
(1995) 02 BOM CK 0086

In the Bombay High Court

Case No : Sales Tax Reference No's. 13 and 14 of 1988

Usha Martin Black Ltd.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-02-1995

Acts Referred:

Central Sales Tax Act, 1956 — Section 2, 5

Citation : (1995) 02 BOM CK 0086

Hon'ble Judges : D.K. Trivedi, J;B.P. Saraf, J

Bench : Division Bench

Judgement

DR. B.P. Saraf, J.—By these two references, which arise out of the common order of the Tribunal, the following question of law has been referred to this Court for opinion :

"Whether, on the facts and circumstances of the case and regard being had to the evidence on record the Tribunal was legally correct in its conclusion that the sale made by the applicant under invoice No. 2062286 dated June 4, 1980, for Rs. 8,29,600 to M/s. Aluminium Industries Ltd., Bombay, was not effected by transfer of documents of title as envisaged by section 5(1) of the Central Sales Tax Act 1956, and was therefore taxable ?"

2. The assessee, M/s. Usha Martin Black Ltd., is a manufacture in iron and steel wire ropes and wires. It has its factory at Ranchi in the State of Bihar and head office at Calcutta. The goods manufactured at the above factory are transferred to its Bombay office for sale. The assessee is registered as a dealer under the Bombay Sales Tax Act, 1959 ("the Bombay Act"), as also under the Central Sales Tax Act, 1956 ("the Central Act"). One M/s. Kamani Engineering Corporation Ltd. ("Kamani") entered into a contract with a foreign buyer in Iran for sale of standard galvanised steel wire ropes. For performing this contract Kamani entered into an agreement with Aluminium Industries Ltd., for purchase of these goods. Aluminium Industries Ltd., in turn entered into a written contract dated October 28, 1977, with the assessee for purchase of the very same goods in

order to enable it to perform its contract with Kamani. Certain correspondence in this regard was exchanged between the assessee and Aluminium Industries Ltd., under letters dated January 5, 1978 and March 16, 1978. In furtherance of the said agreement, the assessee shipped the goods out of India under bill of lading No. PK 33 dated May 19, 1980, and raised an invoice No. 2062286 dated June 4, 1980 for Rs. 8,29,600 in the name of Aluminium Industries Ltd., Bombay. Since, according to the assessee this sale was covered by section 5(1) of the Central Sales Tax Act, 1956, no sales tax was recovered by it in respect of the same. However, with a view to seeking statutory clarification, on November 21, 1981, the assessee made an application to the Commissioner of Sales Tax u/s 52(1)(e) of the Bombay Act seeking determination of the question whether any tax was leviable on the above sale effected by it to M/s. Aluminium Industries Ltd. The submission of the assessee in the above application was that the sale was a sale in the course of export and hence not liable to tax under the Bombay Act. The Deputy Commissioner of Sales Tax, who took up the determination proceeding, did not accept the above contention of the assessee, as according to him, the transaction in question did not amount to sale in course of export within the meaning of section 5(1) of the Central Act but was a sale in the State of Maharashtra liable to tax under the Bombay Act. He therefore, by his order dated January 30, 1982, held it to be an intra-State sale in Maharashtra. Aggrieved by the above order of the Deputy Commissioner of Sales Tax in the determination proceeding u/s 52(1)(e), the assessee appealed to the Maharashtra Sales Tax Tribunal ("the Tribunal"). In the meantime, the assessment of the assessee under the Bombay Act was also completed by the assessing authority. Assistant Commissioner of Sales Tax, who levied tax on the above transaction under the said Act holding it to be an intra-State sale in the State of Maharashtra. The assessee also filed appeal to the Deputy Commissioner against the above order of assessment. The Deputy Commissioner, after hearing the assessee, dismissed both the appeals. The assessee went in further appeal to the Maharashtra Sales Tax Tribunal ("the Tribunal"). The Tribunal took both the appeals together for hearing and on hearing the parties, dismissed the same by a common order. The Tribunal did not accept the contention of the assessee that the sale of galvanised steel wire ropes by the assessee to M/s. Aluminium Industries was an export sale. The Tribunal upheld the finding of the taxing authorities that the sale was an intra-State sale exigible to tax under the Bombay Act. Hence this reference at the instance of the assessee.

3. We have heard Mr. Jetley, learned counsel for the assessee, who submits that the Tribunal erred in law in holding that the sale in question was an intra-State sale in Maharashtra. According to Mr. Jetley the sale, being a sale on f.o.b. basis, was a sale in course of export falling u/s 5(1) of the Central Sales Tax Act, 1956. It was contended that taking of the bill of lading under instructions from the buyer M/s. Associated Industries, in the name of Kamani Engineering Corporation, did not and could not alter the true character of the transaction. It was also pointed out that the payment of full consideration even before taking

the goods on board was not a relevant circumstance in deciding the true nature of the transaction in view of the subsequent developments which necessitated such payment. According to Mr. Jetley, the sale by the assessee was a sale in the course of export and not an intra-State sale as held by the Tribunal.

4. Miss Anklesaria, learned counsel for the Revenue, on the other hand, supports the order of the Tribunal. According to her, the finding of the Tribunal is based on the uncontroverted facts of the case and cannot be faulted with. In support of this submission, Miss Anklesaria drew our attention to the terms of the contract dated October 28, 1977, letters dated January 5, 1978 and March 16, 1978, and subsequent conduct of the parties to show that the sale was complete in Maharashtra and that it was not an export sale within the meaning of section 5(1) of the Central Act as claimed by the assessee. Our attention was also drawn to the fact that in course of the performance of the contract, the terms contained in the contract and the correspondence stood modified which is evident from the fact that full payment of the price of the goods was made to the assessee even before the goods were put on board. According to Ms. Anklesaria, the property in the goods passed from the assessee on receipt of full consideration and got vested in the purchaser on May 14, 1980 and the booking of the goods thereafter on May 19, 1980 to a foreign destination in terms of instructions of the purchaser could not affect the same.

5. We have given our careful consideration to the rival submissions of the counsel for the parties. To appreciate the contentions raised therein, we deem it expedient to set out the material facts of the case on which reliance has been placed by one party or the other in support of their respective cases. These facts are :

M/s. Kamani Engineering Corporation Ltd. entered into a contract with a foreign buyer in Iran for supply of standard galvanised steel wire ropes.

For performing this contract, Kamani Engineering Corporation entered into an agreement with M/s. Aluminium Industries Ltd., Bombay, for purchase of these goods.

M/s. Aluminium Industries, in turn, entered into an agreement dated October 28, 1977, with the assessee M/s. Usha Martin Black Ltd., for purchase of the very same goods in order to enable them to perform the contract with Kamani Engineering.

The relevant terms of the contract are as follows :

"PRICE :

You have agreed to supply at Rs. 5,500 per KM, FIRM, F.O.B. Bombay. All export benefits on this order will be to Kamani Engineering Corporation's account.

PAYMENT TERMS :

100 per cent payment shall be paid to you through letter of credit within 45 days

after presentation of the following documents :

DELIVERY :

We request you to kindly supply minimum 100 KM by 10th December, 1977 since Kamani are planning a shipment from Bombay of this quantity by 15th December, 1977.

SHIPPING MARKS :

The shipping marks shall be as follows :

F O R T A V A N I R

INSPECTION AND SUPERVISION :

Inspection of the material will be carried out by M/s. Iteng Engg. Pvt. Ltd., Bombay and/or the representative of the consultant M/s. Merz Quanta. In addition to this inspection by Export Inspection Agency must be carried out.

TRANSFER OF PROPERTY IN GOODS :

As a specific condition of this contract you shall be under an absolute obligation to export the abovementioned goods to TAVANIR (Iran Power Generation and Transmission Co., Brezil Avenue, Vanak, Teheran, Iran) by taking out the shipping documents in the name of Kamani Engineering Corporation Limited, Bombay as the shippers. However, you shall not transfer the documents until after the goods cross the customs frontiers of India as defined in the Central Sales Tax Act, 1956. The documents shall be transferred by you to us, negotiating the same through your bankers. Property in the goods covered by the documents shall pass on to us only after the goods cross the customs frontiers of India as aforesaid.

SALES TAX :

Sales tax is not attracted on this sale as the material is to be sold in the course of export by transfer of shipping documents after the goods cross the customs frontiers of India

EXPORT INCENTIVES :

All export incentives against this supply will be claimed by M/s. Kamani Engineering Corporation and they will be treated as our shipper and exporters."

Though, in terms of the above contract, the payment of price was to be made through letter of credit within 45 days after the presentation of the documents specified therein including invoices, clean on board bill of lading, full payment was in fact made even before the goods were put on board on May 19, 1980. The payments were made on the following dates :

6. A reading of the terms of the contract set out above clearly goes to show that some of the terms were incorporated merely with a view to bringing the

transaction in question within the scope and ambit of export sale within the meaning of section 5(1) of the Central Sales Tax Act, which otherwise was not an export sale. We do not think that the assessee or the purchaser, M/s. Aluminium Industries, has succeeded in doing so. Despite incorporation of all such clauses in the contract, on the facts of the case, the sale in question cannot be held to be a sale in the course of export within the meaning of section 5(1) of the Central Act. Obviously, it is an intra-State sale complete in all respects in the State of Maharashtra on June 14, 1980, even before the goods were put on board on June 19, 1980. The property in the goods passed to the buyer on June 14, 1980. The putting of the goods on board thereafter by the assessee at his own expense, because the price was f.o.b., cannot in any manner convert the intra-State sale into an export sale. The handing over of the bill of lading by the assessee to the purchaser in such a case is also of no consequence or relevance. The contract between the assessee and Aluminium Industries, Aluminium Industries and Kamani Engineering and Kamani Engineering and the foreign buyer in Iran are three separate and independent contracts. It is Kamani Engineering who agreed to sell the goods to the foreign buyer. It was, therefore, the exporter of the goods. There was no privity of contract between the assessee and the foreign buyer. The privity of contract is between Kamani Engineering and the foreign buyer. Even Aluminium Industries was not a party to the contract with the foreign buyer. The immediate cause of movement of goods and export was the contract between the foreign buyer who was the importer and Kamani Engineering who was the exporter and shipper of the goods. All relevant documents were in the name of Kamani Engineering whose contract of sale had occasioned the export. It was made clear in the contract of sale between the assessee and Aluminium Industries that "All export benefits on the order will be to Kamani Engineering Corporations account". It was also obligatory on the assessee under the terms of the contract to take out shipping documents in the name of Kamani Engineering Corporation, though the assessee was not a party to the contract of sale between the purchaser Aluminium Industries and Kamani Engineering. The mention of f.o.b. price in the contract, in such circumstances, cannot render a transaction of intra-State sale into an export sale or a sale in course of export. The taking of the goods from the assessee's place to the ship is completely separate from the transit pursuant to the export sale. It has no relevance in deciding whether it is intra-State sale or a sale in course of export. In the instant case, the contracts entered into between Kamani Engineering and Aluminium Industries and between Aluminium Industries and the assessee are, in fact and in reality, contracts for procurement of goods for export, which are described in commercial parlance as "back to back" contracts. Such string of contracts is a common phenomenon in export trade. No export is occasioned by such contracts of sale. In the present case, export was occasioned only by the contract of sale between Kamani Engineering and the foreign buyer and the transaction in pursuant to that contract alone can be deemed to be a sale in the course of export within the meaning of section 5(1) of the Central Sales Tax Act. We are therefore, of the clear opinion that the transaction in question between

the assessee and Aluminium Industries is not a sale in the course of export and the Tribunal was right in saying so. It is an intra-State sale in the State of Maharashtra exigible to tax under the Bombay Sales Tax Act.

7. We are supported in our above conclusion by the decision of the Supreme Court in *Mod. Serajuddin v. State of Orissa* [1975] 36 STC 136. In that case the assessee had entered into two contracts with the State Trading Corporation for the sale of mineral ore and the Corporation in its turn entered into similar contracts with the foreign buyers for the sale of the identical goods purchased by the Corporation from the assessee. Under the terms of the contract between the assessee and the Corporation the price was expressed in U.S. dollars per long ton f.o.b. ocean liner vessel, Calcutta. The material had to be ready at Calcutta harbour for shipment by a particular steamer. The final sampling and moisture determination and the final ascertainment of rate was to be done at the port of discharge by certain named persons and their certificate was to be final and binding on both the buyer and the seller. The clause in the contract regarding payment was as follows :

"90 per cent payment against shipping documents as described in buyers" corresponding sale contract. Buyers will assign the relevant foreign letter of credit which is to be opened in their name by their foreign buyer, Messrs. Associated Metals and Minerals Corporation, on receipt from the sellers of a bank draft for difference between buyers" f.o.b. purchase value and f.o.b. sale value, that is, \$ 1.00 (Rs. 4.75) per dry long ton for a bank guarantee from a scheduled bank guaranteeing that sellers will pay buyers immediately upon shipment/shipments the difference between buyers" f.o.b. purchase value as shown in this contract and buyers" f.o.b. sale value as shown in foreign letter of credit, that is \$ 1.00 (Rs. 4.75) per dry long ton by bank draft for each shipment and the buyers will endorse the bills of lading and deliver the same to seller to negotiate against the abovementioned letter of credit. Balance after destination weight and analysis on the basis of documents mentioned in S.T.C."s corresponding sale contract with buyers. If the balance 10 per cent is insufficient to cover shortfall in weight and analysis at destination or any penalty imposed by S.T.C."s foreign buyers, the additional amount shall be payable by sellers to buyers on demand."

The assessee claimed that the sales of mineral ore by it to the Corporation were "sales in the course of export" and were therefore exempt from the tax u/s 5 of the Central Sales Tax Act. The High Court held that the sales were liable to tax. The assessee appealed to the Supreme Court. The Constitution Bench of five Judges of the Supreme Court, by majority (Khanna, J. dissenting), held that the sales made by the assessee to the Corporation were not sales in course of export and hence exigible to tax. It was observed (at page 149) :

".....The features which point with unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale....are these. The Corporation entered on the scene and entered

into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was the exporter of the goods. There was no privity of contract between the appellant and the foreign buyer. The privity of contract is between the Corporation and the foreign buyer. The immediate cause of the movement of goods and export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter and shipper of the goods. All relevant documents were in the name of the Corporation whose contract of sale was the occasion of the export. The expression "occasions" in section 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. Therefore the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by the contract of sale between the Corporation and the appellant."

The Supreme Court further observed (at page 149) :

"The appellant sold the goods directly to the Corporation. The circumstance that the appellant did so to facilitate the performance of the contract between the Corporation and the foreign buyer on terms which were similar did not make the contract between the appellant and the Corporation the immediate cause of the export. The Corporation in regard to its contract with the foreign buyer entered into a contract with the appellant to procure the goods. Such contracts for procurement of goods for export are described in commercial parlance as back to back contracts. In export trade it is not unnatural to find a string of contracts for export of goods. It is only the contract which occasions the export of goods which will be entitled to exemption. The appellant was under no contractual obligation to the foreign buyer either directly or indirectly. The rights of the appellant were against the Corporation. Similarly the obligations of the appellant were to the Corporation. The foreign buyer could not claim any right against the appellant nor did the appellant have any obligation to the foreign buyer. All acts done by the appellant were in performance of the appellant's obligation under the contract with the Corporation and not in performance of the obligations of the Corporation to the foreign buyer."

The Supreme Court accordingly held (at page 150) :

The expression "sale" in section 5 of the Act has the same meaning as in the Sale of Goods Act. String contracts or chain contracts are separate transactions even when there is similarity relating to quantity, quality of goods, shipment, sampling and analysis, weighment and force majeure, etc., or other similar terms. A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for the money consideration called the price. There were two separate contracts. The price was different in the two contracts. This difference also dissociates the two contracts from each other. The High Court was right in holding that the sales of the appellant to the Corporation were exigible to tax because the appellant's sales to the Corporation were not sales in the course of export."

The Supreme Court also dealt with the effect of mention of f.o.b. price in the contracts and observed (at pages 152-153) :

"In the present case, the mention of f.o.b. price in the contracts between the appellant and the Corporation does not render the contracts f.o.b. contracts with the foreign buyer. The Corporation entered into independent contracts with the foreign buyers on f.o.b. basis. The appellants were required under the contracts between the appellants and the Corporation to bring the goods to the ship named by the Corporation. The shipment of the goods by the Corporation to the foreign buyer is the f.o.b. contract to which the appellants are not the parties. The course of export in the export stream is possible in direct contracts between the Indian seller and the foreign buyer. The Corporation purchased goods from the appellants in order to fulfil the contract with the foreign buyer. The only scope of the deeming provision in the Act is to find out the contract of sale which is the direct cause or which occasions the export.

The expression "in the course" implies not only a period of time during which the movement is in progress but postulates a connected relation. Sale in the course of export out of the territory of India means sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities.....The directions given by the Corporation to the appellant to place the goods on board the ship are pursuant to the contract of sale between the appellant and the Corporation. These directions are not in the course of export, because the export sale is an independent one between the Corporation and the foreign buyer. The taking of the goods from the appellant's place to the ship is completely separate from the transit pursuant to the export sale."

8. The above decision in *Serajuddin and Others Vs. The State of Orissa*, was followed by the Supreme Court in *State of Punjab v. New Rajasthan Mineral Syndicate* [1975] 36 STC 378. In this case, the assessee carried on the business of quarry contractors and held a licence to quarry iron-ore. The Government of India had authorised the State Trading Corporation as the sole authority for the purpose of exporting iron-ore to foreign countries. The Corporation had nominated N & Co. to procure iron-ore for the purpose of export. N & Co., who were mere brokers entered into agreement with the assessee for procuring the iron-ore. The agreement between the assessee and N & Co., for the sale of 25,000 tons of iron-ore at Rs. 14-8-0 per ton plus actual railway freight, inter alia, provided as follows : "The sellers agree to stock the ore at the railway siding or sidings and the buyers have the right to reject any ore or cancel at any stage before the same is loaded into wagons. The buyers have the option to appoint any good analytical and consulting chemist and their findings shall be binding on both the buyers and sellers. Rs. 25,000 (twenty-five thousand) will be arranged for payment to the sellers after the acceptance of Rs. 1 (rupee one) per ton for the aggregate quantity of 25,000 tons contract for supply. The balance amount shall be paid to the sellers against actual weight of iron-ore loaded by the sellers

when iron-ore is either weighed at Kandla Port or by draft weight of the ship at the time of shipment to the foreign countries as per bargain by the buyer or by the State Trading Corporation of India.....The amount of railway freight shall be paid directly by the buyer at Kandla Port on the to pay R/Rs. and the sellers shall be held responsible for shortage and excess of weight, if any. The account shall be finally settled when the shipment is made and satisfactory report is received from the foreign buyers, or the State Trading Corporation approves the material for foreign countries where iron is extracted out of it". The assessee contended that these sales were sales in the course of export and therefore exempt from sales tax u/s 5(1) of the Central Sales Tax Act. This contention was rejected by the Sales Tax Officer, who assessed the sales as inter-State sales. The assessee filed writ petitions before the High Court. The High Court accepted the contention of the assessee. Thereupon the State appealed to the Supreme Court. The Supreme Court observed that the basic features of the case were the same as those in the case of *Serajuddin and Others Vs. The State of Orissa*, and, following the ratio and the reasoning of that decision, accepted the contentions of the State and allowed the appeal. The Supreme Court observed that the factual premises, on which the contentions of the assessee's counsel were based, were weaker and less favourable to the assessee than those in *Serajuddin*'s case [1975] 36 STC 136. It was pointed out (at page 388) :

"..... Here there is no direct agreement between the assessee and the S.T.C. The agreement is between the assessed and N & Co. Here is thus room for argument that the export sale made by the S.T.C. to the foreign buyer was preceded by two separate sales, namely, the first made by the assessee to N & Co. and the second made by N & Co. to S.T.C. Further, in the case before us, the assessee was entitled to payment even before shipment if the goods were weighed and approved by S.T.C. at Kandla Port."

As the basic features of the case were found to be the same as those in *Serajuddin*'s case [1975] 36 STC 136, the Supreme Court following its decision in that case, accepted the contention of the State and held that the sale by the assessee to the Corporation was not a sale in the course of export.

9. Reference may also be made to another decision of the Supreme Court in *Murarilal Sarawagi v. State of Andhra Pradesh* [1977] 39 STC 294(AP). The assessee in this case, who sold manganese ore to M.M.T.C. for export to foreign buyers, contended before the sales tax authorities that the sales of manganese ore to M.M.T.C. was complete within the State of Andhra Pradesh and therefore M.M.T.C. was the last purchaser within the State and the M.M.T.C. was liable to pay sales tax. The High Court came to the conclusion that the appellants (assessee) were the last purchasers within the State inasmuch as the contract entered into by the appellants with the M.M.T.C. was integrally connected with the contract entered into by the M.M.T.C. with their foreign buyers and the appellants' contract of sale occasioned the export and was therefore exempt from the sales tax. On appeal to the Supreme Court, counsel for the State placed

reliance on the f.o.b. character of the contract between the appellants and the M.M.T.C. and contended that the M.M.T.C. was not the last purchaser of goods within the State because property in the goods passed from the appellants to the M.M.T.C. on board the ship. Repelling this contention the Supreme Court observed (at pages 297-298) :

It has to be appreciated that quite often merchants dealing in goods which are exported out of our country enter into what is called string contracts for purchase of the goods from the factory or the mines for sale to exporters for sale to foreign buyers. The Trading Corporation are often the only authorities allowed to export out of our country. These Corporations enter into direct contracts with their foreign buyers for export. The directions given by the Corporations to the merchants to place the goods on board the ship are pursuant to the contracts of sale between the merchants and the Corporation. These directions are not in the course of export, because the export sale is an independent one between the Corporations and their foreign buyers. The taking of the goods from the merchants' place to the ship is completely separate from the transit pursuant to the export sale."

Dealing with the string contracts, the Supreme Court observed (at page 298) :

"In string contracts or chain contracts delivery is made by the original seller and eo instanti it is delivered in implement under each separate contract in the chain. In chain or string contracts starting between the mills or mines or factories and their immediate buyer and ending with the ultimate buyer through several intermediaries not only does the mill give and its immediate buyer take actual delivery but eo instanti each middleman gives and takes actual delivery. This process of delivery of possession goes all along the chain at the same moment when delivery is made to the steamer."

10. The ratio of above decisions of the Supreme Court applies proprio vigore to the facts of the present case and support our conclusion that the sale under consideration in the present case is an intra-State sale in Maharashtra and not a sale in the course of export.

11. It may be pertinent to mention that section 5(1) of the Central Sales Tax Act has undergone any change since the delivery of the above judgments by the Supreme Court. The only material change in regard to export sales that has taken place in the meantime is insertion of the definition of "crossing the customs frontiers of India" in clause (ab) of section 2 and the incorporation of a new sub-section, viz., sub-section (3) in section 5 by the Central Sales Tax (Amendment) Act, 1976 (Act 103 of 1976) with effect from April 1, 1976, which provides that "notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, a such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to

such export". Obviously, this sub-section does not apply in the instant case to the sale by the assessee to M/s. Aluminium Industries because admittedly that is not the last sale preceding the sale occasioning the export of those goods out of the territory of India. It is the sale by Aluminium Industries to Kamani Engineering which might meet the description of sale falling under sub-section (3) of section 5.

12. In view of the foregoing discussion, we are of the clear opinion that on the facts and in the circumstances of the case and having regard to the evidence on record, the Tribunal was justified in law in coming to the conclusion that the sale made by the assessee under invoice No. 2062286 dated June 4, 1980, for Rs. 8,29,600 to M/s. Aluminium Industries Ltd., Bombay, was not effected by transfer of documents of title as envisaged by section 5(1) of the Central Sales Tax Act, 1956 and, therefore, it was taxable under the Bombay Sales Tax Act. Accordingly, we answer the question referred to us in the affirmative, i.e., against the assessee and in favour of the Revenue.

In the facts and circumstances of the case, there shall be no order as to costs.

13. Reference answered in the affirmative.