principles of natural justice, it will not be open for a Court sitting in a jurisdiction under Article 226 or 227 of the Constitution to interfere with such findings of fact. Mr. Talsania has given his own reasons in support of above findings. He has pointed out that as per the statement of the petitioner before the Inquiry Officer, the petitioner had, on April 18, 1982, finished his duty at 1.00 p.m. He, thereafter, left the Colaba depot and proceeded to Santacruz to address a gate meeting of the B.E.S.T. Kamgar Union. After the meeting was over, he proceeded to Shiwaji Park where leaders of various trade unions were to be assembled for finalising the plan for "Maharashtra Bandh" planned on April 19, 1982. After attending the assembly he went to his house at Mazgaon at about 11.00 p.m. Since he was performing early morning duty i.e. at 4.40 a.m. He came to Colaba depot at about 00.45 a.m. on April 19, 1982. According to the petitioner, he was engaged in gate meetings and other assemblies from the afternoon of April 18, 1982 and hence he was pretty tired. Hence, he waited at the stop of Museum bus depot.

15. According to Mr. Talsania, the movements of the petitioner from the afternoon of the 18th till the early hours of the 19th are of a suspicious nature. If his duty was to commence at 4.45 a.m. on April 19, 1982 and if he was tired because of the gate meetings and other assemblies with which he was concerned, there was no reason for him to find himself present at the Colaba Bus Depot which is the place of his duty at 00.45 a.m. when his duty was to commence at 4.45 a.m. If he had gone to his house at Mazgaon at 11.00 p.m. on April 18, 1982 he would have had rest and left home just in the time to reach

his duties at 4.45 a.m. His appearance at the Colaba depot at 00.45 a.m. and his waiting at the Museum Bus Station and alighting the 65 Ltd. bus and being around the scene when the incident in question took place is a strong pointer to his being present as a Union leader to ensure the success of the Bandh. The assault in question mounted by the petitioner on the bus conductor was because the said conductor was carrying on or performing his duties despite the call for Maharashtra Bandh which Bandh was supported by the Union to which the petitioner was affiliated. Be that as it may, all that I am concerned with is the concurrent findings arrived at by all the authorities which include both the Labour Court as also the Industrial Court. As observed earlier, the said findings cannot be successfully assailed in the present petition unless the same are shown to be vitiated on the ground that they are perverse or on the ground that the same suffer from the violation of the principles of natural justice.

16. This takes me to the consideration of the main grievance of the petitioner viz. the inquiry in question is vitiated on account of the violation or principles of natural justice, Mr. Talsania has brought to my attention two decisions of the Supreme Court on the point. In the case of K.L. Tripathi Vs. State Bank of India and Others, this is what is observed (pp. 13-14):

"It is true that all actions against a party which involve penal or adverse consequences must be in accordance with the principles of natural justice, but whether any particular principle of natural justice would be applicable to a particular situation or the question whether there has been any infraction of the application of that principle, has to be judged in the light of facts and circumstances of each particular case. The basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the materials and reasons. We must reiterate again that the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the appellant by the procedure followed. See in this connection the observations of this Court in the case of Jankinath Sarangi Vs. State of Orissa, . Hidayatulla, C.J. observed there at page 358 of the report "there is no doubt that if the principles of natural justice are violated and there is a gross case this Court would interfere by striking down the order of dismissal: but there are cases and cases. We have to look to what actual prejudice has been caused to a person by the supposed denial to him of a particular right." Judged by this principle, in the background of the facts and circumstances mentioned before, we are of the opinion that there has been no real prejudice caused by infraction of any particular rule of natural justice of which appellant before us complained in this case. See in this connection the observations of this Court in the case of Union of India (UOI) and Another Vs. P.K. Roy and Others, , where this Court reiterated that "the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula and its application depends upon the nature of the jurisdiction conferred on the

administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in a particular case." See also in this connection the observations of Hidayatulla, C.J., in the case of Channabasappa Basappa Happali Vs. The State of Mysore, . In our opinion, in the background of facts and circumstances of this case, the nature of investigation conducted in which the appellant was associated, there has been no infraction of that principle. In the premises, for the reasons aforesaid, there has been in the facts and circumstances of the case, no infraction of any principle of natural justice by the absence of a formal opportunity of cross-examination. Neither cross-examination nor the opportunity to lead evidence by the delinquent is an integral part of all quasi-judicial adjudications."

17. In the case of Employers of Firestone Tyre and Rubber Co. (Private) Ltd. v. The Workmen 1967 II LLJ 715 it is observed (pp. 717-718):

"The Tribunal gave several reasons for its conclusion that the enquiry was not properly conducted. These were:

(a) that the inquiry was held immediately after the investigation without taking the explanation of the workman;

(b) the workman was examined and cross-examined even before the evidence against him was recorded;

(c) copies of the statements of witnesses examined at the preliminary enquiry were not supplied to the workman;

(d) copies of the minutes of the inquiry were not given to the workman before asking him to reply to the show-cause notice; and

(d) the evidence of Das which cleared the workman was not properly considered.

The Tribunal did not rely upon the record of the enquiry and on the basis of evidence recorded by itself, held that the fault of the workman was not established and that his dismissal was wrong, with the result already indicated.

The Company now contends that none of these grounds has any validity. It has tried to meet each of the grounds and in our opinion successfully. We shall take these grounds one by one and indicate the submissions which in our opinion must be allowed to prevail. As regards ground No. (a) it is clear to us that, although it may be desirable to call for such an explanation before serving a charge-sheet, there is no principle which compels such a course. The calling for an explanation can only be with a view to making an enquiry unnecessary where the explanation is good, but in many cases it would be open to the criticism that the defence of the workman was being fished out. If after a preliminary enquiry there is prima facie reason to think that the workman was at fault, a charge-sheet setting out the details of the allegations and the likely evidence, may be issued without offending against any principle of justice and fair play. This is

what was done here and we do not think that there was any disadvantage to the workman. The management has pointed out that even on fact the view is not correct. They have referred to the workman's letter dated May 30, 1963 in which he reiterated that he was supplied a shorter number of tyres than that given in the invoice and to his statement before Mr. Coyajee that he would state his case fully. In these circumstances, it is hardly possible to say that the workman was at a disadvantage in any way.

We may leave for the present ground No (b) and proceed to consider the others. Ground No. (c) was not a ground of complaint before the Tribunal. This ground was made out by the Tribunal. In fact these statements were not included in the record of the enquiry. Nor were they made the basis of any conclusion. As to ground No. (d) it is sufficient to say that the minutes were hardly needed as the workman was present personally and had conducted the defence. If he needed to read the record he could have easily asked for an inspection and we have no doubt in our mind that he would have been given such an inspection. The minutes show an utmost consideration at all stages of the need for a proper defence. The Tribunal equated the domestic enquiry to enquiries under Article 311 of the Constitution which was hardly proper."

18. It would, thus, appear that whether there is a violation of the principles of natural justice and whether the same vitiates an enquiry and report would depend on the facts of each particular case. No hard and fast rule can be laid down. It would depend on the facts of each particular case.

19. In the instant case, it is undoubtedly true that the petitioner was not furnished with the report of Shri Misal on the basis of which the enquiry in question was initiated. In my view, no prejudice could be said to have been caused to the petitioner on account of the above lapse. The report was not relied upon in the disciplinary enquiry. The same did not form part of the enquiry or report. The charges, which were framed, were furnished to the petitioner. Since no reliance was placed on the report, I do not find that any prejudice has been caused to the petitioner for non-supply of the report.

20. It is next pointed out that the petitioner asked for, but was not furnished, the notes of the proceedings. He was not supplied with the copies of the notes of evidence. Hence, the petitioner was prejudiced in conducting his defence. Had he been furnished with the copies he would have been in a position to conduct the cross-examination more effectively.

21. As has been stated by Mr. Talsania, it would have been better and more in consonance with the principles of natural justice, had the copies of the proceedings been furnished to the petitioner. The question which arises for consideration is, whether the aforesaid breach can be said to vitiate the findings arrived at the enquiry? It is undisputed that the petitioner is a graduate and is conversant with English language. At the enquiry, he did not take assistance of a next friend but chose to conduct the inquiry in person. He has conceded that he

was given inspection of the notes of proceedings. He has further conceded that he took down notes while the examination-in-chief of the witnesses was being recorded. He admitted that the evidence was being dictated to the stenographer correctly and as per the version of the witnesses who deposed in Marathi. I have perused the cross-examination conducted by the petitioner. In my view, the petitioner had not been prejudiced on account of non-supply of the notes of proceedings. He appears to have conducted himself quite well in the matter of cross-examining the witnesses. It does not appear that he was handicapped in any manner on the ground of non-supply of the copies. In view of this position, I find myself unable to accede to the submissions advanced by Mr. Nargolkar that the inquiry in question will stand vitiated on account of the violation of the principles of natural justice.

22. Mr. Nargolkar next contended that the finding that the petitioner had assaulted his co-worker will stand vitiated on account of the order of acquittal passed in the Criminal Court. In the Criminal Court, the evidence of Shri P.M. Patil, the bus conductor, was recorded on March 1, 1984. It is no doubt true that in his evidence he has stated that the petitioner was not one of those who had assaulted him. Based on the evidence, the learned Magistrate, on March 23, 1984, passed an order of acquittal in favour of the petitioner. Two years thereafter, evidence was recorded in the Labour Court. The evidence of the petitioner was recorded on April 2, 1986. Neither in the evidence nor during the entire trial did the petitioner make any reference to the evidence of Shri Patil in the Criminal Court and the order of acquittal. Not only this, he did not make any reference to it during the appeal before the Industrial Court. It is for the first time, in the present petition, that reliance is placed on the above material. I am, in the circumstances, inclined to accept the contention of Mr. Talsania that, had notice of the said material been given to the management at an earlier stage, it would have been open to the management to have cited Shri Patil as witness before the Labour Court and got material out of him as to the circumstances in which he had given two contradictory and conflicting versions, one before the Inquiry Officer and the other in the Criminal Court. The petitioner, in the circumstances, cannot be permitted to take advantage of this inconsistency brought about by the aforesaid material at this belated stage. In any event, a finding of acquittal by a Criminal Court cannot be binding on a disciplinary inquiry. The standard of proof in a Criminal Court is different from the standard of proof in a disciplinary inquiry. All that is required to be seen is whether there is evidence before the Inquiry Officer and that evidence is sufficient to bring home the charge against the delinquent. If the evidence before the Inquiry Officer satisfies the above test he is not bound by a contrary finding arrived at by a Criminal Court.

23. It is next contended by Shri Nargolkar that the findings arrived at by the Inquiry Officer have been signed on September 6, 1982 whereas the order of dismissal has been passed prior to it i.e. on August 30, 1982. According to Mr. Nargolkar, the petitioner has first been dismissed from service and thereafter

reasons have been given to support the finding of dismissal.

24. If one peruses the record minutely one would find that the above contention is devoid of any merit. The findings given by the Inquiry Officer clearly show that they have been dictated on August 30, 1982. The Inquiry Officer, in the instant case, is a Senior Traffic Assistant. He is Inquiry Officer as also the Disciplinary Authority. He is the very same person who has given the findings against the petitioner and the very same person who has passed the order of dismissal. It appears that he has dictated his order containing the findings on August 30, 1982. Based on the findings, he has proceeded to pass the order of dismissal. The order of dismissal, it appears, is transcribed on the same day and he has signed the same on the very day, i.e. August 30, 1982. The findings appear to have been transcribed at a later date and he has signed the same on September 6, 1982. There is clear mention at the foot of the findings that the said findings had been dictated on August 30, 1982. In view of the above position, the present contention also deserves to be rejected.

25. The last and not least, is the question in regard to the quantum of punishment which had been imposed upon the petitioner. I am aware that it would not ordinarily be open to a Court sitting in its writ jurisdiction to interfere with the quantum of punishment awarded in disciplinary proceedings. A Court in exercise of its writ jurisdiction does not act as a Court of appeal. However, it is well established that if the punishment awarded is unconscionable or so harsh and disproportionate to the misdemeanour held to be proved against the delinquent it is always open to a Court to reduce the quantum of punishment. At this stage, I have heard Mr. Nargolkar as also Mr. Talsania. Mr. Talsania has brought to my notice that the petitioner joined services of the undertaking on February 1, 1979. He has, therefore, to his credit service of little over three years. During the short tenure the petitioner has not maintained a satisfactory record. He has been rude to his superiors and has been guilty of wilful disobedience of lawful orders. He has been held guilty of being rude to passengers. According to him, this is not a case which calls for interference in the matter of penalty awarded to the petitioner. As against this, Mr. Nargolkar has submitted that the only act of which the petitioner has been found guilty is of being one amongst several other passengers in the bus who assaulted the bus conductor. The details of the assault, alleged to have been mounted by the petitioner, have not been given. In the circumstances, the extreme penalty of dismissal from service is uncalled for.

26. I have given my anxious consideration to the rival contentions advanced before me. In my view, the following order will meet the ends of justice:

The impugned order holding the petitioner guilty of misconduct for breach of Standing Order Nos. 20(r) and 20(b) is affirmed. The extreme penalty of dismissal of the petitioner from service is, however, set aside. The second respondent the management of the B.E.S.T. undertaking is directed to reinstate the petitioner but without continuity of service and without any back wages. The

reinstatement be given within a period of six weeks. Rule partly made absolute in above terms. No as to costs.