
(2002) 07 AP CK 0078

In the Andhra Pradesh High Court

Case No : Writ Petition No. 36382 of 1998

Y. Satyanarayana

APPELLANT

Vs

Government of Andhra Pradesh

RESPONDENT

Date of Decision : 16-07-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 46

Citation : (2004) 3 ALD 20 : (2002) 5 ALT 212

Hon'ble Judges : Ar. Lakshmanan, C.J.; Ghulam Mohammed, J

Bench : Division Bench

Advocate : L. Ravichander, for the Appellant; Govt Pleader and M. Bhaskara Lakshmi, for the Respondent

Final Decision : Dismissed

Judgement

Ar. Lakshmanan, C.J.—Heard Sri S. Ramachandra Rao for Sri L. Ravi Chandar, learned counsel for the petitioner, Smt. M. Bhaskara Lakshmi learned standing counsel for the High Court and the learned Government Pleader.

2. The writ petition was filed by Sri Y. Satyanarayana who was Subordinate Judge (on deputation as Joint Director of Prosecutions, Directorate of Prosecutions, Andhra Pradesh) challenging the action of the respondents in compulsorily retiring him from service on attainment of age of 58 years and not continuing him in service upto the age of 60 years by issuing G.O.Rt.No.1822 Law Department, dated 23-12-1998 as arbitrary, illegal and violative of the fundamental rights guaranteed to him under Articles 14, 16 and 21 of the Constitution of India and also having the effect of violating the Directive Principles contained in Article 46 of the Constitution of India.

3. The case of the petitioner is that he is a senior judicial officer in A.P. Judicial Service and belong to Scheduled Caste. From 1980 he worked in various posts as District Munsiff and was promoted as Subordinate Judge in May, 1988 and thereupon posted on deputation as the Joint Director of Prosecutions. He was

sent on deputation to the said post on 15-10-1998. According to the petitioner he has always put duty above self and strained himself to overcome the socio-economic strains and the stresses of life and as a judicial officer has always been with high integrity and there has never been a single adverse remark against him during his career spanning nearly two decades and that the only instance was that he had to face disciplinary proceedings while working at Kandukur as Subordinate Judge. No disciplinary proceedings were initiated against him on the basis of the allegation made against him. He was exonerated of all the charges and none of the charges levelled against him were established. When his promotion was overlooked he made a representation on 17-11-1995 specifically bringing to the notice of the authorities that his juniors have been promoted and his case has not been considered for promotion in view of the fact that the disciplinary proceedings were pending against him and since the same has ended in his acquittal his case ought to have been considered and he ought to have been promoted. It is submitted that the Andhra Pradesh Public Employment (Regulation of Age of Superannuation) Act, 1984 (hereinafter referred to as "1984 Act") was amended by the Act 26 of 1998 by and under the said amendment no member of A.P. Higher Judicial Service or A.P. Judicial Service would retire from service on the afternoon of the last date of the month in which he attains the age of 58 years. It is, therefore, submitted that the petitioner is entitled to continue in service upto the age of 60 years. It is pointed out that by and under the provisions of the said Act a member of the said service may be compulsorily retired from service on the afternoon of the last day of the month in which he attains the age of 58 years if he is not found fit and eligible to be continued in the service by the High Court of Andhra Pradesh on an assessment and evaluation of the record of such member for his continued utility, well within time before he attains the age of 58 years. It is submitted that in view of the above it is clear that compulsory retirement of a member of the service is an exception carved out of the general rule contained in Section 3. It is submitted that during his entire service spanning for over two decades except in one case referred to hereinabove, there has never been any complaint against him and no adverse remark has been made against him in his confidential reports. In any event, none having been communicated to him presumption in law could be drawn that there are no adverse remarks against him in his confidential reports. It is submitted that the law requires that assessment and evaluation of the record and continued utility of a candidate be made by the High Court. This requires to be done well within time before a member attains the age of superannuation. It is also necessary to read in the principles of natural justice into the said process as such a decision visits a member with civic consequences. In the instant case if the evaluation/assessment was to his detriment, law requires notice to be given to him so that he may explain his case before suffering the consequences of the decision. Inasmuch as no such enquiry to his notice was held the action of the authorities in deciding to exercise the power under the proviso and consequently compulsorily retiring him from service is arbitrary and violative of the principles of natural justice.

4. An alternative argument was also advanced submitting that assuming without conceding that no notice requires to be given, the power to assess and evaluate is a quasi judicial power. That must be used in furtherance of the provisions and not against it and that any evaluation/assessment on his attaining the age of 58 years would not be drastically different from what was there before. Since there was no adverse remark against him prior to 1998 it can only be assumed that the evaluation/assessment must be necessarily in his favour while exercising the power under the proviso to Section 3. The action of the authorities, therefore, in seeking to retire the petitioner as is evidenced by G.O.Rt.No.1822 Law Department, dated 23-12-1998, is arbitrary, illegal and contrary to Section 3 of the Andhra Pradesh Public Employment (Regulation of Age of Superannuation) Amendment Act, 1998 (hereinafter referred to as "1998 Amendment Act"). The petitioner also made a representation on 14-12-1998. No decision on the subject was communicated to him. According to the petitioner the 2nd respondent failed to follow the procedure while seeking to compulsorily retire him from service and failed to assess and evaluate his record promptly, and arrived at an erroneous conclusion that the petitioner had lost utility and that he was unfit to be continued in service. For the foregoing reasons the petitioner preferred the above writ petition.

5. For the sake of convenience we reproduce the impugned order dated 23-12-1998 hereunder:

GOVERNMENT OF ANDHRA PRADESH ABSTRACT Public Service - Andhra Pradesh State Judicial Service - Sri Y. Satyanarayana, Sub-Judge, on O.D. as Joint Director of Prosecutions - Retirement from service on attaining the age of 58 years on 31-12-1998 - Orders - Issued. LAW (LA&J HOME COURTS.C) DEPARTMENT G.O.Rt.No.1822 23-12-1998

ORDER:

6. In the circumstances reported by the Registrar (Vigilance), High Court of Andhra Pradesh in the reference read above, Government hereby order that Sri Y. Satyanarayana, Sub-Judge on O.D. as Joint Director of Prosecutions shall retire from service on completion of 58 years of age on 31-12-1998. He shall be paid 3 months pay and allowances in lieu of notice in accordance with Rule 44 of the Andhra Pradesh Revised Pension Rules, 1980.

7. The following notification shall be published in the Andhra Pradesh gazette:

Sri Y. Satyanarayana, Sub-Judge on O.D. as Joint Director of Prosecutions shall retire from service on completion of 58 years of age on 31-12-1998. He shall be paid 3 monthly pay and allowances in lieu of notice in accordance with rule 44 of the A.P. Revised Pension Rules, 1980.

8. At the time of hearing, the proceedings of the High Court of Andhra Pradesh relating to one officer by name N. R. L. Nageswara Rao, Subordinate Judge, Sompeta who previously worked as Subordinate Judge, Kavali and who faced

enquiry and was found guilty and thereafter reinstated in service and got promotion as District & Sessions Judge (Grade II) and now working as District & Sessions Judge (Grade II) at Nalgonda district was placed for our perusal. By placing the above proceedings the learned senior counsel for the petitioner Sri S. Ramachandra Rao argued that an officer who faced an enquiry and was found guilty but was reinstated into service was later promoted as District & Sessions Judge (Grade II) whereas the petitioner was discriminated and, therefore, there is violation of Article 14 of the Constitution of India and, therefore, the order passed by the respondents in not extending his service beyond 58 years is discriminatory.

9. A counter affidavit was filed by the then Registrar General of this Court denying the allegations contained in the affidavit filed in support of the writ petition. It is submitted that the High Court had to lodge numerous complaints received against the petitioner alleging that he was adopting corrupt practices, for want of definite material and while he was working as Subordinate Judge, Kandukur, on considering the petitions and also the reports from the District Judge, Prakasam district the High Court ordered departmental enquiry against him and pending the enquiry he was also placed under suspension in public interest. As many as 10 charges were framed against him in the said enquiry and the enquiry officer held him guilty of charges 2 and 9 and charge No.2 pertains to taking loans from advocates and charge No.9 relates to non-delivery of cheques to the parties in whose favour they were ordered to be issued and making them go round the court. The High Court on considering the report took a lenient view of the matter and exonerated the petitioner by treating the period of suspension as on duty and the petitioner was also warned to conduct himself properly so as not to give opportunities to the advocates to make such complaints as in charge No.2. While the petitioner was working as a Subordinate Judge, Nagarkurnool the High Court on considering suo motu report of the District Judge, Mahboobnagar initiated disciplinary proceedings for fixing a low upset price and conducting auction in O.S.No.19 of 1985 on the file of the sub court in the absence of the judgment debtor. However, the High Court by taking a lenient view decided to drop further action in view of his retirement on attaining the age of 58 years. Besides the above, on considering the complaint petition received against the petitioner when he was working at Atmakur as subordinate judge the High Court conducted an enquiry in cognito and on considering the matter directed him to hand over charge of his post and to await further orders. Subsequently on the recommendation of the High Court the Government issued orders posting him as Joint Director of Prosecutions.

10. In view of the above it is submitted by Smt. Bhaskara Lakshmi that it cannot be said that the petitioner is free from enquiries and complaints. Hence, it is submitted that the contentions of the petitioner are devoid of merit and lack substance.

11. It is also submitted in the counter-affidavit that the promotion of the

petitioner from the post of Subordinate Judge to the post of District & Sessions Judge Grade II by transfer was considered by the High Court along with other officers due for such promotion in the Full Court meeting held on 6-8-1993 and 9-12-1994 and also in the Administrative Committee meeting held on 19-8-1995, 6-2-1996 and 26-3-1997 but taking into consideration the overall performance, representations of the petitioner and other relevant factors he was not empanelled for promotion as District & Sessions Judge. It is also submitted that the 1984 Act is issued by the Government pursuant to the directions of the Hon"ble Supreme Court in Review Petition No.249 of 1992 in writ petition No.1022 of 1989. The High Court took up the case of the petitioner on 24-8-1998 for giving the benefit of extended period of superannuation upto 60 years in the light of the said judgment of the Hon"ble Supreme Court and decided to retire him on attaining the age of 58 years. Hence the question of deviation from the 1998 Amendment Act does not arise. Further the amendment to the 1984 Act was published in the Andhra Pradesh gazette on 19-8-1998 and was communicated to the High Court subsequent to the decision of the High Court regarding the case of the petitioner. It is submitted that the directions of the Supreme Court in the above review petition regarding the age of superannuation from 58 years to 60 years in case of judicial officers was incorporated in the 1984 Act by the 1998 Amendment Act. The High Court in the light of the judgment dated 24-8-1993 in review petition No.249 of 1992 has taken up for consideration the cases of different judicial officers before their attaining the age of 58 years for giving benefit of extended period of superannuation upto 60 years. The case of the petitioner also was considered by the High Court within time i.e., well before his attaining 58 years regarding extending the age of superannuation beyond 58 years duly taking into account the past record of service, character rolls, quality of judgments and other relevant material concerning him and upon consideration of the said material the High Court felt that the petitioner had lost his utility and is not fit to be continued in judicial service further beyond the age of 58 years. Accordingly the High Court addressed the Government on 26-10-1998 requesting to issue necessary orders retiring the petitioner on attaining the age of 58 years on the afternoon of 31-12-1998 and the Government in G.O.Rt.No.1822, dated 23-12-1998 have issued orders to the said effect. It is further submitted that as per rule 44 of the A.P. Revised Pension Rules, 1980 three months" notice is to be served on the officer in case of retiring him from service before the attainment of the age of superannuation date i.e., 60 years. The High Court decided to pay three months" salary in lieu of three months" notice at the time of retirement of the judicial officers at the age of 58 years. In the case of the petitioner also, the Government have been requested to issue orders for payment of three months" pay in lieu of three months" notice and the Government accordingly issued orders for payment of three months" salary.

12. With regard to the averment of the petitioner that he was not given an opportunity to explain his position before suffering consequences of the decision

it is submitted by the learned counsel Smt. Bhaskara Lakshmi that the judgment of the Supreme Court does not contemplate providing such an opportunity to the officer whose case is considered before completion of 58 years. As per the orders of the Supreme Court the High Court reviewed the case of the petitioner for giving the benefit of extended period of superannuation upto the age of 60 years based on the work review, confidentials and the disciplinary matters and they arrived at a conclusion that the petitioner lost his utility and is not fit to be continued in judicial service further beyond the age of 58 years.

13. The Government of Andhra Pradesh who is respondent No.1 also filed counter-affidavit more or less on the same lines as that of the counter-affidavit filed by the High Court of Andhra Pradesh.

14. A reply was filed by the petitioner with certain material papers. In paragraph 5 of the reply affidavit it is stated that the petitioner cannot be discriminated by taking advantage of the word "warning" given by way of an advice. In this context the petitioner pointed out the case of one N. R. L. Nageswara Rao, Subordinate Judge, who was his junior and who was also warned in the enquiry conducted for a major misconduct more or less during the same period but was reinstated and was promoted as District & Sessions Judge (Grade II) superseding the petitioner. At the time of hearing the learned senior counsel for the petitioner highlighted the above issue and submitted that the treatment of the petitioner differently amounts to hostile discrimination under Article 14 of the Constitution and, therefore, the petitioner should also be extended the same treatment.

15. We shall now first answer the arguments advanced by the learned senior counsel Sri S. Ramachandra Rao on the question of violation of Article 14. It is settled law that Article 14 cannot be extended to legalise illegal orders though others have wrongly got the benefit of the orders and that each case has got to be assessed on its own merits and demerits. In our opinion even assuming that a wrong order was passed it cannot be the foundation for claiming equality. We, therefore, reject the said submission made by the learned counsel for the petitioner.

16. It is settled law by catena of decisions that compulsory retirement is not a punishment and that the principles of natural justice have no place in the context of compulsory retirement and judicial scrutiny is not altogether excluded. In the instant case compulsory retirement was ordered by the High Court after assessing and evaluating the record of the judicial officer concerned with respect to his continued utility. The committee found that the petitioner is not fit and eligible to continue in service. Therefore, he was compulsorily retired on his attainment of the age of 58 years. A Division Bench of the Kerala High Court in *PARADESI THYAGARAJAN v. HIGH COURT OF KERALA* held that the retirement of a judicial officer at the age of 58 years is "retirement" on superannuation and it is not a compulsory retirement imposed as a punishment and no notice is necessary. Speaking for the Bench Justice AR. Lakshmanan (as he then was) has held:

The retirement on superannuation of government servants is contemplated in rule 60 of KSR. The officers are generally to retire at the age of 55 years. However, in the case of an officer of the Kerala judicial service or Kerala State Higher Judicial service, the retirement age as per rule 60(aa) is attainment of age of 60 years. The sub-rule stipulates that the officer has the option to retire on attainment of the age of 58 years, availing all terminal benefits due to him on retirement on superannuation. The sub-rule also stipulates that officers who opt to continue beyond the age of 58 years can continue only if the high Court find him suitable to continue beyond the age of 58 years. The retirement of a Judicial Officer at the age of 58 years is therefore retirement on superannuation. It is not a compulsory retirement imposed as a punishment, as contemplated by the provisions of Kerala Civil Services (Classification, Control and Appeal) Rules and hence no notice is contemplated.

17. G. NAGESWARA RAO v. STATE OF A.P. is the next judgment to be considered by us arising under the scheme of the Supreme Court. In that case, a District Munsiff who was compulsorily retired on completion of 58 years of age on various allegations, has sought to quash the proceedings of the High Court of Andhra Pradesh. The second respondent before the Court filed a counter affidavit and has stated that the High Court at the time of review, considered the past record of the petitioner for the entire 17 years as judicial officer and other relevant factors and as the petitioner was found to be wanting in requisite potential for continued useful service beyond 58 years of age, he was directed to retire on completion of 58 years of age. The High Court held as follows:

What is to be considered in such matters is the examination of the overall entries of the officer concerned and not an entry here and there. It may well be in some cases that in spite of satisfactory performance, still the authority may decide to compulsorily retire him in public interest, as in the opinion of the said authority, the post has to be manned by more efficient and dynamic person. There is no denying of fact that in all organisations there is great deal of dead wood, and more so, in government departments, which has to be replaced in public interest. Therefore, it is purely a matter of subjective satisfaction of the government or the reviewing committee, as the case may be. As long as the order of compulsory retirement is passed without casting any aspersion or attaching stigma to the officer concerned there cannot be any justification for interference by the Court. Very termination of service of a public servant would not amount to dismissal or removal, but only such termination arrived at or imposed by way of punishment is in contravention of the protection afforded under Art. 311 of the Constitution."

18. The Supreme Court has in BIKUNTHA NATH DAS v. CHIEF DISTRICT MEDICAL OFFICER, BARIPADA examined the nature and effect of an order of compulsory retirement. Justice Jeevan Reddy, speaking for the bench laid down that an order of compulsory retirement is not a punishment, it implies no stigma, nor any suggestion for misbehaviour and that the order is passed on subjective

satisfaction of the government. The learned Judge also stated that principles of natural justice have no place in the context of an order of compulsory retirement and the High Court or the Supreme Court would examine the matter and interfere if they are satisfied that the order is passed - (a) mala fide; or (b) that it is based on no evidence; or (c) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material, in short if it is found to be a perverse order. It is also further held that an order of compulsory retirement is not liable to be quashed merely because uncommunicated adverse remarks were also taken into consideration. This judgment throws ample light and guidance in dealing with matters of this nature as the judgment was rendered on an overall review of previous judgments of the Supreme Court in this regard.

19. Considering the earlier case law on the subject the Supreme Court, in *STATE OF UTTAR PRADESH v. SHYAM LAL* has observed as follows;

Unless it is established from the order of compulsory retirement itself that a charge or imputation against the officer is made the condition of the exercise of that power or that by the order the officer is losing benefits already earned, the order of retirement cannot be said to be one for dismissal or removal in the nature of penalty or punishment. In the present case, the order of compulsory retirement does not suffer from any such vice.

20. In *UNION OF INDIA v. J.N.SINHA* the Supreme Court held that a show cause notice against compulsory retirement is not required. The Court held thus:

Where an appropriate authority bona fide forms opinion that a Government servant be retired in public interest, he can pass order of compulsory retirement. That opinion cannot be challenged before Courts. Nor R.56 (j) requires that the opportunity to show cause against compulsory retirement must be given. Order of compulsory retirement can be challenged only on ground that either the requisite opinion was not formed or that the order was passed arbitrarily or on collateral grounds. Fundamental R 56 (j) holds the balance between the rights of the individual government servant and the interests of the public. While a minimum service is guaranteed to the government servant, the government is given power to energise its machinery and make it more efficient by compulsory retiring those who in its opinion should not be there in public interest. Compulsory retirement involves no civil consequences. Rule 56 (j) is not intended for taking any penal action against the government servants. That rule merely embodies one of the facets of the pleasure doctrine embodied in Art. 310 of the Constitution.

21. In *CHIEF G.M., STATE BANK OF INDIA v. SURESH CHANDRA BEHERA* the Supreme Court held as follows:

In the present case, looking to the findings arrived at by the Reviewing Committee after a detailed examination of the service record of the respondent, the order of compulsory retirement cannot be faulted on any ground. The High

Court cannot examine for itself the service record of any employee and substitute its own judgment for the judgment of the Reviewing Committee. The power under the third proviso of para 19(1) has been properly exercised in this case on relevant considerations in public interest. The order cannot be termed as either arbitrary or mala fide.

22. In *ALLAHABAD BANK OFFICERS' ASSN v. ALLAHABAD BANK* the Supreme Court has again reiterated the earlier principles laid down in other rulings and held thus:

The power to compulsorily retire a government servant is one of the facets of the doctrine of pleasure incorporated in Art. 310 of the Constitution. The object of compulsory retirement is to weed out the dead wood in order to maintain efficiency and initiative in the service and also to dispense with the services of those whose integrity is doubtful so as to preserve purity in the administration. Generally speaking, Service Rules provide for compulsory retirement of a government servant on his completing certain number of years of service or attaining the prescribed age. His service record is reviewed at that stage and a decision is taken whether he should be compulsorily retired or continued further in service. There is no leveling of a charge or imputation requiring an explanation from the government servant. While misconduct and inefficiency are factors that enter into the account where the order is one of dismissal or removal or of retirement, there is this difference that while in the case of retirement they merely furnish the background and the enquiry if held and there is no duty to hold an enquiry - is only for the satisfaction of the authorities who have to take action, in the case of dismissal or removal they form the very basis on which the order is made. A government servant who is compulsorily retired does not lose any part of the benefit that he has earned during service. Thus, compulsory retirement differs both from dismissal and removal as it involves no penal consequences. Therefore, compulsory retirement is not considered prima facie and per se a punishment and does not attract the provisions of Art. 311 .

23. In *J. V. JOSHI v. STATE OF RAJ*, Dr. Justice AR. Lakshmanan, Chief Justice speaking for the Bench has held:

What is to be considered in such matters is the examination of overall entries of the officer concerned and not an entry here and there. It may well be in some cases that in spite of satisfactory performance still the authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by more efficient and dynamic person. There is no denying of the fact that in all organizations there is great deal of dead wood and more so in Government departments, which has to be replaced in public interest. Therefore, as pointed out by many Courts in India, it is purely a matter of subjective satisfaction of the High Court or the Reviewing Committee, as the case may be.

24. In *VINOD K. AGARWAL v. HIGH COURT OF JUDICATOR (RAJ)* it is held that

the order of compulsory retirement is not a punishment and it implies no stigma and, therefore, the principles of natural justice have no place in the context of order of compulsory retirement. Dr. AR. Lakshmanan, Chief Justice speaking for the Bench observed thus:

It is also a matter on record in the instant case that the petitioner's unsatisfactory performance for a fairly long time coupled with his tendency to resort to litigation for each and every order, rendered him a liability to the institution. In our opinion, the petitioner was rightly retired in public interest. The recommendations of the reviewing committee and the unanimous decisions of 19 Judges who were present in the Full Court meeting and the acceptance of the same by the State Government was not unreasonable or arbitrary as assailed by the petitioner. The petitioner has assailed his compulsory retirement on certain flimsy grounds. The respondents have power under the Regulation in question to retire an employee compulsory in public interest. In fact, the Committee of four Judges which considered the case of compulsory retirement of the subordinate judicial officers, in so far as the petitioner is concerned, observed that the petitioner is a liability to the institution.

In our opinion, the order of compulsory retirement is not a punishment and not stigmatic in nature and hat the petitioner is entitled to draw all retrial benefits. In our opinion, the respondents have exercised their duty only in public interest to effectuate the efficiency of the service. On the consideration of the totality of the facts and circumstances of the case, the Reviewing Committee, Full Court and the State Government have decided that the officer deserves compulsory retirement from service. The order of compulsory retirement by the respondents is perfect and, therefore, does not call for any interference by this Court on judicial side."

25. The Supreme Court in BISHWANATH PRASAD SINGH v. STATE OF BIHAR held that the availability of the benefit of extension of service beyond 58 years was not automatic but was conditional upon being found suitable by the High Court in accordance with the Supreme Court's judgment and such evaluation was independent of and different from the assessment for compulsory retirement in public interest which could be effected under relevant rules by the State Government on the recommendation of the High Court. Hence a judicial officer found by the High Court not entitled to the benefit of enhancement of superannuation in terms of the said decision of the Supreme Court, held, would stand retired at the normal age of superannuation even in the absence of any order to that effect.

26. Therefore, the preponderance of judicial pronouncements referred to above in this judgment clearly point out that unless there is right to the post the action cannot be challenged. We have no hesitation in holding that the petitioner does not have the right to hold the post beyond the age of 58 years and his right to continue upto 60 years is subject to certain conditions. Unless those conditions are satisfied he is not entitled to seek the benefit. In pursuance of the directions

of the Supreme Court the committee has assessed and evaluated the potential of the officer for his continued utility. It is not open to this Court to interfere with the said decision and in the circumstances it cannot be said that the right of the petitioner to continue till 60 years is scuttled. In view of the discussion of the above case law and the judicial dicta what emerges is that the finding of the High Court that the petitioner does not possess requisite potential for continued useful service beyond 58 years is a finding recorded for the purpose of giving the benefit of extended superannuation or not and it does not ipso facto amount to punishment. It is a case of giving the benefit of extended period of service under the terms of the Supreme Court judgment alone and therefore no question of stigma arises if under those grounds no benefit is given. Even on merits it cannot be said that the decision of the committee of the High Court is based on no materials to come to the said conclusion. The committee has looked into the entire service records and other relevant documents.

27. For the foregoing reasons we are of the opinion that there are no merits in this writ petition. The writ petition, therefore, fails and is dismissed. No costs.