

Surendra Kumar Gyani vs State Of Rajasthan And Anr. on 3 September, 1992

Equivalent citations: AIR1993SC115, 1993(1)ALT9(SC), [1992(65)FLR878], JT1992(5)SC293, (1993)IILLJ903SC, 1992(2)SCALE432, (1992)4SCC464, 1992(2)UJ465(SC), AIR 1993 SUPREME COURT 115, 1992 (4) SCC 464, 1992 AIR SCW 2977, 1992 LAB. I. C. 2569, (1993) 1 SERVLJ 134, (1992) 5 JT 293 (SC), 1992 (2) UJ (SC) 465, 1992 UJ(SC) 2 465, 1993 SCC (L&S) 24, (1992) 2 CURLR 694, (1992) 65 FACLR 878, (1993) 2 LABLJ 903, (1992) 2 LAB LN 1003, (1992) 5 SERVLR 343, (1993) 1 ANDH LT 9, (1993) 23 ATC 366

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Bench: G.N. Ray

JUDGMENT

G.N. Ray, J.

1. Civil Appeal No. 833 of 1986 and Special Leave Petition (Civil) Nos. 6597-6686 and special Leave Petition (Civil) No. 12528 of 1986 have been heard analogously as the common question of law and fact arise in these matters and all the above matters are disposed of by this common judgment. It appears that various persons joined service of the Government of Rajasthan in the Department of State Insurance and Provident Fund as Lower Division Clerks at the daily wage of Rs. 15/-. Such appointment at the daily wage of Rs. 15/- was made pursuant to the approval given by the General Administrative Department of Government of Rajasthan by Letter No. 13/10/General/Admn./3/84 dated 5.9.84. The persons getting such employment continued to work as Lower Division Clerks with breaks at times. But after some time their service were terminated. For example in the case of Surendra Kumar Gyani, appointment was made on 8.10.1984 and the impugned termination was effected on 30.9.1985 (afternoon) with break in service on 15.6.1985 and appointment on 22.6.1985.

2. Civil Writ Petition No. 1720 of 1985 (Suresh Kumar Gyani v. State of Rajasthan and Anr. was taken up for hearing before Single Bench of Rajasthan High Court along with a number of other Writ Petitions referred to in Schedule A to the judgment. It was contended at the hearing of the Writ petition on behalf of the petitioners in the Writ Petitions that the Department of State Insurance and Provident Fund, Government of Rajasthan was an "industry " under Section 2(j) of the Act and the Writ Petitioners were workmen under Section 2(s) of the Act. The termination of the service of the Writ Petitioners constitute retrenchment under Section 2(oo) of the Act and the said orders of

retrenchment having been passed in contravention of the mandatory provisions of Clauses (a) and (b) of Section 25F of the Act inasmuch as Writ Petitioners were neither given one month's notice nor they had been paid the salary for a month in lieu thereof as required in Clause (a) of Section 25F and they are also not paid retrenchment compensation as required under Clause (b) of Section 25F of the Act. Accordingly, the impugned orders of termination passed against the Writ Petitioners were void and of no consequence and the Writ Petitioners should be treated as in service. The Writ Petitioners also contended that the impugned orders of termination had been passed in contravention of the provisions of Section 25G of the Act inasmuch as persons who had been recruited subsequent to the petitioners and became juniors to the petitioners in service had been retrained while the services of the petitioners had been terminated. It was further contended that there was no need for retrenchment and even after the said illegal retrenchment other persons were employed on daily wage basis as Lower Division Clerks. Such Writ Petitions were contested by the respondents, namely the State of Rajasthan and Director of the State Insurance and the Provident Fund Department, Rajasthan. It was contended on behalf of the respondents that since the Writ Petitioners were employed in the discharge of regal functions of the State in department of State Insurance and the Provident Fund, Government of Rajasthan, the provisions of Section 25F of the Act were not applicable to such employees. Hence, the question of non-compliance with the requirement of retrenchment compensation and notice under Section 25F of the Act did not arise. It was also contended that the appointments made to the Writ Petitioners were only a stop-gap-arrangement and was a condition of appointment, the service of the Writ Petitioners was liable to be determined without any notice. It was further contended on behalf of the respondents in the Writ Proceedings that some suitable persons duly recruited according to the rule by the Rajasthan Public Service Commission were not readily available and there was a temporary need to get the service of some Lower Division Clerks in the State Insurance and Provident Fund Department of the Government of Rajasthan, a request was made by the said Department to create certain temporary posts to stride over the temporary need of the Department. It was only on such request, about 180 posts were created by the Government purely as a temporary measure with the express condition that the service of the persons employed against such temporary posts should be terminated on the availability of the duly recruited persons by the Rajasthan Public Service Commission. It was expressly indicated in the letter of appointment that such appointment was intrinsically a temporary one and was liable to be terminated at any time without any notice. If in terms of the service, the orders of termination had been passed, no exception should be made to such orders and such orders cannot be treated as retrenchment within the meaning of Section 25F of the Act. It appears that a serious dispute was raised by the respondents that the Department of State Insurance and Provident Fund could not be regarded as 'Industry' under Section 2(j) of the Act. The learned Judge presiding over the Single Bench relying on the division of the Constitution Bench of this Court in Bangalore Water Supply and Sewerage Board v. A. Rajappa and Ors. and also some other decisions of the Supreme Court had come to the findings that the said Department was 'Industry' within the meaning of Section 2(j) of the Act. Accordingly, Section 25F of the Act was applicable in the matter of retrenchment and termination of service of the employers of the said Department. The learned Judge was of the view that as no specific tenure was fixed for determining the service of the Lower Division Clerks employed on daily wage basis, the respondents were required to give retrenchment compensation in accordance with the provisions of Section 25F of the Act. But such retrenchment compensation not having been paid in accordance with the Act, the impugned orders of

termination were illegal and invalid. The learned Judge, therefore, quashed the orders of termination of service of the Writ Petitioners and directed that the Writ Petitioners would be entitled to be reinstated with full backwages.

3. The State of Rajasthan and the Director of the Department of State Insurance and Provident Fund thereafter preferred appeal before the Division Bench of Rajasthan High Court. The Division Bench, however, accepted the finding of the learned Single Judge that the State Insurance and the Provident Fund Department of the Government of Rajasthan was an 'Industry' within the meaning of Section 2(j) of the Act. But the Division Bench was of the view that since the termination was passed on the basis of the stipulation made in the orders of appointment, the provisions of Clause (bb) of Section 2(oo) of the Act were attracted and as such the orders of termination could not be treated as retrenchment. Hence, such orders of termination could not be held as illegal and void and the Writ Petitioners were, therefore, not entitled to be treated as in service. The Division Bench of the Rajasthan High Court considered the additional affidavit and the documents placed before the Bench. It was indicated by the Division Bench with reference to such affidavit and documents, that the State Insurance Department had received allotment orders of 80 Lower Divisions Clerks who had been duly selected by the Rajasthan Public Service Commission and all of them had been posted in different districts. It was also revealed that allotment of 100 more Lower Division Clerks regularly selected by Rajasthan Public Service Commission was going to be made immediately. The Division Bench has held that in view of the regular selection of the Lower Division Clerks by the Rajasthan Public Service Commission, the services of the petitioners who had been taken on daily wage basis against the temporary created 180 posts of Lower Division Clerks, had been terminated. So there was no question of any victimisation of the petitioners and they cannot any right to continue in service when regularly selected Lower Division Clerks by Rajasthan Public Service Commission were made available for appointments.

4. Being aggrieved by such decision of the Division Bench of the Rajasthan High Court, the said Civil Appeal No. 833 of 1986 and the Special Leave Petition Nos. 6597-6607 of 1986 were preferred by various Writ Petitioners challenging the said orders of termination of service. The State of Rajasthan and the Director of State Insurance and the Provident Fund, Rajasthan, moved Special Leave Petition No. 12528 of 1986 challenging the finding of the High Court of Rajasthan in the Writ proceedings that the State Department of Insurance and Provident Fund, Government of Rajasthan was an 'Industry' within the meaning of Section 2(j) of the Act. Mr. Bachawat, learned Counsel appearing for the appellant, Shri Surendra Kumar Gyani in Civil Appeal No. 833 of 1986, contended inter alia that Shri Surendra Kumar Gyani was appointed as a Lower Division Clerk as a daily wagger @ Rs. 15/- per day. He has stated that it appears from the order of appointment dated October 8, 1984 that Sri Surendra Kumar Gyani and four other persons were appointed in the Head Office of the Department in the post of Lower Division Clerks as daily wagers and the service of those persons was liable to be terminated at any time without any notice. It was mentioned in the said Office Order that such appointment was made pursuant to the approval for appointment given in Letter No. 13/10/General/Admn./3/84 dated 5.9.84. The learned Counsel has contended that simply because the appellant Shri Surendra Kumar Gyani was appointed as a daily wagger, his service could not be terminated without following the legal procedure. He has contended that although in the Office Order it was mentioned that his service could be terminated at any time without any notice, the

provisions relating to the retrenchment under the Act could not be dispensed with. Such provisions being statutory must be held to be overriding the terms of contract of appointment. The learned Counsel has also contended that the Office Order was issued pursuant to the approval as contained in the letter dated 5.9.84. If reference is made to such Office Order, it will be evident that since properly recruited persons by the Rajasthan Public Service Commission to man the posts of Lower Division Clerks in the State Insurance and Provident Fund Department of the Government of Rajasthan were not readily available, sanction had been accorded by the Government to allow recruitment of Lower Division Clerks as daily wagers until persons duly recruited by Rajasthan Public Service Commission were made available. In the aforesaid circumstances the services of the daily wagers would only be terminated if Lower Division Clerks properly recruited by the Rajasthan Public Service Commission were made available. It, however, could not be established that on the date of termination of service, namely, on September 30, 1985, Lower Division Clerks recruited by the Rajasthan Public Service Commission were made available and only in order to give appointment to such persons, the conditional appointment of the Writ Petitioners had come to an end. He has submitted that as a matter of fact, even after the termination of service of the Writ petitioners, other persons were recruited as Lower Division Clerks on daily wage basis. In the aforesaid circumstances, Clause (bb) of Section 2(oo) of the Act was not attracted and the Division bench completely misappreciated the facts and circumstances of the case and erroneously held inter alia that since the said Clause (bb) was attracted, the termination could not be held to be retrenchment within the meaning of Section 2(oo) of the Act. The learned Counsel has further contended that although there was no adverse remark against the Writ Petitioner and it was nobody's case that his service was unsatisfactory as Lower Division Clerk, the service had to be terminated. The learned Counsel has contended that some time in June 1986, for few days only the service was terminated only for the purpose of creating an artificial break but such artificial break should not be held as legal and must be an unfair labour practice. In support of this contention, the learned Counsel has referred to a Bench decision of the High Court of Punjab and Haryana made in the case of the Kapurthala Central Co-operative Bank Ltd., *Kapurthala v. The Presiding Officer, Labour Court, Hullundur and Ors.* 1984 Labour and Industrial Cases 974. It has been held by the said case that where the services of the workmen were terminated on their rendering 230 days service with notional breaks, when the work of the workmen was satisfactory, and others had been recruited in their place, it was an instance of unfair labour practice and in such circumstances the workmen were held entitled to reinstatement with full/ backwages.

5. The learned Counsel has also referred to a decision of the High Court of Allahabad made in the case of *Shailendra Matha Shukla and others v. Vice-Chancellor Allahabad University and Ors.* 1987 Labour and Industrial Cases 1607. It has been held in the said decision that termination of service of a workman who has worked for not less than 240 days within a period of 12 months immediately preceding the date of termination without paying retrenchment compensation or following the procedure provided under the Act, is void which entitles the workman not only reinstatement but also for a declaration for continuing in service with back wages. Section 2(oo)(bb) is in the nature of an exception to Section 2(oo) and has to be construed strictly and in favour of the workmen as the entire object of Act is to secure a just and fair deal to them. Relying on the said decision, the learned Counsel has contended that even if service is contractual, the non-renewal of contract thereby bringing termination cannot be made if the same really amounts to retrenchment within the

meaning of Section 2(oo).

6. The learned Counsel has also referred to a decision of this Court made in the case of Madan Singh and Ors. etc. v. State of Haryana and Ors. AIR 1988 SCC 2133. In the said case, the appellants were employees in the work charged establishment of the Irrigation Branch of the Public works Department of the State Government of Haryana. It was not disputed that they had been employed for a number of years. Under Executive Instructions, their services had been terminated. Although the services of the appellants had been terminated, fresh recruitment had also been made almost simultaneously. Considering the facts of the case, it was held by this Court that there was no justification for the Government to terminate the services of the appellants and such orders of termination were unjust and unfair. This Court directed that the appellants should be absorbed and continue in service because the Government had passed orders from time to time for absorption of persons similarly circumstanced.

7. The learned Counsel has also referred to another decision of Delhi High Court made in the case of Workmen of Municipal Corporation of Delhi and Anr. v. Management of Municipal Corporation of Delhi and Anr. 1987(1) Labour Law Journal 85. The concerned workman in the said case was employed on daily wage basis as a Pipe Fitter in the Slum Department of the Municipal Corporation of Delhi. The said workman was not allowed to work in the Municipal Corporation of Delhi and the Labour Court did not grant any relief in favour of the workman in view of the fact that the Department of which the workman was employed had been transferred to Delhi Development Authority and therefore no relief could be asked against the Delhi Municipal Corporation. It was held in the said case that when the workman was not assigned any further work, when he was an employee of Delhi Municipal Corporation it amounted to termination. Since the provisions of Section 25F of the Act were complied with, the workman was entitled to be deemed to be in continuous service of the Municipal Corporation and entitled to consequential benefits.

8. The learned Counsel has also referred to the decision of this Court made in the case of Daily Rated Casual Labours employed under post and Telegraph Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India and Ors. 1988(1) SCR 589. In this case, discriminatory treatment between the regularly recruited employees and the casual employees in the matter of pay scale although the casual employees in the matter of pay scale although the casual labourers had been working for a long time, was held to be unfair and violative of Articles 14 and 16 of the Constitution. It has also been held by the Court that the Government should be a model employer, it cannot take advantage of its dominant position and compel any worker to work even as a casual labourer on starving wages. Since the petitioners though not regularly recruited had been working continuously for a long period and in some cases for about 10 years doing same type of work, they are entitled to get at least the minimum of the scale. Non-regularization was not a wise policy and the respondent-department was directed to prepare a Scheme for absorbing as far as possible the casual labourers who had been continuously working for more than one year in the Posts and Telegraph Departments.

9. The learned Counsel has also submitted that the question of regularisation of casual employees has been considered in a number of reported decisions and this Court has always considered

sympathetically the cases for regularisation and has given reliefs in appropriate cases.

10. The learned Counsel for the appellant has further contended that there was a necessity for retaining the services of the Lower Division Clerks for a number of years even after the impugned order of termination but only for the purpose of depriving some of the poor employees including the appellant, of their legitimate pay scales and other benefits of service, the Department resorted to unfair labour practice by giving appointment only as a daily rated wagger & Rs. 15/- per day and thereafter by unjustly terminating the services. It is nobody's case that the lower Division Clerks so recruited on daily wage basis had not been doing the regular functions of the said department or they were deficient in properly discharging the duties and functions. In the facts of the case, it was only desirable that Lower Division Clerks who had been appointed as daily rated wagers and had been discharging the functions to the satisfaction of the Department should have been regularised, if necessary, by making appropriate provisions for such regularisation. Instead of doing so, their services were terminated on the plea that the service was a contractual service and could be terminated at any time without any notice. Such action on the part of the State Government is wholly unjust and unfair and on that score alone, the impugned order of termination is required to be set aside. Learned Counsel has submitted that unfortunately the Division Bench of the Rajasthan High Court was influenced by the fact that appointment of the appellant was a temporary appointment with a stipulation that service could be terminated without any notice. Even if there was such a stipulation, the concerned authorities were not justified in terminating the service when the service of the appellant was satisfactory and there was still a necessity to get the service of Lower Division Clerk. The learned Counsel has further submitted that as a matter of fact even after the disposal of the Writ proceedings and the appeals by the Rajasthan High Court other persons were employed as a Daily Rated Lower Division Clerks in the very same department. When the services of such subsequently employed clerks were sought to be terminated, challenge was made in the Rajasthan High Court and interim orders have been passed by the Rajasthan High Court on the basis of which such clerks have been continuing in service. The learned Counsel has also submitted that the State Government, therefore, should take a reasonable view in the matter and should allow the appellant to join the service and regularise the service treating the same as a continuous service from the date of initial appointment. The other learned Counsels appearing for the petitioners in the Special Leave Petitions heard analogously, have also supported the contention of the learned Counsel for the appellant and have submitted that the State Government has issued directions to regularise the service of the employees who are continuing in service by virtue of the interim orders passed by the Rajasthan High Court but no consideration has been made for the unfortunate employees whose cases are pending before this Court in the Special Leave Petitions in view of the fact that their orders of termination have been upheld by the Division Bench of the High Court of Rajasthan by allowing the appeals of the State Government. It has been submitted before us that even today daily rated employees have been working as clerks in the said department and there is requirement of such employees to work as Lower Division Clerks in the State Insurance and Provident Fund Department. In the circumstances, it will be unjust and unfair if the poor employees who are the appellant in the appeal and the petitioners in the Special Leave Petitions pending before this Court are not reinstated and their services are not regularised.

11. Mr. B.D. Sharma, appearing for the respondents in the appeal and also in the Special Leave Petitions has further contended that services of the appellant and the other employees concerning the said Special Leave Petitions were only temporary and the appointments were tenure appointments with an express condition that such services can be terminated at any time without any notice. It was never intended to appoint them permanently because such appointment will be contrary to the rules for recruitment. Some persons were given appointment to the post of Lower Division Clerk as daily rated wage expressly on condition that the employment will be terminated at any time without any notice. In the aforesaid circumstances, Clause (bb) of Section 2(oo) of the Act is squarely attracted and the impugned orders of termination were quite just and fair and valid. It has been rightly held by the appeal Bench of the Rajasthan High Court that such termination was not retrenchment and as such provisions of Section 25F or 25G of the Act are not attracted. Mr. Sharma has contended that 180 posts were temporarily created for appointment of Lower Division Clerks as daily rated wage to stride over the exigencies created by the non availability of persons duly recruited by the Rajasthan Public Service Commission to hold the posts of Lower Division Clerks. Since the persons properly recruited by the Rajasthan Public Service Commission have been made available and they have been given appointment, the question of continuing the service of the petitioner and/or reinstating them and/or regularising the services of such employees does not arise. He has submitted that in the instant case, there has not been any unfair labour practice because it was not the case that an employee appointed on daily wage basis was allowed, to continue in service for years and there was no necessity to terminate the service of such employee but only to victimise such employee the order of the termination has been effected as noted in some of the decisions cited by the learned Counsels for the appellant and the petitioners. The appellant and the other employees were aware from the very beginning that they have been taken only as a stop-gap-measure and their services were liable to be terminated any time without notice and such employments were to be replaced by the persons duly recruited by Rajasthan Public Service Commission. He has therefore submitted that no interference by this Court is called for against the decision of the appeal Bench of the Rajasthan High Court and the Special Leave Petitions and the appeal should be dismissed.

12. Mr. Aruneshwar Gupta, learned Counsel appearing in Special Leave Petition No. 12528 of 1986, has submitted that although the Division Bench of the Rajasthan High Court has upheld the orders of termination but unfortunately the Division Bench has also upheld the decision of the Single Bench that State Insurance and Provident Fund Department of the Government of Rajasthan is an 'industry' within the meaning of the Act. Since large number of employees are working in the said Department the State Government is apprehending complication if the erroneous finding that the said Department is Industry remains. The learned Counsel has contended that the Department being the Government Department discharging regal functions of the State should not be held as an Industry and this finding should be set aside. He has further submitted that since the High Court came to the finding that the impugned orders of termination were just and proper there was no necessity to decide the question whether the said department was an industry or not and such question should not have been decided in the absence of proper materials.

13. Since the learned Counsels for the appellant and other petitioners in the Special Leave Petitions have contended that even after the impugned orders of termination passed against the Writ

Petitioners, the department has appointed daily rated employees as Lower Division Clerks in the said department and even now there are vacancies for such Lower Division Clerks in the Department a direction was given to Mr. Sharma to submit a Report indicating the present State of affairs. Mr. Sharma, learned Counsel for the State has submitted a Report about the present position in the State Insurance and Provident Fund Department so far as the Lower Division Clerks are concerned. Such Report has been filed with noticed to the learned Counsels for the appellant and the petitioners in the Special Leave petitions. It appears from the said Report that Lower Division Clerks working in the said Department of Rajasthan, in Jaipur and other places are 59 in all. All of them are working pursuant to the interim orders passed either by this Court or by the High Court of Rajasthan . The List containing the names of such 59 persons has been annexed as List. A. It has been further stated that from time to time sanctions were issued by the Finance Department for appointment of Lower Division Clerks on daily wage basis on specific terms for specific period. After 29th February, 1988 no sanction was issued and at present there is no necessity for Lower Division Clerks working on daily wage basis. Details regarding the sanctions has also been annexed as List B. Persons selected by Rajasthan public Service Commission were posted in the Department from the period 21.12.85 to 10.9.91 and the total number of such Rajasthan Public Service Commission approved candidates came to 625 and the details of such candidates have been annexed in the List C. It is also appears from the Report that at present total number of vacancies for Lower Division Clerks in the said department is 191 as shown in the List D. After considering the facts and circumstances of the case and the submissions made by learned Counsels for the parties, it appears to us that the appellant and other employees concerning the Special Leave Petition had not been given any permanent appointment and it was not even intended go give them appointment on a regular basis, because such appointments on regular basis were not permissible under the relevant recruitment rules and the Rajasthan Public Service Commission was required to select persons for employment in the cadre of Lower Division Clerk. Since there was temporary need to get the service of some Lower Division Clerks in the department, it was decided to create temporary posts of 180 clerks as a stop-gap-measure to tackle the volume of work in the General Provident Fund State Insurance Department. Accordingly 180 posts were sanctioned temporarily on the footing that appointments of daily rated clerks would come to an end on the availability of duly recruited persons. It is the case of the State Government that since the persons recruited as daily wagers were not intended to be appointed as regular employees either permanently or ever temporarily, it was made expressly clear that their services could be terminated any time without notice and consequently on the basis of such terms of service, the impugned orders have been made. it also appears that as a matter of fact 180 persons properly recruited by the Rajasthan Public Service Commission were made available for appointment and such persons have, in fact been given appointment. Hence in any event, the service of the appellant and other employees in Special Leave Petitions was liable to be terminated on the availability of properly recruited persons. In the aforesaid circumstances, we do not think that any direction that the said employees should be held to be in service and are continuing as such should be made. We, therefore, do not think that any interference with the Judgment passed by the Division Bench of the Rajasthan High Court need be made. In the facts of the cases, we do not think that it is necessary to decide whether or not the said Insurance and Public Provident Fund Department is an Industry. Such question is, therefore, kept open to be decided in an appropriate case on the basis of proper materials.

15. It, however, appears from the Report submitted before us by the learned Counsel for the State that at the present moment total number of fancies is 191 as shown in List D and 59 employees on daily wage basis are working in terms of the interim orders passed by the Rajasthan High Court or by this Court. It, therefore, appears to us that against the available vacancies, the appellant and the petitioners in the Special Leave Petition (Civil) Nos. 6597-6607 of 1986 deserve a sympathetic consideration for appointment since it is nobody's case that even at this time, services of more Lower Division Clerks are not required or the appellant and these petitioners are not capable or discharging their functions as Lower Division Clerks. It has been submitted before us that persons who had been continuing in service in terms of the interim order of the Rajasthan High Court have become eligible to be considered for regularisation in terms of the Government Order passed subsequently but since the cases of the appellant and the petitioners in the Special Leave Petitions had been decided by the Appeal Bench of Rajasthan High Court against the concerned employees they have been deprived of such consideration for regularisation. In our view, it is only just and proper if a pragmatic and sympathetic consideration is made in respect of the appellant and the other petitioners in the Special Leave Petitions so that if they have got the requisite qualification like similarly circumstanced persons being eligible for appointment and/or regularisation they also should be considered for appointment and for regularisation against the available vacancies so that useful service rendered by them in past may get a proper recognition. It is reasonably expected that State Government should give an anxious and sympathetic consideration to the appellant and the Petitioners in the Special Leave Petitions in the matter of appointment in the available vacancies according to the seniority and the length of service rendered by such persons as Daily Rated Lower Division Clerks in the said State Insurance and Provident Fund Department by making appropriate provisions. With the aforesaid observations, Civil Appeal No.833 of 1986 and the Special Leave Petition Nos. 6597-6607 of 1986 and 12528 of 1986 are disposed of without any order as to costs.