

(1993) 02 KL CK 0090
In the High Court Of Kerala
Case No : S.A. No. 636 of 1990

Unni Madhavan Nair

APPELLANT

Vs

Kamalakshy and Others

RESPONDENT

Date of Decision : 25-02-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 100
Specific Relief Act, 1963 — Section 16, 16(a), 16(c), 16(c)

Citation : (1993) 1 KLJ 871

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : P.N.K. Achan, for the Appellant; A.R. Sreenivasan and Lekba Suresh, for the Respondent

Final Decision : Dismissed

Judgement

T.L. Viswanatha Iyer, J.—Defendant is the appellant. He succeeded in the trial court, but lost in appeal. The suit was one for specific performance of an agreement Ext. A1 dated March 20, 1978 to sell the plaint schedule property which belonged to the appellant to one Vasu for a consideration of Rs. 11,815/-. An advance of Rs. 2,000/- was paid on the date of the agreement. The balance consideration was to be paid within a period of two and a half months, within which the appellant had to satisfy Vasu about the measurements of the property, and its being unencumbered. Vasu issued notice Ext. A2 on June 2, 1978 calling upon the appellant to furnish him the title deeds of the property, as also the encumbrance certificate, to enable him to get the sale deed prepared and executed. The appellant sent reply Ext. B10 on June 6, 1978 stating that he had always been ready and willing to perform his part of the contract, and that it was Vasu who was the defaulting party, he being not ready to complete the sale. Vasu filed the suit on October 24, 1979 for a decree of specific performance of the agreement. I shall refer to Vasu as the plaintiff in the further discussion, for purpose of convenience. After reciting the terms of the agreement Ext. A1, and about issue of the notice Ext. A2, to which, according to the plaint, there was no

reply, the plaint proceeded to state that the defendant - appellant was bound under the agreement Ext. A1 to convey the property and deliver possession of the same to the plaintiff, and that the suit was necessitated by reason of the appellant's default in performing the obligations under Ext. A1. The prayer in the suit was for execution and registration of the deed of sale. It did not contain any alternate prayer, either for damages, or for refund of the advance of Rs. 2,000/- in case specific performance was refused, apart from the usual residuary prayer to grant such other reliefs as the court may deem fit.

2. In his written statement, the appellant denied any default on his part, stating inter alia that he had sent a reply to Vasu on June 6, 1978. According to him, he had offered the documents to the plaintiff, but the latter was evading receipt of the documents. He also contended that the default being on plaintiff's part, he was not entitled to any decree of specific performance, and the suit should be dismissed.

3. The plaint as it was originally filed on October 24, 1979 did not contain any specific averment about the plaintiff's readiness and willingness to perform his part of the contract as required u/s 16 (c) of the Specific Relief Act, 1963 (the Act) read with forms 47 and 48 of Appendix A to the Code of Civil Procedure, 1908. The plaintiff got the plaint amended by filing I.A. No. 646 of 1981 on February 4, 1981 by incorporating an averment to the effect that he was ready to pay the balance consideration to the appellant/defendant at any time. This amendment was allowed despite opposition subject to payment of costs on August 19, 1981. The nature of the opposition and how it was dealt with will be evident from the order of the Subordinate Judge which is as under:-

The plaintiff in this petition filed under Order 6 Rule 17 CPC now seeks to amend the plaint incorporating an additional plea that he was and is ready and willing to pay the balance of purchase price. The petition is opposed by the respondent-defendant on the ground that in the absence of such a plea, the suit would have failed for the reason of Sec. 16 of the Specific Relief Act, 1963. It might be perhaps true that the absence of a plea in the plaint in the suit of this nature that the plaintiff always was and is willing and ready to perform his part of the contract, is fatal. But for that reason alone, the petitioner-plaintiff cannot be denied the relief sought for by amending the plaint, suitably. Of course, the suit was in late 1979 and the amendment petition comes up only in February 1981. In that way, the petition is belated for which the defendant shall be compensated by payment of costs.

3. Accordingly, this petition will be allowed on payment of cost of Rs. 25/- on or before 31-8-1981. Call the petition on 1-9-1981.

Apparently feeling that this amendment was also insufficient to satisfy the requirements of section 16 (c) of the Act, the plaintiff applied again by I.A. No. 4065 of 1982 on September 15, 1982 seeking a further amendment of the plaint to incorporate a specific plea that he had always been ready and willing to

perform his obligations under the agreement during the period prescribed for performance thereunder, and thereafter till date, and that he had not committed any default in the performance of his obligations. The trial court refused to allow the amendment in the view that the amendment will deprive the defendant of a defence available to him, thereby permitting the plaintiff to plug a loop hole in the plaint namely non-compliance with section 16(c) of the Act. The plaintiff took up the matter in revision to this court namely C.R.P. No. 2533 of 1982 which was disposed of on October 9, 1986. This court allowed the amendment, but with a rider, that the defendant may raise question of limitation if any, that may arise, at the time of final hearing of the suit.

4. The plea of limitation referred to was that the averment of readiness and willingness required by section 16(c) of the Act was part of the cause of action for the suit; the rectification of that defect by the amendment in question was beyond the period of limitation prescribed for a suit for specific performance, and therefore the suit itself was liable to be dismissed as barred by limitation. It was this plea raised by the defendant that was left open for consideration at the trial of the suit.

5. Subsequently, the original plaintiff Vasu died and his legal representatives were impleaded as supplemental plaintiffs in the suit. They are the respondents in this appeal. The trial court dismissed the suit accepting the defendants' contention that the suit was barred by limitation. He held that the averment of readiness and willingness on the part of the plaintiff was part of the cause of action for the suit, and should therefore have found a place in the plaint within the period of limitation. The amendment by I.A. No. 4065 of 1982 incorporating such a recital was made at a time when the cause of action to sue for a decree of specific performance had become barred by limitation. The suit was accordingly barred by limitation. It was therefore dismissed.

6. But the trial court rightly chose to render findings on the other issue arising for consideration, whether the plaintiff was ready and willing to perform his part of the contract. He held that the omission of the averment regarding the readiness and willingness of the plaintiff in the original plaint was an inadvertent one. He further held, on an analysis of the evidence, and the conduct of the parties, that the plaintiff had always been ready and willing to perform his part of the contract, and that it was the defendant who was not ready and willing to perform his obligations. In fact, the trial court observed that the evidence of the appellant as DW 1 was not at all believable.

7. While dismissing the suit however, the trial court granted a decree for refund of the advance of Rs. 2,000/- with interest at 12% per annum, though there was no specific prayer for such refund, and act even an issue had been raised on the point whether the plaintiff was entitled to get refund of the amount.

8. The legal representatives of the deceased plaintiff filed appeal, which was allowed by the District Court. The appellate court concurred with the trial court in

holding that the plaintiff had always been ready and willing to perform his part of the agreement Ext. A1. But he did not agree with the trial court that the suit was barred by limitation. The court held that an amendment of the plaint incorporating an essential fact cannot be said to be an attempt to bring out a cause of action. He also took the view that the allegations in the original plaint, and as amended by I.A. No. 646 of 1981 would clearly satisfy the requirements of section 16 (c) of the Act. They amounted to a clear expression of the readiness and willingness on the part of the plaintiff to perform his part of the contract. The second amendment by I.A. No. 4065 of 1982 was only a formality which did not, in any way, change the nature of the pleadings. In the light of these findings, the appeal was allowed and the suit decreed.

9. The lower appellate court differed from the trial court on another question as well, whether a decree for refund of the advance of Rs. 2,000/- could be granted to the plaintiff in case specific performance could not be decreed. This matter was dealt with in the cross-objections which the defendant had filed and it was held that no such decree could be granted in the absence of a prayer in that regard in the plaint. But no substantive relief was given to the defendant, based on this finding inasmuch as specific performance was decreed.

10. The second appeal is filed by the defendant against the decree for specific performance passed by the lower appellate court.

11. Though there is a challenge to the finding concurrently rendered by the courts below about the readiness and willingness of the plaintiff to perform his part of the contract, I do not think that it is open for consideration in a second appeal u/s 100 of the C P. C. being essentially a question of fact. Even otherwise the finding is supported by the evidence on record as also the circumstances of the case. I shall briefly state the reasons which prompt me to hold that the finding on this point does not call for interference.

12. The agreement was on March 20, 1978. The period fixed for performance expired on June 5, 1978. The plaintiff issued his notice Ext. A2 on June 2, 1978 calling upon the defendant to hand over the title deeds as also the encumbrance certificate to enable him to get the sale deed prepared. The agreement Ext. A1 cast an obligation on the defendant to satisfy the plaintiff that the property was unencumbered. The encumbrance certificate was not taken within the period fixed for performance, the only encumbrance certificate that was taken being Ext. B9 on 7-12-1981. after the suit. The defendant's case that the plaintiff did not have the wherewithal to fulfil his obligation to pay the balance consideration was one developed at the trial which did not find reflection either in Ext. B10 or in his written statement. On the other hand, both the plaintiff and his witness P.W. 2, spoke about the plaintiff's readiness and willingness as also his capacity to complete the contract. The evidence of the defendant as DW1 was on the other hand, artificial, and found to be unbelievable by the trial court. All this is sufficient to uphold the finding of the courts below that the plaintiff was always ready and willing to perform his part of the contract and that it was the

defendant who was not so willing.

13. The main point which was debated in the appeal was the plea of limitation which found favour with the trial court but not in appeal. This plea is founded on the absence of a specific averment in so many words, regarding readiness and willingness, in the plaint as originally presented. The first amendment by I.A No 646 of 1981 which was within the period of limitation introduced the averment that the plaintiff was ever ready to pay the amount of consideration to the defendant. This again did not contain a specific averment about the plaintiff's readiness and willingness, which was introduced only by I.A. No. 4065 of 1982, which was allowed by this court in C.R.P. No. 2533 of 1982 after the application stood dismissed by the trial court. But this court expressly reserved the right of the defendant to raise the plea of limitation though the amendment incorporating the averment was allowed to be made. The contention raised by the defendant is that a recital regarding readiness and willingness of the plaintiff to perform the essential terms of the contract is part of the cause of action for the suit in view of the provisions contained in section 16 (c) of the Act and the prescriptions in forms 47 and 48 of Appendix A to the C. P. C. Section 16(c) provides that specific performance of a contract cannot be enforced in favour of a person who fails to ever and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms, the performance of which has been prevented or waived by the defendant. Forms 47 and 48 of Appendix A to the C.P.C. work out this requirement with appropriate recitals in model plaints. The defendant's contention is that this recital goes to the root of the matter, and unless it finds a place in the plaint within the period of limitation prescribed by law, the entire suit has to fail.

14. In *Ouseph Varghese v. Joseph Aley*, (1969) II SCWR 347, the Supreme Court stressed the need for this averment in the plaint in these terms:

The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbents on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in *Pt. Prem Raj v. The D. L. F. Housing and Construction (Private) Ltd.* and that it is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable.

This decision was followed and the dictum reiterated recently in Abdul Khader Rowther Vs. P.K. Sara Bai and Others, (Kania and Kochu Thommen, JJ). To a similar effect is the decision of this court of Kochu Thomman, J. in Govindan v. Ulaahnan, 1987 (2) KLT 513 where the learned Judge stated that in the absence of averments conforming to section 16(c). the suit is liable to be dismissed. The importance of the averment about the plaintiff's readiness and willingness to perform the essential terms of the contract cannot therefore be belittled. It goes to the root of the matter, and it will prove fatal to the suit if the averment could not be read into the plaint.

15. But then, is it necessary to religiously chant the exact words of the section, that the plaintiff "has performed or has always been ready and willing to perform the essential terms of the contract", in the plaint to save the suit from dismissal for non-compliance with the mandatory requirements of section 16(c)? No doubt, a repetition of the very words of the statutory provision will obviate controversy atleast in part regarding non-compliance with section 16(c), but are the words so sacrosanct that faithful allegiance to the language alone will render the suit maintainable? I think not. As stated by the Supreme Court:

Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. (R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others,).

Section 16(c) does not insist on the use of any particular words. All that it requires is that the plaintiff must ever and prove his readiness and willingness to perform the essential terms of the contract. These suit is one for specific performance, and normally the plaintiff will plead all the essential pre-requisites which alone will entitle him to a decree of specific performance. The averment of readiness and willingness is part of the pleadings in the case. If by inadvertence, or otherwise the specific words are not recited, but otherwise the necessary details or particulars are found in the plaint, a just cause should not be defeated by reason of non-recitation of the exact words of the section. The question is one of construction of the plaint, whether it contains the facts, details or particulars from which the readiness and willingness of the plaintiff could be inferred. If therefore it is possible to read in the plaint the essential facts which lead to an inference of his readiness and willingness, I am of the opinion, the suit is not liable to be defeated for not being verbally loyal to section 16(c). This point was dealt with by a Division Bench of the High Court of Gujarat in Rajya Tulsibhai Patel Vs. Benar Enterprise and Others, . The facts of that case are analogous to the case on hand. The plaint concerned did not contain any averment regarding the readiness and willingness of the plaintiff, but such an averment was sought to be introduced by a petition for amendment which was filed after 24th December 1985 when the period of limitation for specific performance of the contract in question expired. The trial court dismissed the application in the view that the absence of the averment as to readiness and willingness tantamount to

absence of cause of action which is fatal to the suit in view of section 16(c) of the Act. By allowing the amendment, a valuable right which had accrued to the defendant by lapse of time on 24th December 1985 would be lost and therefore the amendment cannot be allowed. The suit was eventually dismissed and the matter came up in appeal by the plaintiff. After referring to the decisions of the Supreme Court on the essential nature of the averment of readiness and willingness, Ahmadi J. speaking for the Bench observed:-

However, in our view the Supreme Court has not laid down a hard and fast rule that failure on the part of the plaintiff to reproduce the exact words of the statute would be fatal. What the law contemplates is that when a person brings an action under a contract, he must disclose to the Court that he has not been guilty of breach of contract and that he has fulfilled all the material conditions of the contract and is also ready and willing to perform the other essential conditions of the contract. What the law contemplates is that the plaintiff must disclose that he has hitherto performed his part of the contract and is ready and willing to perform the essential terms there of which he has to perform for the enforcement of the contract. Once he has disclosed this by pleading relevant facts, it would be futile to insist on form, that is, reproduction of the exact words of the statute. All that is required is that the facts pleaded in the plaint and the other averments made therein disclose substantial compliance with the requirements of the law. If the facts pleaded disclose that the plaintiff has performed his part of the contract and if the averments show that he is ready and willing to perform the other conditions of the contract, we think that would constitute compliance with the requirements of the forms and the statute even if the exact phraseology is missing. To insist on a mechanical reproduction of the exact words would be to insist on form rather than substance. If on an analysis of the facts averred in the plaint the Court finds that even though the exact words of the statute are not reproduced, the facts reveal that the plaintiff has performed all the terms and conditions of the contract upto the date of the institution of the suit and has shown his willingness to perform remaining terms of the contract, the requirement of law in our view, would stand satisfied.

In reaching this conclusion, the court agreed with the view taken in *Prag Datt Vs. Smt. Saraswati Devi and Another*, , *Dhian Singh v. Tara Chand*, AIR 1954 All. 4 and in *Anwarul Haq (deceased by L. Rs.) Vs. Nizam Uddin (deceased by L. Rs.) and Another*, , I may extract the words of Agarwal, J. in the last of these decisions which are apposite.-

The substantive provision contained in S. 16(c) does not insist upon a particular set of words to be used: the averment must in substance indicate the continuous readiness and willingness on the part of the person suing. The Form prescribed under O. 6 R. 3 is procedural, it is a rule of pleading, this has for its object the advance of cause of justice and it is not intended to short circuit decision on merits. It is procedural, something designed to facilitate justice and further its end, not a penal enactment (See *Smt. Dipu v. Wassam Singh*, (AIR 1983 RC

846); Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs., ; Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, I am inclined for these reasons to agree with the view expressed in Virendra Kumar v. Daya Nand (1982 All. W. C. 176); Prag Datt Vs. Smt. Saraswati Devi and Another, , Shakoor v. Palakdhari (1983 All WC 737) that the court in suitable cases should look into the totality of circumstances and the allegations made in the plaint and from them come to a conclusion whether necessary allegations have been made by the plaintiff in that regard. No particular language or phraseology need be employed by the plaintiff. A literal compliance to the language appearing in Forms 47 and 48 of the Appendix A is not imperative nor is this the requirement of law.

(See also Radhakrishna Menon, J. in Oskar Louis v. Saradha 1990 (1) KLT 469).

16. If this be the position, I should think that the plaint in this case satisfied the requirements of the law, especially after the amendment by I.A. No. 646 of 1981. All the necessary facts necessary to establish the readiness and willingness of the plaintiff had been set forth in the plaint. What was lacking was a ritualistic affirmation of his being ever ready to perform his obligation under the contract, which was introduced by I.A. No. 646 of 1981. This was within the period of limitation for a suit for specific performance.

17. The defendant had understood I.A. No. 646 of 1981 as aimed at curing the defect arising out of non-compliance with section 16(c) The matter was dealt with accordingly by the Subordinate Judge as disclosed by his order on the petition which I have extracted in paragraph 4 above. The subsequent amendment by I.A. No. 4065 of 1992 was apparently intended only to further clarify the position by reaffirming readiness and willingness in the very language of section 16(c).

18. This construction of the plaint will suffice to reject the defendant's plea that section 16 (a) has not been complied with and that the suit is barred by limitation. Even otherwise, I am satisfied that the bar of limitation will not apply in a situation like this, assuming that it was only the amendment by I.A. No. 4065 of 1992 that made the plaint conform to the requirements of section 16 (c).

18.A. The averment as to readiness and willingness is not the cause of action itself, but only completes the cause of action which otherwise inheres in the plaintiff. The averment is only one of those facts required to be pleaded by the plaintiff. Its incorporation in the plaint does not alter the cause of action or add a fresh one. It just effectuates the relief claimed by the plaintiff with proper averments. Grant or refusal of leave to amend the plaint for this purpose will therefore depend upon the general principles governing amendment of plaints as laid down in L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., , and Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, , uninfluenced by any question of limitation. Suffice it to say, the suit cannot be dismissed as barred by limitation for the reason that the averment of readiness and

willingness was introduced in the plaint beyond the period of limitation.

19. Balakrishnan, J. accordingly upheld grant of such an amendment in *Parvathy v. Ipe* 1988 (1) KLT 228. Similarly *Radhakrishna Menon, 3.* in *Oskar Louis v. Saradha*, 1990 (1) KLT 469. The refusal by Padmanabhan, J. in *Ahammed Vs. Mammad Kunhi and Others*, to entertain the prayer for amendment of the plaint in such circumstances was based on the facts of that case, particularly the non-explanation of the delay in seeking the amendment.

20. I have already mentioned the decision of the High Court of Gujarat in *Rajya Thulsibhai v. Benar Enterprises*, AIR 1988 Guj. 42, as analogous to the facts of this case. The refusal to grant leave to amend the plaint on the ground that the application was made beyond the period of limitation for the suit was frowned upon with the observation that by adding this averment "the plaintiff was not trying to add a new cause of action which was non est."

21. The Supreme Court had recently had occasion to consider this question in *Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar*, . The appeal arose out of an application for amendment of the plaint filed to incorporate a specific averment that the plaintiff was and had always been ready and willing to perform his part of the agreement. The application was rejected by the Civil Judge and the revision petition therefrom was dismissed by the High Court of Karnataka in the view that the application had been made beyond the period of limitation and it could not be granted as a vested right of the defendant would be disturbed by the amendment. The Supreme Court allowed the plaintiff's appeal with the following observations:-

If these principles are to be followed, there is little doubt that the learned Judge was in error in rejecting the application for amendment made by the appellant. In the present case no fresh cause of action was sought to be introduced by the amendment applied for. All that the appellant sought to do was to complete the cause of action for specific performance for which relief he had already prayed. It was only that one averment required in law to be made in a plaint in a suit for specific performance in view of the provisions of sub-section (c) of Section 16 of the Specific Relief Act was not made, probably on account of some oversight or mistake of the lawyer who drafted the plaint and that error was sought to be rectified by the amendment applied for. There was no fresh cause of action sought to be introduced by the amendment and hence, no question of causing any injustice to the respondent on that account arose.

It is clear from the above that no new cause of action is involved in such an amendment; nor any question of limitation by virtue of the amendment being beyond the period of limitation prescribed for the suit.

22. At the same time, any unexplained delay will prove relevant in the exercise of the discretion to decree specific performance as held by Padmanabhan, J. in *Ahammed's case*. AIR 1987 Kerala, 228.

23. Coming to the facts of this case, the plaint as filed originally did contain the necessary details about the plaintiff's readiness and willingness to perform his part of the contract. The amendment by I.A. No. 646 of 1981 which the defendant also understood as necessitated by section 16(c) removed the technical bar of a specific averment. Any further doubts in the matter were set at rest by the amendment by I.A. No. 4065 of 1992. The courts below have concurred in finding for the plaintiff that he had always been ready and willing to fulfil his obligations under the agreement Ext. A1 and that the default was on the part of the defendant. It will be the height of injustice to throw out the plaint for technical non-compliance with section 16(c) by not reproducing the exact words thereof when all the essential facts were already in the plaint. I am therefore in agreement with the lower appellate court that the suit is not barred by limitation.

24. The other point which was argued and with which I have to deal, is that the discretion to grant or refuse specific performance should have been exercised in favour of the defendant. The contention is that the agreement was in March 1978 and the value of the property has gone up considerably, a fact which this court can take judicial notice of. Specific performance at this distance of time will cause immeasurable hardship to the defendant and therefore the discretion should not be exercised in favour of the plaintiff. Reliance is placed on the decisions in *Madamsetty Satyanaravana v. Yelloli Rao*. AIR 1966 S. C. 1405 and *Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others*, .

25. Grant of specific performance of a contract is the ordinary rule. Its denial should be only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief (*Prakash Chandra Vs. Angadlal and Others*, . The delay in this case occurred only due to the refusal of the defendant to perform his obligations under the contract Ext. A1. The plaintiff had issued his notice Ext.A2 as early as on June 2, 1978 within the period fixed for performance. But apart from raising some untenable contentions, defendant was not prepared to fulfil his obligations. He delayed matters. Even in the suit, he raised contentions which were untenable. It was for these reasons, attributable to the conduct of the defendant, that the sale got delayed. It may be true that prices have gone high by this time. But there is nothing to indicate that there was any steep like in the prices from the date of Ext. A1 and the filing of the suit, assuming that that was a relevant factor (apart from the assertions of the defendant). It will be a perverse exercise of discretion to deny specific performance in such circumstances. The discretion has been rightly exercised by the lower appellate court to decree specific performance.

26. Since the plaintiff is entitled to specific performance, the question whether the amount of Rs. 2,000/- was liable to be refunded or whether a decree could be granted for the amount in the absence of a specific prayer therefore (on which the courts below differ), does not arise for consideration. I leave that question open as unnecessary. No other points are urged in the second appeal. The decision of the lower appellate court granting specific performance is right and

does not call for interference.

The Second Appeal is therefore dismissed, without however any order as to costs.