

(2000) 06 MAD CK 0043
In the Madras High Court
Case No : C.M.A. No. 1216 of 1993

Ramakrishna Steel Industries Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-06-2000

Acts Referred:

Railways Act, 1989 — Section 38, 83, 84, 99

Citation : (2001) 1 ACC 194 : AIR 2001 Mad 227 : (2001) 2 LW 362

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : P. Bhuvaneswari, for T.R. Rajaraman, for the Appellant; V.R. Gopalan, for the Respondent

Final Decision : Allowed

Judgement

K.P. Sivasubramaniam, J.—This appeal is directed against the order of the Railway Claims Tribunal at Madras in O.A.I. No. 1643 of 1990. The claimant is the appellant in the above appeal.

2. The appellant being a consignee/ purchaser of one wagon load of Bentonite powder from the supplier M/s. Ashapura Minechem Private Limited, Bhavanagar sent from Bhuj (Western Railway) to be sent to Karamadai (Southern Railway) on 9-5-1987 under an invoice in Wagon No. 33255. According to the claimant, since the goods did not arrive even after a lapse of more than 3 months, they were sending letters to the Railway Administration on 27-8-1987 and thereafter also. It was only on 4-11-1987, they were informed that only a part of the goods had arrived through a different wagon at Karamadai and claimant could not take delivery of even part of the load of bentonite powder as the entire consignment was totally in a damaged condition and that therefore on the same day, the claimant preferred a claim for compensation before the Railway Administration. But the Claims Officer, without properly appreciating the reasons for not taking delivery and also without considering the other factors resulting in the total damage of goods, had rejected the claim. The claimant again sent a letter on

27-1-1988 fully explaining the circumstances, but the Claims Officer merely persisted in blaming the applicant. A reply was sent by the claimant on 18-2-1988 and more than six months after the arrival of the goods, the claimant received a communication dated 22-8-1988 from the Chief Goods Superintendent purported to be a notice under Sections 55 and 56 of the Indian Railways Act, 1890 (hereinafter referred to as "The Act"). The said notice was illegal and a reply was sent by the claimant on 5-9-1988. Subsequently after exchange of further correspondence, from the letter of the Chief Claims Officer, Madras dated 10-5-1989, it appeared that he was prepared to reconsider the claim, but without settling the claim, the claimant was directed to pay the alleged dues towards demurrage. The said demand was illegal. The claimant further contended that the Railways was liable to pay Rs. 13,617.69 towards compensation for damage, deterioration and non delivery of goods with future interest at 6% per annum. The loss and damage had been occasioned only as a result of the negligence on the part of the Railway Administration.

3. In the reply statement, the Railway Administration contended that the consignment had been booked by the claimant, the consignment was carried to the destination with due care and caution. The respondent also denied that the consignment was entrusted in a sound condition. The Railways was not guilty of any negligence or misconduct and hence not liable for the alleged non-delivery. The claimant had refused to take delivery on his own view that the consignment was damaged. The consignee was not entitled to refuse to take delivery and it was open to him to claim for damage due to him only after taking delivery. It was further stated that the consignment was auctioned for Rs. 6,305/- after observing all the legal requirements and that a sum of Rupees 10,793/- towards freight charges and Rs. 62,416/- towards demurrage charges were due to the Railways and as such the Railways had a lien over the sale price of the material. Hence the Railways was not liable to pay any amount to the claimant.

4. An additional affidavit was filed by the claimant contending further that the goods had been transmitted in a totally different wagon and in a damaged condition exposed to rain water and mixed with unwanted material like straw and other platform dust in a caked condition totally unfit for foundry moulding work. Therefore the claimant had every right to refuse to take delivery of the consignment and they are entitled to seek for compensation.

5. Before the Tribunal, both sides have filed only documentary evidence and did not examine any witnesses. The Tribunal after considering all the materials held as follows:--

(a) The consignment had been entrusted in a sound condition by the consignor to the Railways.

(b) There was a long unexplained delay in the transit and the goods were received at the Destination in a damaged condition and the negligence and misconduct was established against the Railways.

(c) There was no valid notice as required under Sections 55 and 56 of the Act and hence the auction sale of the consignment was invalid and wrongful.

(d) The Railways be therefore liable for damages for conversion and therefore should pay a sum of Rs. 6,305/- being the sale price. However, the said amount was liable to be adjusted towards demurrage and wharfage and no amount was due to be paid by the claimant.

(e) As a result of the improper refusal on the part of the claimant to take delivery of the goods, the claimant was not entitled to claim damages. There was no proof to hold that only half of the consignment had arrived at the destination. With a result, the claim petition was rejected and hence the present appeal by the claimant.

6. According to the learned counsel for the appellant, the Tribunal having found that the negligence on the part of the Railways had been established, ought to have decreed the claim. It was erroneous on the part of the Tribunal having felt that the appellant was bound to take delivery of the goods notwithstanding the condition in which they were delivered. She would further submit that the Tribunal having found the auction sale as invalid was not justified in finally holding that the Railways was not obliged to pay the sale proceeds to the appellant since a larger amount was due towards demurrage charges. Further according to the learned counsel, there was no demand or any notice from the Railways claiming demurrage charges. The claim of demurrage charges has been projected only to counter the claim of damages. There was also no offer by the Railways for the assessment of the damaged consignment.

7. Reliance is placed on the judgment of the Andhra Pradesh High Court reported in Union of India (UOI) and Another Vs. Jonnalagadda Venkata Subbaiah and Co., which held as follows:--

"When on an arrival at the destination the goods were found damaged, the Railway was bound to give Consignee open delivery. Otherwise the Consignee was not bound to take delivery all that part of the goods which found damaged. The claim to demurrage as allotted by the Tribunal for adjusting sale proceeds was also misconceived and was not maintainable."

8. Reference is also made to the judgment of Allahabad High Court in Firm Naraindas Pitamchand Vs. Firm Shanker Lal Mohandas and Others, holding that In a case where the Railway Administration was unable to establish that the destruction or damage had not taken place either during the period of transit or between the period prescribed for taking delivery after arriving at the destination, the Railway Administration cannot successfully plead in defence the bar of Section 77(2) of the Act. Therefore, according to the learned counsel, the view of the Tribunal that the consignee was bound to take delivery of the goods found to have been damaged even during the transit, cannot be accepted.

9. Reliance is placed on another judgment of the same High Court reported in

Nizamuddin v. Union of India, 1982 TAC 441 which has held that the circumstance that the plaintiff had refused to take open delivery cannot follow as a matter of law that he would be disentitled to claim even for those damaged goods which resulted from the negligence or misconduct of the Railways.

10. Mr. V.R. Gopalan, learned counsel for the respondent/Railways however counters the points thus raised on behalf of the appellant and he would categorically contend that Section 77 of the Act enjoins upon the consignee to take delivery of the goods and then only he can maintain the claim for damages. He would also point out that in the present case, there was an offer by the Railways to assess the damages and that the claimant would not agree for the same. Therefore, the Tribunal was right in holding that the claimant was not entitled to claim compensation. As regards demurrages, admittedly the claimant refused to take delivery and therefore the Railways Act as well as the General Rules provided for the levy of demurrage as well as for adjustment out of the sale proceeds or any other dues payable by the claimant. He also challenges the findings of the Tribunal that the auction held by the Railways was invalid. He relied on several rulings in support of the above points which will be discussed below.

11. The issue of the validity of the auction sale may be conveniently dealt with first. The Tribunal found that the auction was invalid due to absence of proper notice under Sections 55 and 56 of the Act. According to Mr. Gopalan, a notice by R.P.A.D. had been admittedly sent and received by the claimant under Ex. A-10 on 22-8-1988 informing him about the proposal to auction the consignment and that even by an earlier letter dated 18-2-1988, the claimant had been informed that the refusal to take delivery was not permissible and that the Railways had no option except to dispose of the consignment in accordance with the rules.

12. I have gone through the said notice as well as the statutory provisions entitling the Railways to sell the properties either not claimed by the consignee or detained for realising the dues to the Railways. Section 55 of the Act deals with lien of the Railways for rates and other charges and Section 56 of the Act deals with disposal of unclaimed, properties. Section 56-C of the Act deals with disposal of unremoved goods at notified stations. All the said provisions require personal notice to the owner of the property. Sections 56 and 56-C of the Act which are appropriate provisions applicable to the facts of the present case contemplated personal notice as well as the date of the sale to be notified in one or more local Newspapers.

13. It is not the case of the Railways that any such publication was made in the Newspapers nor was any specific date of sale mentioned in the notice to the consignee. Even if the section may or may not mention about the need to furnish the date of sale, it is always incumbent and imperative and presumed that any notice of sale or auction in whatever form should contain the date of auction. It is an essential ingredient of any such notice, the object being to enable the aggrieved party to secure competitive purchaser and also to satisfy himself about

the proper conduct of the auction. Admittedly no date of auction had been mentioned in the communication to the consignee and hence on that ground alone, I am inclined to agree with the finding of the Tribunal holding that the auction sale was invalid.

14. In *Niranjan Lal Vs. Union of India (UOI)*, it was held that the Railways had no right to sell the goods consigned for failure to pay demurrage etc. Where no demand for payment of a fixed sum had been mentioned, even if the consignee had refused to take delivery. It was further held that since auction was not notified in the local Newspapers, the sale would be vitiated. It was contended by Mr. Gopalan that the Tribunal went beyond the scope of the issues arising for consideration in the claim petition and holding that the sale was invalid. I am unable to sustain the said contention. The validity of sale had to be necessarily considered by the Tribunal in order to arrive at the quantum of compensation to which the claimant would be entitled to.

15. On the main issue as regards whether the consignee was obliged to take delivery of the consignment and whether due to such refusal to take delivery, he was disentitled to sue for compensation, it is necessary to extract Section 77 of the Act which is as follows:--

"77. Responsibility of a railway administration after termination of transit:--

(1) A railway administration shall be responsible as a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872), for the loss, destruction, damage, deterioration or non-delivery of goods carried by railway within a period of seven days after the termination of transit:

Provided that where the goods are carried at owner's risk rate the railway administration shall not be responsible for such loss, destruction, damage, deterioration or nondelivery except on proof of negligence or misconduct on the part of the railway administration or of any of its servants.

(2) The railway administration shall not be responsible in any case for the loss, destruction, damage, deterioration or nondelivery of goods carried by railway, arising after the expiry of the period of seven days after the termination of transit.

(3) Notwithstanding anything contained in the foregoing provisions of this section, a railway administration shall not be responsible for the loss, destruction, damage, deterioration or non-delivery of the goods mentioned in the Second Schedule, animals and explosives and other dangerous goods carried by railway, after the termination of transit.

(4) Nothing in the foregoing provisions of this section shall relieve the owner of animals or goods from liability to any demurrage or wharfage for so long as the animals or goods are not unloaded from the railway wagons or removed from the railway premises.

(5) For the purposes of this Chapter,--

(a) unless otherwise previously determined, transit terminates on the expiry of the free time allowed (after the arrival of animals or goods at destination) for their unloading from railway wagons without payment of demurrage, and where such unloading has been completed within the free time so allowed, transit terminates on the expiry of the free time allowed for the removal of the animals or goods from railway premises without payment of wharfage;

(b) "demurrage" and "wharfage" have the meanings respectively assigned to them in Clause (d) and Clause (h) of Section 46-C".

16. Section 99 is the corresponding provision under the present Indian Railways Act, 1989 and it is the same as Section 77 of the old Act, except for the omission of Sub-section 5 of Section 77 of the Act.

17. According to the learned counsel for the appellant, the provisions do not mandate that refusal to take delivery would result in the consignee being disabled from claiming compensation. Reliance placed upon Section 77(2) of the Act for the present case is inappropriate and the said provision deals only with damages occurring seven days after the arrival of the consignment at the destination and hence the said provision was irrelevant for the present case.

18. I have considered the submission of both sides. It is true, Section 77(2) of the Act cannot apply to the present case to the extent that it will apply only to cases of damages, destruction, deterioration arising after the expiry of seven days after termination of the transit. But the section also contemplates "non-delivery of goods carried by railways, after the expiry period of seven days." Therefore it would certainly cover cases of non-delivery after expiry of prescribed period. But before the said phraseology would be applied to a particular case. The most important test is to find out who was responsible for the non-delivery. If the Railways themselves are responsible then there is no question of the Railways invoking the protection of Section 77(2) of the Act. If, on the other hand, the consignee was responsible for non-delivery, the provision would apply.

19. Therefore, in the present case in order to fix the responsibility on anyone of the parties, two issues have to be decided. Firstly, whether it is open to the consignee to refuse to take delivery under any of the circumstances and secondly whether in the present case, there was an offer by the Railways to assess the consignment and to give open delivery so that it can be said that the consignee was at default in not accepting the open delivery.

20. An analysis of the facts of the present case discloses, notwithstanding the repeated assertion on the part of the claimant that the entire stock had not arrived and that the consignment which was received was totally damaged, and incapable of usage by the consignee, the stand of the Railways is virtually nothing. Except in a counter statement contending formal denials of the allegations and the three exhibits filed on their side, no other material had been

filed and no witness had been examined. Out of three exhibits, while Ex. B-3 is only a statement of demurrage charges, the other two exhibits are two letters. Ex. B-1 is a letter to the claimant dated 13-5-1988 and on a perusal of the same, it shows that the claimant was asked for instructions regarding the delivery and disposal of the consignment within seven days from the date of receipt of the notice and as otherwise, the consignment would be sold at the risk of the claimant. Ex. B-2 is an inter-departmental letter and it is not a helpful material to establish the case of the Railways.

21. Therefore, the evidence on the side of the Railways is practically nil. Even so, I have taken care to go through the entire file produced by the learned counsel for the Railways and there is not a scrap of evidence or material to disagree with the clear finding of the Tribunal that "the long unexplained delay in transit coupled with the damage to the goods indicates negligence and misconduct on the part of the Railways in the carriage of the goods." Even though in a latter portion of its order, the Tribunal has remarked that the claimant has not established his assertion that only half of the consignment had arrived at the destination, there was no acceptable evidence to support the case of the claimant. The said finding is not consistent with the analysis of the evidence in the preceding paragraphs.

22. In paragraph 7 of its order, the Tribunal had remarked as follows :--

"Shri Ranganathan, the purchase Manager of the petitioner has stated in his affidavit that the consignment which was brought in a different wagon was in a totally damaged condition being exposed to atmospheric agents like rain water, etc., mixed with unwanted materials like straw and platform material and was brought in a totally caked and unacceptable condition and was not fit for foundry moulding work and had lost its original chemical properties and that the petitioner could not take delivery of the consignment which was not of the same quantity as booked at the forwarding station. I have found above under Issue No. 1 that the consignment was in a sound condition when it was entrusted to the railways for carriage at the forwarding station. It is not the case of the respondent that the goods had not been damaged at all when the goods arrived at the destination."

23. The Tribunal went further to hold that the goods had arrived at the destination was in a damaged condition and that inordinate delay and damage indicated negligence and misconduct on the part of the Railways.

24. Whatever be the evidence relating to the actual quantity received, at least in other respects namely the allegation that the entire commodity was received in a caked and wet condition and the same was unusable for the purpose for which it was purchased, the assertion of the consignee is not seriously challenged and in fact the Tribunal had upheld the contentions of the claimant. In fact, in one of the inter-departmental letters available in the file and not filed before the Tribunal, the following is the information which the Station Master, Karamadai

had to report to the Chief Commercial Officer dated 31-1-1989 at page 78 of the file.

"The two wagons viz., CRC 57382 and NRC 16902 arrived at KAY on 3-11-1987 and 5-11-1987 respectively. Since the consignment arrived in wet and good for nothing condition, the party S.R.S.I. refused to take delivery."

25. In this background, the question which arises for consideration is whether the consignee was bound to take delivery of the goods even if the goods had become totally damaged and unusable for him. There is no finding by the Tribunal that only part of the consignment was damaged and one part of the consignment was in a usable condition and could be separated from the damaged part of the consignment. But yet the Tribunal came to the conclusion that the claimant was bound to have taken delivery of the consignment and that this case cannot be stated to be a case of non-delivery by the Railways.

26. In this context, learned counsel for the appellant had relied on the judgment of the Andhra Pradesh High Court reported in Union of India (UOI) and Another Vs. Jonnalagadda Venkata Subbaiah and Co., . As cited above and in my opinion, learned single Judge who decided the case , rightly held that when the goods were found damaged even while arriving at the destination, unless open delivery was given, the consignee was not bound to take delivery and was also not obliged to take delivery of that part of the goods which are found damaged.

27. For arriving at this conclusion, learned Judge relied on Rule 47 of the General Rules which verbatim corresponds to the present Rule 152, which is as follows :--

"152. Partial delivery of consignments:--

A consignee must take delivery of goods forming part of a consignment whenever they are available for delivery notwithstanding that the remaining goods are short or damaged or have not arrived at their destination or are otherwise not available for delivery; and, if the consignee does not take delivery, of such goods forming part of a consignment as are available for delivery, they will be subject to wharfage charges if not removed within the time allowed for removal."

28. Learned Judge rightly held that a reading of the Rule clearly brings out that the consignee was not obliged to take delivery of that part of the goods which are damaged and would also be entitled to refuse to take delivery of that part of the goods which were not damaged, if no open delivery was given. But if he fails to take delivery of that part of the goods which were not damaged for which open delivery is offered, he would be liable for demurrage charges.

29. I am in agreement with the said view and there can be no compulsion on the consignee to take delivery of the damaged goods. I have already held that as against the assertion of the consignee that the entire stock was damaged and wet, there was no oral and documentary evidence on the side of the Railways to show that only a part of the consignment was damaged and that part was

separable from the other part and can be assessed.

30. In *Nizamuddin v. Union of India* 1982 T.A.C. 441, learned single Judge of Allahabad High Court held that in a case of nondelivery of goods arising out of mis-conduct on the part of the Railways and the goods arrived at the destination after eight months, there was no warrant either in the statute or any other principle for holding that just because the plaintiff refused to take up delivery, it must follow as a matter of law that he would be disentitled to claim even those damages which had resulted due to negligence and misconduct on the part of the Railway Administration.

31. In *Union of India (UOI) and Another Vs. Hukumchand and Others*, , where it was admitted that the goods were damaged during transit, the Railways insisted that their assessment of damages should be accepted and the consignee refused to take delivery, it was held that the contention of the Railways was not justified and therefore the consignment cannot be treated as unclaimed property.

32. In *Raman and Co. Vs. Union of India and Another*, learned single Judge of this Court held that the onus was on the Railways to show that no loss, destruction or deterioration or damage has taken place not only during the period of transit but also during the period of seven days after the termination of transit and that Railways having failed to establish the same, the Railway Administration cannot claim the protection of Section 77 (2) of the Act. The defence of the bar u/s 77 (2) of the Act would be available only when the loss had taken place after the period of seven days of the termination of the transit.

33. Mr. V. R. Gopalan however placed strong reliance on the judgment of the Supreme Court in *St. Joseph Textiles Vs. Union of India and another*, in support of his contention that where delivery of goods was not taken for more than seven days after the arrival at the destination, the railways was entitled to protection u/s 77 (2) of the Act.

34. Reference is also made to a judgment of a Division Bench of this Court in O.S.A. No. 55 of 1980 dated 13-2-1995, which placed reliance on the Judgment of the Supreme Court cited above.

35. On an analysis of the facts of both cases, I am inclined to hold that the facts do not deserve any comparison. While the judgment of the Supreme Court dealt with the case where goods arrived safely and without any damage at the destination on 1-7-1973 and were made available for delivery within seven days, but no one turned up to take delivery of the goods till 20-7-1993. The facts of the case decided by the Division Bench discloses that the consignment had reached the destination on 5-8-1974 and delivered on 13-8-1974 to a person who had produced the railway receipt. The dispute was mainly as regards the delivery effected to the said person who had produced railway receipt and whether the delivery was effected to the proper person or not. It was held that the delivery was effected bona fide to the person who had produced railway receipt and it was only in the said context, the Division Bench held that on a

reading of Section 77 of the Act, the Railway was absolved of its liability.

36. Reliance is also placed on the judgment of Allahabad High Court in *Niranjan Lal Vs. Union of India (UOI)*, on the observation that the consignee should take delivery within a reasonable time after giving notice to the Authorities showing damage to the materials and it was further held that the alleged damage was no excuse to postpone the taking of the delivery.

37. Reference is also made to the judgment of *Union of India (UOI) Vs. Mohan Raj*, in which it was held that the delivery of the entire consignment was not taken in spite of offer for verification and the Railway Administration was ready and willing to give delivery of the part of the consignment and as such the Railways cannot be held responsible for damages or loss on account of the non-delivery.

38. For reasons already stated above, with due respect, I am unable to accept the view that the consignee was under a compulsion to take delivery of the damaged goods, the damage having been caused by the Railways. Such a conclusion is not warranted in the face of Rule 152 of the General Rules.

39. The judgment of *Suryamurthy, J. in Union of India v. Saligram Kantilal* holding that there should be proof of actual damages, is not relevant for the present case since the quantum of damages has not been seriously disputed. The details of claim of Rs. 13,617.69 as damages had been stated in the annexure of the claim petition and value at the same rate of Rs. 415/- per metric tonne as shown in the invoice. Further as admitted by the Railways, even the damaged consignment had been auctioned at Rs. 6,305/-. The price fetched by auctioning the damaged goods cannot be treated as true value of the entire consignment.

40. The object of the provisions under the Act in the context of the claim of damage has to be appreciated in a proper manner from the point of view of both the Railways and the citizen who is invited to make use of its service. The transit of goods is not a welfare activity, but a competitive commercial activity and just because the Railways is an organ of the Government, the Organisation is not absolved of its commercial obligations. Section 77 of the Act itself ensures the applicability of the provision of the Contract Act dealing with the rights and obligations of a common carrier or a bailee. To say that even where the Railways is found guilty of gross negligence and misconduct should be absolved of its liability to compensate merely because the consignee refused to take delivery, would be a misreading of the provisions and would only render the provisions arbitrary, unreasonable and invalid.

41. The object behind requiring consignment to be cleared within a period of seven days is to ensure prompt clearance of goods considering the lack of space and the unnecessary responsibility on the Railways to maintain safe custody of the consignment and to protect Railways from harassment and bogus claims. But the said protection cannot be extended to a case where the Railways was found to be guilty of negligence or mis-conduct. As far as the obligation of the

consignee to receive the goods on assessment is concerned, it could be referable only to goods or part of the consignment which are in good condition and can be assessed separately but no goods which are totally destroyed and are unusable.

42. The claim for wharfage or demurrages should also be based on proper notice to the consignee and details regarding the claim. Such claims cannot be used as a shield to ward off or to escapes justifiable claim of compensation and being projected as a counter-blast for the claim of compensation.

43. The only other issue which remains to be decided is as to whether the Railways had offered delivery on assessment and whether the consignee had refused the offer. As stated earlier, neither Ex. B.1 nor Ex. B 2 can be held to be a proof of such an offer. There is no other evidence on the side of the Railways on whom the burden lies. I have also gone through the file and there is no document to establish the alleged offer by the Railways.

44. Page 33 of the file is the letter dated 9-12-1987 from the Chief Commercial Inspector, Coimbatore to the Chief Commercial Officer, Madras in which it is stated that the party was contacted and appraised of the position and requested to take delivery on assessment for which the party was refusing to take delivery. This is only an unsubstantiated intra-departmental communication which cannot be treated as evidence of the actual offer to the consignee.

45. Page 41 of the file is the letter dated 27-1-1988 from the Chief Claims Officer to the claimant informing him that the enquiry has revealed that the consignment was received at the destination on 4-1-1987 and it was offered to the consignee to effect delivery on assessment and the same was refused by him and that therefore any request for compensation cannot be complied with.

46. The said letter cannot also be treated as an acceptable evidence of the actual offer; it merely refers to the decision taken as a result of the alleged refusal by the consignee and nothing more. No letter has been produced calling upon the consignee to accept the assessment. In fact, in his reply (page No. 43), the consignee had denied the facts as stated in the letter of the Chief Commercial Officer dated 27-1-1988. Therefore there being no proper evidence of any offer having been made to the claimant for delivery after assessment and for the other reasons already stated. I am inclined to hold that the claimant is entitled to the compensation for damages.

47. As a result of holding that the Railways was liable to the compensation of damages and the claimant cannot be blamed for not taking delivery, the issue of demurrage does not arise for consideration.

48. As regards sale proceeds, having regard to the circumstance that the entire loss suffered by the claimant is being compensated, there is no obligation on the part of the Railways to return the sale proceeds.

49. With a result the above appeal is allowed and the claim petition filed by the appellant is ordered as prayed for. No costs.