Mohammad Bux vs Govt. Of State Of Uttar Pradesh And Anr. on 5 November, 1951

Equivalent citations: AIR1953ALL739, AIR 1953 ALLAHABAD 739

JUDGMENT

Mootham, J.

1. These three applications can conveniently be dealt with in one order. The three applicants were members of the Municipal Board of Kasganj in the district of Etah. On or about the 25th March, 1949, each of them was served with a notice requiring him, under Sub-section (4) of S. 40 of the Uttar Pradesh Municipalities Act, 1916, to furnish an explanation of certain act specified in the notice which it was alleged constituted a flagrant abuse of his position as a member of the Board. Each of them submitted an explanation, but by an order dated the 24th Nov-ember, 1949, they were informed that the Governor had come to the conclusion that their continuance as members of the Municipal Board was detrimental to the public interest and that he had ordered their removal forthwith from membership of the Kasganj Municipal Board. The applicants made representations to the Government against the order of removal, but their representations were rejected on the 14th December, 1950, and on the 24th February, 1951, they filed the present applications in which, -- in the lax way in which such applications are sometimes presented to this Court, -- the applicants ask for "a writ, order or direction in the nature of 'certiorari' or prohibition or 'mandamus' or any order" that the order of removal may be set aside.

Learned counsel has however stated that the relief which the applicants in fact seek is the issue of a writ in the nature of 'certiorari' and the quashing of the order of the 24th November, 1949. The application of Mohammad Baksh is accompanied by an affidavit of considerable length which contains a good deal of irrelevant matter. Each of the other two applications is accompanied by a very short affidavit in which the applicant states that he relies upon the facts set forth in the affidavit of Mohammad Baksh. This is an unsatisfactory practice as it is likely to result in one or more of the deponents deposing to matters not within his or their personal knowledge; the better course is for a joint affidavit to be filed.

2. Sub-sections (3) and (4) of Section 40 of the Uttar Pradesh Municipalities Act, 1916, are in the following terms:

> "(3) The Provincial Government may remove from the board a member who in its opinion has so flagrantly abused in any manner his position as a member of the board as to render his continuance as a member detrimental to the public interest:

> (4) Provided that when either the Provincial Government or the prescribed Authority, as the case may be, proposes to take action under the foregoing provisos of this section, an opportunity of explanation shall be given to the member concerned, and when such action is taken, the reasons therefor shall be placed on record."

3. It is the applicants' case that the Prorincial Government had no jurisdiction to make the order of which they complain because they were not afforded an adequate "opportunity of explanation" which is a condition precedent to the exercise of the power of removal; it is also their case that the order in question is an unreasonable and arbitrary order. They concede that they have a remedy by way of suit against the Government, --and indeed, if the allegations be correct this is not in doubt -- and counsel for the State contends that in these circumstances the Court will not issue a writ in the nature of 'certiorari'. He has further argued that the order which is now challenged is an administrative order, that the provisions of Sub-section (4) were complied with and that the Court has no power under Article 226 to quash an order made prior to the date upon which the Constitution came into force.

4. In the recent case of -- 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (A), it was laid down by a Full Bench of this Court that "there can be no doubt that Article 226 of the Constitution makes the issue of directions, orders or writs discretionary and it cannot be argued that any party has a right to any form of order as a matter of course. The discretion is a judicial discretion to be exercised according to judicial principles."

That view appears to be substantially the same as that now taken in England where, in -- 'King v. Stafford Justices; ex parte Stafford Corporation', (1940) 2 KB 33 (B), the Court of Appeal held that, the issue of a writ of 'certiorari', save where it goes as of course, is discretionary, even in those cases in which there being a clear excess of jurisdiction an aggrieved person is said to be entitled to the writ 'ex debito justitiae'; that is in those cases in which, as was said in -- 'Farquharson v. Morgan', (1894) 1 Q B 552 (C), the want of jurisdiction was patent and not latent and dependent on the evidence, or, in the words of Atkin, L. J., in -- 'King v. North; Ex parte Oakey', (1927) 1 KB 491 (D), is based upon the breach of a fundamental principle of justice.

In every case, the Court is entitled to enquire into the circumstances of the case and the conduct of the petitioner -- that is why the relief is a discretionary one -- but as the Master of the Rolls pointed out in the first mentioned case, "in all discretionary remedies it is well known and settled that in certain circumstances... the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way."

Subject to that consideration, I am of the opinion that in exercising its discretion the Court must have regard to the general rule that the Court will normally require the applicant to have recourse to his ordinary remedies: -- 'In re Ramjidas Mahaliram', 62 Cal 1011 at p. 1135 (E); -- T. Sudara Rao v. Commissioner Corporation of Madras', AIR 1942 Mad 348 (F); -- 'Khurshed Mody v. Rent Controller, Bombay', AIR 1947 Bom 46 (G).

5. The applicants contend that they were given no adequate opportunity of explanation because the charges they were called upon to answer were so vague that they did not know the nature of the allegations made against them. They were however asked for an explanation; each of them submitted an explanation and in none of those explanations was it contended or even suggested that the charges were not understood. I am anxious not to express an opinion as to whether the charges were stated in terms sufficiently clear to enable the applicants to comprehend fully the case they had to meet; that they were not stated with that precision which is desirable is clear, but the applicants were municipal councillors and it may lie the case (I do not of course say that it is) that the charges related to alleged malpractices by the applicants as councillors the loose wording of the charges was not in fact a handicap to them in preparing their explanations.

In other words, the alleged defect is latent and depends on evidence; and the question whether there has been a contravention of Sub-section (4) of Section 40 is one which can, in my judgment, be more satisfactorily and more appropriately determined in a suit than on the scanty materials before us.

6. The applicants have allowed thirteen months to elapse before filing these applications. They say that if they are compelled to resort to a suit the vacancies on the Municipal Board will be filled by a bye-election before the suit can be determined. I understand however that that bye-election has already been held, and, in my opinion it is not the balance of convenience at the present time which has to be considered, but the balance of convenience--in cases in which the matter is material--at the time the applicants first had the choice of pursuing alternative remedies. If as a result of a suit filed by the applicants the order for their removal is declared null and void they will be deemed to have continued in office as municipal councillors, and there will in consequence have been no vacancies to be filled by a bye-election.

7. Taking all the circumstances into consideration I am of opinion that the petitioner have failed to make out a case for the issue of a writ of 'certiorari', that the appropriate remedy for them is by way of suit, and that this Court should, therefore, refuse to issue a writ. The application, must accordingly be dismissed, but as the principles on which writs of 'Certiorari' are issued are not as yet well understood we make no order as to costs.

Sapru, J.

8. These are three separate applications by three different applicants who were Municipal Commissioners and who seek to have the order of then removal from the office of the Municipal Commissioner by the Government of Uttar Pradesh set aside by this Court. The applicants have come under Article 226 of the Constitution and their prayer is that a writ order or direction in the nature of 'certiorari or 'prohibition' or 'mandamus' or all or any of them may be issued or such other order or directions may be passed by this Court as it may deem fit so that the order of their removal from the office of the Municipal Commissioner by the Government of Uttar Pradesh may be set aside. There is a prayer that for the purpose of doing justice in this case this- Court may be pleased to send for the record relating to the removal of the applicants.

9. It will be convenient to deal with the three cases in one judgment. The applicants are Shri Mohammad Bux, Shri Gauri Shanker and Shri Babu Lal Chole. They were elected members of the Municipal Board of Hathras (Kasganj?) but were removed by an order, dated the 24th of November 1949 under section 40(3) of the U. P. Municipalities Act, on the ground that they had so flagrantly abused their position as members of the Board as to render their continuance as members detrimental to the public interest. Each of the applicants appears to have presented two applications to the Government for reconsideration but they were turned down on the 14th of December 1950.

The applicants have left unspecified in their application the particular writ or order they seek from this Court but in the course of argument it was made clear to us that what they were asking us to do was, in effect, to invoke us to exercise our powers of 'certiorari' under Article 226 of the Constitution. The main ground on which they seek the intervention of this Court under Article 226 is that the provisions of section 40 (3) and (4) of the U. P. Municipalities Act of 1916 have not been complied with inasmuch as no opportunity such as is contemplated by that section was given to them for offering any explanation before their removal.

10. It will be seen that the order which is sought to be impugned was passed before the coming into force of the Constitution on January 26, 1950. The question, in these circumstances, naturally arises whether Article 226 of the Constitution is retrospective in its effect and, if so, in what sense. This is a difficult question on which we allowed full argument to be addressed to us but, after giving my careful consideration to all the aspects of the case, I have come to the conclusion that it is unnecessary to base our decision on our view in regard to it as, in the view we are taking, the question does not arise.

I may, however, point out that the position in English law is, as pointed out by Maxwell in his "Interpretation of Statutes", 9th Edition, p. 221, that "no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

> "No rule of construction", observes Sir Maxwell, 'is more firmly established than this : that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.....
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> A statute is not to be construed to have a greater retrospective operation than its language renders necessary."

11. I may be further permitted to quote the following observation of their Lordships of the Privy Council in the case of the -- 'Delhi Cloth and General Mills Co., Ltd. v. Income-Tax Commissioner, Delhi', AIR 1927 PC 242 at p. 244 (H) :

> "The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the -- 'Colonial Sugar Refining Co. v. Irving1, (1905) AC 369 (I), where it is, in effect, laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

Mr. Beg's argument is that notwithstanding the fact that the order was passed before the Constitution had come into force and become final, the order of Government has not ceased to be operative for the reason that one effect of it is that under section 41(3) the applicants who have been removed under Sub-section (3) of section 40 of the Act are not eligible for further election or nomination for a period of three years from the date of the removal. He has further contended that the effect of giving retrospective operation to Article 226 will be neither to impair any existing right or obligation nor to touch a right in existence at the passing of the statute. I consider it unnecessary to notice this and other arguments as, in the view that we are taking, the questions raised do not arise. Suffice it to say that without expressing any final opinion on the points raised I do not feel impressed with the line of argument referred to above.

12. I may also briefly indicate that I am not prepared to accept the argument of the learned Standing counsel that the order of removal, which is being sought to be impugned in this case, is an administrative order which it could not have been competent for us to consider even had there been no question of its having been passed before the Constitution came into force. The distinction, between what may be called an administrative and 'quasi' judicial acts by an administrative authority is a subtle one and has been the subject-matter of much case law. It would be correct to say that in a sense there is no administrative or executive act which has no judicial element in it. Even in arriving at an administrative decision, the executive Government has to weigh the 'pros' and 'cons' of the issues involved and it is by this process that it arrives at some conclusion. Now, there is no doubt that both judicial and quasi-judicial functions presuppose the existence of a dispute between the parties and that is this feature which distinguishes them from an administrative function.

The distinction between an administrative and judicial or quasi judicial act, therefore, turns upon the question whether the duty of the authority was to act judicially or not. On this point, I may be permitted to quote the observations of Das, J. -- 'Province of Bombay v. Khushaldas', AIR 1950 SC 222 at p. 257 (J). They run as follows:

> "In this connection the term judicial does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for purposes of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting rights, and if there be a body empowered by law to enquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving

> such consequences would be judicial acts."

I would also refer to the observations of Atkin L. J. as he then was in -- 'Bex v. Electricity Commissioners', (1924) 1 KB 171 (K). They run as follows :

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The above observations of Lord Atkins have become classical and were accepted as correctly laying down the law in -- 'Bex v. London County Council', (1931) 2 KB 215 (L), and by many other learned Judges in subsequent cases including the Supreme Court and the latest decision of their Lordships of the Judicial Committee in --'Nakkuda Ali v. M. P. Des Jayaratne', 54 Cal WN 883 (PC) CM).

The conclusion to be drawn, therefore, is that the real test which distinguishes a 'quasi'-judicial act from an administrative act is as observed by Atkin L. J.'s definition, namely, the duty to act judicially. The law lias been well put by Lord Hewart C. J. in -- 'R. v. Legislative Committee of the Church Assembly', (1928) 1 KB 411 at p. 415 (N) that:

> "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be supsradded to that characteristic the further characteristic that the body has the duty to act judicially."

13. Now it strikes me that in this particular case there can be no doubt that though the decision of the Government as to whether a member has or has not acted in such a manner as to render him unfit to be a member of the Board is subjective, the process by which it arrives at the decision involves a judicial act for, in arriving at it, Government must not take into consideration any factor which is not a judicial factor. In other words, it is, on an honest application of its mind to the 'pros' and 'cons' of the case, against the municipal commissioner concerned that it must arrive at its decision. It is obvious that in declaring a person unlit to be a municipal commissioner, Government is passing an order which would deprive him not only of an office to which he has been elected by the electorate but also automatically disqualify him under Section 40 (2) for a period of 'lour' years from, seeking election to that office. Tin's is a serious thing to do. Obviously, therefore, in exercising it the Government must be deemed to have acted 'quasi'-judicially.

14. I should like to remark that one of the requirements of an order under Section 40 (3) is that it should be recorded in writing. I do not understand it to lay down that it must be communicated to the applicants. I indicated to the learned Standing Counsel that I wanted to know whether any such order had or had not been recorded. I understand that reasons were nut on the record. The requirement above referred to merely goes to strengthen the view that the act was a 'quasi'-judicial, and not administrative one.

15. It is obvious that it was only after an opportunity had been given to the member concerned to explain that action could be taken against him. Clearly, by an opportunity to explain a reasonable opportunity is intended. Where, for example, the charges framed are so vague or indefinite as to make it impossible for the applicant to tender his explanation, it cannot be said that a reasonable opportunity has been given. The further requirement that reasons must be recorded makes it clear that though not necessarily communicated to the person concerned the act was considered to be of a 'quasi'-judicial nature. One of the principal complaints against the members appears to "be that they somehow misused their position as members in the matter of the allotment of electrical power.

It would appear that by a Government Notification, dated the 25th of July 1947, the Chairman of the Municipal Board was allowed to allot electrical power to members of the public to the extent of a total of 30 Kilowats. It was contended, by the applicants that applications were made by a member or members to the Chairman for the allotment of electrical powers and that these applications were disposed of in strict order of priority. Among the applicants for- electrical power, there were three members of the Board, Shri Babulal Chola, Chaudhary Mohnmmsd Bux and Shri Ram Prakash. They were also allotted "electrical powers on payment of the usual charges. There were some complaints against the allotment and thereafter the U. P. Government decided to depute one Shri H. L. Kashyap, Electrical Inspector, to go and enquire into the grievances.

This officer reported that there was no ground for any complaint or grievance. On his report, the matter appears to have been produced by the 'U. P. Government in 1947. Thereafter, the matter was revived and charges were framed against the members concerned and they were required to answer them. The charges against each of the members were as follows :

> Shri Mohammad Bux: That he misappropriated for his own use 10 Horse Power out of the quota of 40 Horse Power of electric power which was granted to the Kasganj Municipal Board for public use.
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> Shri Gauri Shankar : That in 1946, he purchased a nazul plot of land near the railway station in Kasganj for Rs. 265/- only in the name of his cousin, Shri Piarelal. The plot was worth more than Rs. 10,000/- and it is clear that he made the purchase with the help of some of the Board's staff and thus caused a heavy loss to the Board.
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> That he again tried to purchase a piece of land near the female dispensary in the name of his friends and relatives thus abusing his position as a member. Had not the present Executive Officer intervened in the proposed sale, the Board would again have been put to loss.
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> That he misappropriated some of the 40 Horse Power electric energy given to the Board for public use though outwardly it was done in the name of his father-in-law.
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> Shri Babulal Chola : That he along with Shri Girja Shankar tried to purchase a piece of land near the female dispensary in the name of his friends and relations at a low price thus abusing his position as a member.

> That he misappropriated to himself 10 Horse Power out .of the 40 Horse Power quota of electric, energy granted to the Board for public use.

16. Ten days time from the date of the receipt. of orders was given to each of the applicants to submit their explanations to Government through the Commissioner who was directed by the order to make his comments and recommendations thereon as early as possible.

17. No objection was raised by the applicants or any of them to the effect that the charges framed against them were not intelligible and required elucidation and clarification. The applicants seem to have proceeded upon the assumption that what they were called upon to answer was what had already been explained by them in the enquiry previously held against them by Shri H. L. Kashyap. Their answers were presumably rot found satisfactory by the Government for I find that on the 24th of November 1949 intimation was sent to them that the Governor had arrived at the conclusion that their continuance as members of the Municipal Board was detrimental to the public interest, and that they could not consequently be allowed to remain as members of the Board.

Upon its receipt, the applicants made representations against the Government's order of removal but Government did not consider that there was any case for reconsideration and rejected them on the 14th of December, 1950. On the 24th of February 1951, that is to say, some two months and ten days after their representation had been rejected, the applicants filed the present application, the precise nature of which has not been indicated clearly in the affidavit.

18. Now on these facts it is clear to me that the applicants had an alternative remedy, i.e., they could go to a civil Court and challenge the order passed against them on the ground that it was arbitrary, capricious, wanton and that the action in removing them was not 'bona fide'. In -- 'U. P. Government, Lucknow v. Radhey Lal', AIR 1948 All 179 (O), it was remarked by Bind Basni Prasad J. that:

> "Where the statute provides that the sole judge of a certain fact will be a certain authority, no suit can lie to question the decision of such, authority in respect of such matter."

It was further laid down that:

> "The phrase "in its opinion" which occurs in Sub-section (3) of Section 40, U. P. Municipalities Act, has the effect of making the Provincial Government the sole judge of the fact whether a member has flagrantly abused his position so as to render his continuance in the Board detrimental to public interest. Where the Provincial Government has properly exercised the powers conferred upon it by the Act and the action taken by it in removing a member from a Board is 'bona fide' and not capricious, wanton and arbitrary, the civil Court will not allow it to be challenged."

As I read this case which arose out of a suit instituted for a declaration that the applicant had been illegally removed and that he was, therefore, not subject to the disability or non-eligibility for

election in accordance with the provisions of Sub-section (3) of Section 40 of the said Act, the position is that though the Governor in Council is the sole judge of the question whether the acts by the Commissioners concerned justified their removal or not, the jurisdiction of the civil Court would not be ousted, if the applicant was able to show that the authority vested with the power to remove him had exercised its discretion in a capricious, wanton and arbitrary manner and in an unreasonable way. I may be permitted to refer to the observations of Malik J. (Now Malik C. J.) in the case mentioned above. I quote them below :

> "It is not, alleged by the plaintiff that the Provincial Government had not followed the procedure laid by the statute or had not acted strictly within the limits of its authority, nor is there any charge of malice or want of good faith. The Provincial Government having acted in accordance with the procedure laid down, and having in good faith considered that the plaintiff had so flagrantly abused his position as a member of the Board as to render its continuance as such detrimental to the public interest, the civil Courts cannot substitute their own opinion for the opinion of the Provincial Government."

In other words, Malik J. would have been prepared to interfere with the order of Government had the applicant either shown : (a) that the Provincial Government had failed to observe the procedure laid down by the statute, or (b) had not acted within the limits of its authority, or (c) had acted with malice or want of good faith. Haying regard to the law, as laid down in this ruling, it cannot be said that, on the grounds alleged by the applicants, the alternative remedy of a civil suit was not available. This being so, the question naturally arises whether we should allow the applicants the relief under Article 226 of the Constitution. It is urged that the remedy of a civil suit is not an expeditious one, that the matter is, from the point of view of the applicants, urgent, that there is a penalty attached to the removal inasmuch as under Section 40 (3) a member removed under Sub-section (3) under the Act is not eligible for a period of three years from the date of his removal and that this Court should, in view of the above circumstances, exercise its powers under Article 226. It is further alleged that no suit under Section 80 of the Code of Civil Procedure can be filed against the Government, unless two months' notice thereof is given and this involves delay. It has been held by a Bench of this Court that this is an immaterial circumstance, vide: case of -- 'Dharni Dhar Sharma v. Thakur Per-shad', Writ Appln. 169 of 1950, D/- 31-10-1350 (All) (P).

19. As regards the other considerations to which attention has been invited, by the learned-counsel, the answer is that had the matter from, the point of the applicants' view been really urgent, they would have come to this Court much, earlier i.e., immediately after this Court became vested with the, power of issuing writs under the Constitution on the 26th of January 1950. It is to be noticed that the writ application was not filed until the 24th of February 1951. During the interval that elapsed between the date on which the order was passed and the application to this Court was made, it was possible for the applicants to go to the civil Courts and seek a relief. The fact that this procedure of a civil suit is a somewhat dilatory one, on account of congestion of work in the civil suit, is no ground to invoke the jurisdiction of this Court under Article 226 of the Constitution.

I may be permitted in this connection to refer to the observations of the Pull Bench in the case of the -- 'Indian Sugar Mills Association v. Secretary to Government, U. P.', AIR 1951 All 1 at p. 3 (FB) (Q):

> "We feel that the time has come when we may point out that Article 226 of the Constitution was not intended to provide an alternative method of redress to the normal process of a decision, in an action brought in the usual Courts established by law. The powers under this Article should be sparingly used and only in those clear cases where the rights of a person have been, seriously infringed and he has no other adequate' remedy available to him."

These observations were made in a case in which the writ asked for was in the nature of a mandamus and were limited to the facts to that case.

20. I should also like to refer to the observations of the Pull Bench of which I was a member in -- 'Asiatic Engineering Co. v. Achhru Ram',. AIR 1951 All 746 (PB) (A) :

> "Though the historical background of these various orders in the nature of writs have to be borne in mind in considering whether a writ should or should not issue, there can be no doubt that Article 226 of the Constitution makes, the issue of directions, orders or writs discretionary and it cannot be urged that any party has a right to any form of order as a matter of course. The discretion is a judicial discretion to be exercised according to judicial principles."

In this case the writ principally asked for was a 'certiorari' or prohibition. The question in these circumstances is whether we should exercise our discretion, in issuing writs in favour of applicants who did not raise any objection at the time when the charges were forwarded to them by the U.P. State Government, that there was any ambiguity about the charges and that they were framed in such a manner as not to enable them to know the exact nature of the case against them and who went on, even after the order had been passed, making representations to Government without protesting against the vague, ambiguous or defective nature of the charges and did not choose to come to this Court until after the lapse of a year of the passing of the final order by Government.

Important as the right to vote is, speaking from the point of view of a citizen living under a democratic system of Government, this Court will not assist a party who fails to come to it at the earliest possible opportunity. All this, of course, presupposes that there is a power under Article 226 to issue writs or direction or orders affecting the rights of parties in recpect of matters which were disposed of finally before the Constitution came into force. On that point I consider it unnecessary, however, to express any final opinion, as properly speaking, in the view that I am taking, it doss not arise in this case.

21. For the reasons given above, I would refuse the writ but it is open to the applicants, if they so desire, to prosecute any remedy that they may have in the civil Courts and it will be for the civil Court to go into the question of fact which was raised in the supplementary affidavits which were sought to be filed by the learned counsel for the applicants.

22. After giving the matter my anxious consideration I have come to the conclusion that, in the circumstances of the case, no costs should be awarded. In all the circumstances of this case, the proper order to pass will be to make the parties bear their own costs. This application should be accordingly dismissed but no order should be made as to costs.