

(2014) 08 KAR CK 0175

In the Karnataka High Court

Case No : Writ Petition No. 47235/2013 (GM - MMS)

S.K. Suresh

APPELLANT

Vs

The Principal Secretary

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Mines and Minerals (Development and Regulation) Act, 1957 — Section 12, 2(f), 2(g), 2(m), 23

Citation : AIR 2014 Kar 179 : (2014) 4 AKR 345 : (2014) ILR 6597

Hon'ble Judges : D.H. Waghela, C.J.;H.G. Ramesh, J

Bench : Division Bench

Advocate : Ashok Haranahalli, Senior Counsel for Raghavendra Kattimani, Advocate for the Appellant; Narendar G., Additional Government Advocate, Advocate for the Respondent

Judgement

D.H. Waghela, C.J.—The petitioner is holder of Quarry Lease No. 447 dated 10-11-2010 granted for quarry of a minor, non-specified mineral - steatite, valid for five years, executed as per the Karnataka Minor Mineral Concession Rules, 1994 (hereinafter referred to as "KMMC Rules"). Admittedly, before execution of the quarry lease, Senior Geologist, 3rd Respondent herein, had asked the petitioner to submit an affidavit, which the petitioner executed on 16-09-2009, according to which the petitioner undertook to utilize the extracted mineral only for cottage industry and not for any other purpose or any big factory (industry).

2. While the petitioner was paying royalty and working the lease, the 3rd Respondent, upon a spot inspection conducted on 18-03-2013, discovered that large decorative blocks were being extracted by the petitioner in violation of KMMC Rules. Therefore, he issued notice dated 25-03-2013 stating that conditions of the aforementioned affidavit were violated, as steatite mineral was being utilized for purposes other than cottage industry and also that minerals had been dispatched to granite cutting and polishing units in Tamil Nadu.

3. In their reply dated 06-04-2013, the petitioner claimed to have conducted all transactions with the knowledge of 3rd respondent who had issued regular dispatch permits and pointed out that KMMC Rules did not restrict excavation of minerals in bigger size. The petitioner claimed that the industries he transported the excavated steatite mineral to, were producing household articles and utensils which was permissible under KMMC Rules and claimed to have not violated any terms of the lease or KMMC Rules.

4. In the meantime, 3rd Respondent had issued another notice dated 05-03-2013 based on another spot inspection conducted on 28-03-2013, when 50 allegedly unlawfully mined, large designer blocks were discovered, and a criminal case in Crime No. 53/2013 was filed against the petitioner at Ajjampura police station. Petitioner gave replies dated 06-04-2013 and 17-04-2013. However, final notice dated 24-04-2013 was issued by 3rd respondent to which he gave reply dated 30-04-2013 and reiterated that there was no prescribed size for the extraction of steatite mineral in KMMC Rules and stated that he had voluntarily discontinued quarrying work, thereby incurring loss.

5. Eventually, the order bearing No. 127/10-05-13 dated 10-05-2013, (Annexure-M) which is impugned herein, came to be passed, cancelling the petitioner's quarry lease, which was obtained for the purpose of extracting steatite mineral for cottage industry usage, since mining was carried out to extract blocks exceeding 0.04 cubic meters in size allegedly violating KMMC Rules and Government notification.

6. Also, notice bearing No. DMG/CKM/QL/2013-14(A) dated 10-05-2013 was issued by 3rd respondent to the petitioner (Annexure Q), which is also impugned herein, demanding from him payment of Rs. 1,43,34,000/- for unauthorized mining carried out to extract large size decorative/ornamental blocks of 3 to 16 cubic meters size and transported to industries other than cottage industries in violation of the affidavit/undertaking given by him.

7. The petitioner filed two writ petitions before this Court, one W.P. 21511/2013 challenging the cancellation order at Annexure M, wherein he was directed to file a Revision Petition against it and another W.P. 37542/2013 regarding the demand notice at Annexure Q pending adjudication of the said Revision Petition, which was disposed on the understanding that the Government was not to take precipitate action in the meantime, and ordering early disposal of the Revision Petition in RP No. 81/2013 filed by the petitioner on 13-06-2013.

8. Revisional Authority i.e., Joint Director, Department of Mines and Geology, Mysore, 4th respondent herein, passed order in RP No. 81/2013 dated 21-09-2013 (Annexure Y). The contentions of the petitioner and respondent have by and large remained the same except for an additional reason for cancelling the quarry lease being that the lease area is included in a pending proposal for declaration thereof as forest land. The revision petition was rejected directing the competent authority to control illegal activity and recover arrears from the

petitioner.

9. It is firstly contended by learned counsel for the petitioner that there was grave violation of principles of natural justice as the petitioner had been denied an opportunity of a personal hearing by 3rd and 4th respondents and that revisional authority passed order dated 21-09-2013 in great haste without due application of mind.

Secondly, it is contended that the affidavit dated 16-09-2009 executed by the petitioner is not part of the lease deed and hence there could be no requirement of use of steatite mineral for cottage/small scale industries only. Moreover, as petitioner only supplied the extracted steatite to industries, which used them for making household articles and utensils, he was well within the prescription of KMMC Rules as regards usage of steatite.

Thirdly, it was argued that the government notification prescribing 0.04 cubic meter size for the mineral extracted was applicable to ordinary building stones and not steatite, hence there being no requirement to adhere to the size mentioned therein, and as such the cancellation of lease based on alleged extraction of large blocks for decorative purpose and transportation to industries other than cottage/small scale industries was illegal.

Lastly, it is the contention of the petitioner, regarding the demand notice for penalty, that such penalty could be levied if there was breach of the lease deed and not for the alleged breach of an affidavit and even if he is found liable to pay penalty, the applicable rate would be five times of Rs. 20 per MT as per Schedule - II to KMMC Rules and not five times of Rs. 1200 per cubic metre as is applied, wrongly treating steatite as an ornamental/decorative building stone. It is prayed that the impugned cancellation order dated 10-05-2013, impugned notice for demand of arrears dated 10-05-2013 and the order dated 21-09-2013 of revisional authority in RP No. 81/2013 may be quashed.

10. Per contra, learned AGA appearing for the respondents submitted that the application dated 20-08-2009 for grant of quarry lease was submitted by the petitioner to Senior Geologist with the understanding that it was for steatite, which was a non-specified minor mineral that could only be used for making household articles as per KMMC Rules. He submitted that petitioner voluntarily executed the affidavit dated 16-09-2009 and undertook to utilize the mineral only for purpose of cottage industry, which was actually a pre-condition for sanction of the quarry lease, forming part of the terms of lease. It was clearly deposed in his affidavit that he even acceded to cancellation of the quarry lease if he utilized the mineral for any other purpose and thus he was estopped from challenging the order of cancellation.

11. Learned AGA relied on Notifications-I and II issued under KMMC Rules to contend that under Notification-I, all other material which are capable of being mined as dimensional block in excess of the sizes specified in Notification-II are classified as specified minor minerals and as ornamental and decorative building

stones. Since the petitioner was found excavating the mineral in the form of large dimensional blocks above the size of 0.04 cubic meters, it would imply that he was not mining non-specified minor mineral for which he held the lease. It is also submitted that under Part VII of the lease deed, it was the duty of petitioner to immediately report discovery of any new minerals in the lease area to the Competent Authority, which petitioner had failed to do and consequentially the lease deed was liable to be cancelled for extraction of mineral other than that specified under QL 447 dated 10-11-2010.

12. As for the demand notice dated 10-05-2013 for Rs. 1,43,34,000/-, learned AGA submitted that it was consequential upon the breach of conditions of lease and was in consonance with Rule 44 of KMMC Rules and section 25 of the Mines and Minerals (Development and Regulation) Act, 1957 (for short "MMDR Act").

13. To address the preliminary contention raised by the petitioner in respect of violation of principles of natural justice and non-affording of personal hearing to the petitioner, there is little merit in the argument. Learned counsel for the petitioner sought to rely upon the observation of Hon"ble Supreme Court in State of Haryana Vs. Ram Kishan and Others, where it is held in context of section 4-A of the MMDR Act that:

"8. Considered in this light, the section must be interpreted to imply that the person who may be affected by such a decision should be afforded an opportunity to prove that the proposed step would not advance the interest of mines and mineral development. Not to do so would be violative of the principles of natural justice. Since there is no suggestion in the section to deny the right to the affected persons to be heard, the provisions have to be interpreted as implying to preserve such a right.

.....

We, therefore, hold that a final decision to prematurely terminate a lease can be taken only after notice to the lessee."

It was also pointed out that Rule 6(3) of the KMMC Rules specifically provides that the Competent Authority may "determine the lease or license after providing an opportunity of being heard."

However, these arguments do not have any relevance in the present context, as sufficient opportunity was provided to the petitioner to respond to the various notices issued by the 3rd respondent and also present his case before the 4th respondent, the revisional authority, which was availed of by the petitioner. There is no violation of principles of natural justice apparent from the record of proceedings in the case of the petitioner.

14. Relevant provisions of the Karnataka Minor Mineral Concession Rules, 1994 may be extracted here for reference:

2. Definitions. - In these rules, unless the context otherwise requires.-

- a)
- b) "Competent Authority" means a Competent Authority appointed under Rule 4;
- c)
- d)
- e)
- f) "Non-specified minor mineral" means minor minerals other than specified minor minerals;
- g) "Ordinary building stone" means ordinary building stone specified by the State Government from time to time;
- h)
- i)
- j)
- k)
- l)
- m) "Specified minor mineral" means minor minerals specified by the State Government from time to time.

4. Competent Authority. - The State Government may by notification, appoint the Competent Authority for all or any of the purposes of these rules.

6. General conditions of quarrying lease and license. -

(1) ... (2)

(3) In case of breach by the lessee or licensee or his transferee or assignees of any of the conditions specified in these rules or in the quarrying lease deed or licence, the Competent Authority shall require by notice in writing the lessee or licensee to remedy the breach within thirty days from the date of notice and if the breach is not remedied within such period the Competent Authority may levy a fine not exceeding two thousand rupees in the case of non-specified minor minerals and rupees ten thousand in case of specified minor minerals and the Competent Authority may without prejudice to any other action that may be taken against such lessee, licensee, transferee or assignee determine the lease or licence after providing an opportunity of being heard.

(4) ...

NOTIFICATION - I No. CI. 418 MRC 92, dated 2-7-1994 Karnataka Gazette, Extraordinary, dated 2-7-1994

In exercise of the powers conferred by clause (m) of rule 2 of the Karnataka Minor Mineral Concession Rules, 1994, the Government of Karnataka hereby

specify the following minor minerals to be specified minor minerals for the purpose of the said clause, namely.-

Ornamental And Decorative Building Stones, such as, :-

(i) Black and Green Granites etc., and their varieties (All Dyke Rocks).- All black or grey or green or brown coloured mafic/ultramafic dyke rocks including porphyritic and other varieties of different structural and textural patterns suitable for use as ornamental and decorative stone.

(ii) Pink and Red Granites, Syenites etc., and Pink and Red Granitic Rocks and their varieties.- Granites, Granitic rocks and syenites including Gneissic, Porphyritic and Aplitic varieties of different structural and textural patterns and with relatively dominating red or pink or brown colour (when combined with other colours) suitable for use as ornamental and decorative stone.

(iii) Grey and White Granites/Grey and White Granitic Rocks and their varieties.- Granites and Granitic rocks including Gneissic, Porphyritic and Aplitic varieties of different structural and textural patterns, with relatively dominating grey or white colour (when combined with shades of grey, white, cream colours) suitable for use as ornamental and decorative stone.

(iv) Felsite and its varieties suitable for use as ornamental and decorative stone.

(v) Quartzite and its varieties suitable for use as ornamental and decorative stone.

(vi) Sandstone and its varieties suitable for use as ornamental and decorative stone. (vii) Marble or crystalline limestone and their varieties suitable for use as ornamental and decorative stone.

NOTIFICATION - II No. CI. 418 MRC 92, dated 2-7-1994 Karnataka Gazette, Extraordinary, dated 2-7-1994

In exercise of the powers conferred by clause (g) of Rule 2 of the Karnataka Minor Mineral Concession Rules, 1994, the Government of Karnataka hereby specify the following stones to be the ordinary building stones for the purpose of the said clause, namely.-

"Any granite or granitic rock, basalt, greywacke, phyllite, sandstone, quartzite, shale, slate, banded feruginous quartzite and dyke rocks of any colour, texture and structure which, by virtue of presence of inherent close-spaced joints, fractures, irregular veins, cannot be quarried and extracted in the form of blocks of dimension or size exceeding 0.04 cubic metres or in the form of slabs of dimension not exceeding 0.90 cubic metres with their (slabs) thickness not exceeding 20 centimetres".

NOTIFICATION - III No. CI. 418 MRC 92, dated 2-7-1994 Karnataka Gazette, Extraordinary, dated 2-7-1994

In exercise of the powers conferred by Rule 4 of the Karnataka Minor Mineral

Concession Rules, 1994, the Government of Karnataka hereby specify the following authority and officers of the Department of Mines and Geology specified in column (2) of the table below to be the Competent Authority for the purposes of the provisions of the rules specified in column (3) and within the area specified in column (4) thereof.

15. Learned AGA, by way of memo dated 11-07-2014, produced copies of the QL Application, Inspection Report and Grant Notification in respect of petitioner's quarry lease No. 447. It is seen that the application was made by petitioner on 20-08-2009 in "AQL Form" prescribed under Rule 9 (for quarrying of specified minor minerals), Rule 21 (for quarrying of non-specified minor minerals), Rule 33 (for quarrying in a patta land) and Rule 34 (for quarrying specified minor minerals in certain private lands). Rule 21 of the KMMC Rules, reads as under:

CHAPTER - IV

Grant of Quarry Lease for Non-Specified Minor Minerals.

21. Application for grant or renewal of a quarrying lease in respect of non-specified minor minerals.-

(1) Every application for grant of a quarrying lease to quarry non-specified minor minerals in the land belonging to the State Government which has not been notified under Rule 8-B shall be made in Form-AQL to the Competent Authority. The application shall be accompanied by a security deposit in the form of treasury challan for a sum calculated at the rate of rupees five thousand per acre and an application fee of rupees two thousand in the form of a treasury challan together with a certificate issued by the Competent Authority for having cleared the arrears, if any, in respect of any lease held by the applicant as on the date of making the application and other documents area sketch etc. as specified in Form-AQL.

(2) ...

(2-A)

(2-B)

(3) Application received under sub-rule (1) and (2) shall be acknowledged in Form - A.

The petitioner herein made his application dated 20-08-2009 in AQL Form to the "Senior Geologist" who, as per Notification III, is only authorized to sanction quarry lease for non-specified minor minerals in his respective jurisdiction.

Hence the application could be construed to have been made in AQL-Form under Rule 21 to the Senior Geologist, Department of Mines and Geology, Chikkamagalur, for grant of quarry lease/quarrying license for "building stone", in this case steatite (non-specified minor mineral) for a period of 5 years over an extent of 6 acres of specified land along with requisite security deposit.

16. Pursuant to the above application, an affidavit came to be executed by the petitioner on 16-09-2009 whereby the petitioner solemnly affirmed as under:

"I have submitted application to the Senior Geologist, Chikmagalur on 20/08/2009 seeking stone quarry lease for extraction of "Steatite" mineral over an extent of 6-00 acres of region in Sy. No. 6 of Rangapura village, Shivani Hobli, Tarikere Taluk, Chikmagalur. In case of grant of stone quarry lease in my favour, I undertake to utilize the same only for cottage industry. I shall not utilize the same for any other purpose or for any big factory (industry) and I hereby solemnly affirm that, I shall utilize the same for cottage industry.

In case if I utilize the same for any other purpose, I hereby agree and affirm that, stone quarry lease granted in my favour may be cancelled and legal action may be initiated.

I state on oath that, what I stated above is true and correct."

The application was duly processed by the respondent Department. In the Inspection Report dated 05-10-2010, in Form-S, the inspecting officer/Geologist has noted in the following manner that steatite mineral deposit found in the applied lease area is suitable for usage in cottage industries:

Based on the application dated 20-08-2009, affidavit of petitioner dated 16-09-2009, NOC dated 10-06-2010 issued by Assistant Commissioner, Tharikere and Inspection report dated 05-10-2010 in Form-S; the notification No. 13/2010-11 dated 05-10-2010 (bearing No. DMG/SG/CHK/QLA/2010-11/1350-1352) was issued following which the lease deed dated 10-11-2010 was registered and Quarry Lease No. 3447 came to be granted in favor of the petitioner for Steatite stone.

17. It may be seen from the above notes and specific recommendation recorded in the Inspection Report that the steatite deposits available in the applied lease area were found to possess properties suitable for use in cottage industries and handicrafts. Affidavit dated 16-09-2009 was executed by the petitioner with the understanding that the steatite mineral extracted from the leased area would be utilized only for the purpose of cottage industries - for which purpose it was deemed suitable. There was a clear mutual understanding of the said pre-condition between petitioner and respondents, which is apparent from the willful execution of the affidavit dated 16-09-2009 to that effect, by the petitioner. Hence, violation of this essential pre-condition would tantamount to violation of the terms of the lease itself.

18. In interpreting a contract, primarily the document itself is considered, but surrounding circumstances may also be taken into account as no contract is made in a vacuum and there is always a setting in which they have to be placed, as per Lord Wilberforce in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen ([1976] 1 WLR 989, 995-996):

"No contracts are made in vacuum; there is always a setting in which they have

to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the back-ground, the context, the market in which the parties are operating."

In such cases, resort may be had to the rules of construction to interpret the intention of the parties, as held by the Privy Council in the case of AIR 1924 162 (Privy Council):

"In the construction of written or printed documents, it is legitimate in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply."

19. Thus, it is amply clear from the circumstances surrounding the grant of quarry lease to the petitioner, that the presence of steatite deposits in the quarry area being found suitable for cottage/small scale industries and the affidavit to use the mineral only for that purpose being executed by the petitioner himself, formed the basic premise and promise upon which the quarry lease was granted.

20. As for contention of the petitioner that 3rd respondent continued to issue dispatch permits and was aware of the transport of mineral to industries other than cottage industries and transport of mineral to industries situated outside the State of Karnataka, it still did not derogate from the breach of the essential pre-condition by the petitioner or absolve him from his duty to abide by the affidavit executed by him, on the basis of which the application for lease was processed by the Competent Authority.

21. As for regulating size of the blocks of mineral extracted, State Government is empowered to impose regulatory restrictions not only from a revenue perspective but also keeping in view the benefit to the public. Section 2(m) defines "specified minor minerals" as those specified by the State Government under Notification-I, which are further named to be "ornamental and decorative stones" enumerated therein. Section 2(f) defines "Non-specified minor minerals" as those minor minerals other than the ones specified under Section 2(m). "Ordinary building stones" as per Section 2(g) are described in Notification-II as those which cannot be quarried in blocks and slabs beyond certain prescribed dimensions.

22. As per Geology and Mineral Resources of the States of India, Part VII-Karnataka and Goa, (Miscellaneous Publication No. 30, Geological Survey of India, Government of India, 2006), steatite (soapstone) is described as "a massive variety of talc (hydrothermally altered ultramafic rock)" occurring in association with ultramafic rocks of Sargur and Bababudan Groups in Karnataka.

The quarry lease granted under the KMMC Rules to the petitioner herein being

for steatite, a non-specified minor mineral prescribed for use in making household articles and utensils, it falls outside the purview of ornamental and decorative stones under Notification-I, and comes within the ambit of ordinary building stones, and naturally would have to be extracted in accordance with the size restrictions imposed in Notification-II. By virtue of that notification, no sooner the stones could be or were quarried in blocks larger than 0.04 cubic meters or in the form of slabs larger than 0.90 cubic meters they ceased to be ordinary building stones and non-specified minor mineral. They would then be specified minor minerals, by virtue of being ultramafic rock, if quarried in dimensions and form suitable for use as ornamental and decorative stone as per clause (i) of Notification-I, which classifies "all black or grey or green or brown coloured mafic/ultramafic dyke rocks including porphyritic and other varieties of different structural and textural patterns suitable for use as ornamental and decorative stone" as specified minor minerals and in respect of which quarry lease has not been granted to the petitioner. The petitioner cannot escape the liability arising from such violation of the lease-deed, in so far as admittedly the lease was granted for quarrying the non-specified minor mineral, and as per Part VII, clause 10 as under of the lease-deed itself, he was obliged to immediately inform the availability of mineral other than the non-specified mineral, only for quarrying which the lease was granted.

"PART VII THE COVENANTS OF THE LESSEES/LICENSEES

10. To report discovery of other minerals.

Whenever the lessee/licensee shall find, in the said lands, any mineral other than the said mineral/minerals the lessee/licensee shall immediately report such discovery in writing to the Competent Authority with full particulars of the nature and position of each such find."

Therefore, steatite was permitted to be quarried by the petitioner for the purpose of cottage/small scale/handicrafts industry usage as seen from the Inspection Report, and at any rate, only for making household articles and utensils. The petitioner was in clear violation of the terms of the affidavit executed by him in so far as end usage of the mineral is concerned. Larger dimension blocks not being a commonplace or permissible extraction for the authorised purpose as per the KMMC Rules, the 3rd respondent's action of issuing the impugned notice dated 10-05-2013 cannot be faulted.

23. Chapter-IV governing the grant of quarry lease for non-specified minor minerals prescribes conditions whereby under Section 23, persons/companies having established manufacturing units situated in the state of Karnataka or persons/companies holding valid license for manufacture of sand using building stone in the state of Karnataka are given priority for grant of quarry lease over those who do not have such license, in case of applications made on the same day. Analogous provision is made under Chapter-III which regulates grant of quarry lease for specified minor minerals where, under Section 12, such priority

is given inter alia to persons having established 100% export oriented units in the State of Karnataka and then to small scale industrial units in the State of Karnataka indicating that the legislative policy of the State of Karnataka in respect of disposal of minerals, quarried under leases granted in accordance with KMMC Rules, is in favour of industrial and small scale units situated within the State which has priority over disposal by transporting said minerals to units situated outside the State. Even otherwise, grant of a lease for mining/quarrying purpose was not a fundamental right of the petitioner and there is no restriction on the Government to formulate a policy along which it may grant such lease.

24. It is trite that the extraordinary jurisdiction of the High Court under Article 226 of the Constitution may not be exercised in each and every case in which an illegality is pointed out, especially where the alleged illegality has to be weighed against the basic impropriety of the claim made by the petitioner. In the facts of the present case, it may be true that the designated authority (Senior Geologist) may have permitted or may not have noticed the extraction of large blocks of steatite and issued mineral dispatch permits for transporting them outside the State of Karnataka, but it did not take away the obligation undertaken by the petitioner himself, on the basis of which the grant of lease was considered in the first place.

25. Therefore, usage of the extracted steatite mineral for purposes other than cottage industries and that too by transporting to cutting and grinding units situated outside the State of Karnataka, constitutes breach of the contractual obligations undertaken by the petitioner voluntarily, at the time of grant of the quarry lease. Therefore, impugned notice dated 10-05-2013 (Annexure M) cancelling the petitioner's quarry lease is not illegal.

26. As regards the issue of demand notice dated 10-05-2013 issued to the petitioner for payment of penalty to the tune of Rs. 1,43,34,000/-, the petitioner contended that the rates applicable to ornamental/decorative building stones @ Rs. 1200/- per MT were wrongly applied to large dimension steatite blocks extracted by him under the quarry lease. Larger blocks of steatite extracted by the petitioner from the lease area were outside the purview of non-specified minor minerals and fell within the categories of specified minor minerals under Notification-I. The applicable rates of royalty and penalty, if any, would have to be calculated as per classification in Notification-I and II and the rates prescribed under KMMC Rules (Schedule II). In view of serious controversy about the rate for calculating the additional amount of royalty and penalty, if any, as applied in the impugned notice dated 10-05-2013 of the Senior Geologist and no opportunity of hearing having been granted to the petitioner, the petitioner is ordered to be afforded an opportunity of being heard by the competent authority. Accordingly, the petitioner will be at liberty to make appropriate representation in respect of the rates of royalty and penalty applied in the impugned notice (Annexure Q) on or before 15-09-2014, which may be considered and decision thereon may be communicated to him by the 3rd respondent within a period of

one month from the date of receipt of the representation, if any, submitted by the petitioner as aforesaid.

27. Subject to the above observation and direction, the petition is dismissed with no order as to cost.