# Bharat Coking Coal Ltd vs M/S Annapurna Construction on 29 August, 2003

## Equivalent citations: AIR 2003 SUPREME COURT 3660, 2003 AIR SCW 4146, 2003 AIR - JHAR. H. C. R. 1076, (2008) 1 UC 596, 2003 (5) SLT 161, (2004) 1 ALLMR 56 (SC), 2004 (1) ALL MR 56, (2003) 6 ALL WC 4640, (2003) 4 JCR 87 (SC), 2003 (10) SRJ 41, 2003 (3) ARBI LR 119, 2003 (8) ACE 21, 2003 (8) SCC 154, 2003 (7) SCALE 20, (2004) 1 MAH LJ 433, (2004) 1 PAT LJR 19, (2003) 3 ARBILR 119, (2003) 2 WLC(SC)CVL 587, (2003) 4 CURCC 16, (2003) 10 INDLD 270, (2003) 3 MAD LJ 185, (2003) 6 ANDHLD 85, (2003) 6 SUPREME 517, (2003) 4 RECCIVR 552, (2003) 4 ICC 332, (2003) 7 SCALE 20, (2003) 4 JLJR 237, (2004) 2 CIVLJ 732, 2004 (2) BOM LR 15, 2004 BOM LR 2 15

## Author: S.B. Sinha

## Bench: Chief Justice, S.B. Sinha

CASE NO.:
Appeal (civil) 5647-48 of 1997

PETITIONER:
Bharat Coking Coal Ltd.

RESPONDENT:
Vs.

M/s Annapurna Construction

DATE OF JUDGMENT: 29/08/2003

BENCH:
CJI. & S.B. Sinha.

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

These appeals are directed against the judgment and order dated 29.4.1997 passed by the High Court of Patna, Ranchi Bench, Ranchi in Appeal from Original Order No.169 of 1995 (R) whereby and whereunder the appeal preferred by the appellant herein from a judgment and order dated 3.6.1995 passed by the Subordinate Judge,

4th Court, Dhanbad in Title (Arbitration) Suit No.109 of 1994 was dismissed.

FACTS:

The basic fact of the matter is not in dispute. The parties hereto entered into a contract for construction of 140 numbers of temporary hutments, the estimated cost of which was Rs.49,45,447.81. A formal work order was issued to the respondent herein. Entire work in terms of the agreement was to be completed within a period of four months.

A formal contract was entered into for the aforementioned work by and between the parties. The said contract contained an arbitration agreement. The said contractual job was not allegedly completed by the respondent within the stipulated period wherefor a request was made for extension of time till 31.12.1986 to complete the work. Further extensions of time were sought for and granted from time to time. Disputes and differences having arisen between the parties, the arbitration agreement was invoked. The Chief Engineer of the appellant-Company was appointed as the sole arbitrator. He was to give a reasoned award. Before the arbitrator the respondent raised a claim of Rs.55,01,640.66. The appellant herein also raised a counter claim for a sum of Rs.28,47,860.57. By reason of an award dated 13.7.1994, the sole arbitrator awarded a sum of Rs.18,97,729.37 with interest @ 18% per annum in favour of the respondent. The counter claim of the appellant, however, was rejected.

The said award was filed before the learned Subordinate Judge, Dhanbad for being made a rule of court in terms of Section 14 of the Arbitration Act, 1940 (for short 'the Act'). The appellant herein in the said proceedings filed an objection under Sections 15, 16, 30 and 33 of the Act. The learned trial Judge by reason of a judgment dated 3.6.1995 rejected the said objection of the appellant and made the award as rule of court, where-against an appeal was preferred which by reason of the impugned judgment was dismissed.

However, it may be noticed at this stage that the learned Subordinate Judge did not grant any interest from the date of decree in favour of the respondent wherefor an application purported to be under Section 152 of the Code of Civil Procedure was filed. The said application was rejected on 12.12.1995 where-against the respondent preferred a civil revision application before the High Court. Both the appeal being M.A. No.169 of 1995 (R) filed by the appellant herein and Civil Revision being C.R. No.12 of 1996 (R) filed by the respondent herein were heard together. While disposing the appeal, the revison petition was allowed by the High Court by reason of the impugned judgment.

SUBMISSIONS:

Mr. Ajit Kumar Sinha, learned counsel appearing on behalf of the appellant, inter alia, submitted that the respondent having accepted the final bill, a further claim by it was inadmissible. The learned counsel pointed out that as a special case the appellant granted 95% advance wherefor no interest was to be charged. The said advance was to be adjusted from the running bills. In that view of the matter, the learned counsel would contend that the arbitrator committed an illegality in entertaining Claim Item Nos. 3 and 7. The learned counsel would urge that the respondent having been granted extension, it was obligatory on the part of the learned arbitrator to consider as to whether the respondent was entitled to any compensation for the alleged loss occurred on the ground of delay in completion of work, particularly when it was agreed that the extension of time was granted subject to payment of penalty. The learned counsel would further submit that in terms of the contract the appellant had been supplied with all the essential raw materials, namely, cement, steel etc. which would cover about 95% of the total cost to be incurred for the construction of the hutments and in that view of the matter the respondent could not be held to be entitled to any amount by way of escalation in the price.

Mr. S.B. Upadhyay, learned counsel appearing on behalf of the respondent, per contra would submit that the objections filed by the appellant herein have been thoroughly considered by the learned Subordinate Judge and the High Court and as such it is not a fit case wherein this Court should interfere. The learned counsel would urge that it is not the case of the appellant that the learned sole arbitrator did not pass a reasoned award and, thus, this court in exercise of its jurisdiction under Section 30 of the Act would not interfere when two views are possible. The learned counsel would submit that while exercising its jurisdiction under Section 30 of the Act, the court does not reappraise evidences brought on record. Strong reliance, in this connection, has been placed on Ispat Engineering & Foundry Works, B.S. City, Bokaro vs. Steel Authority of India Ltd., B.S. City, Bokaro [(2001) 6 SCC 347].

FINDINGS:

Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim. We, therefore, do not find any merit in the said submission of Mr. Sinha. The submission of Mr. Sinha to the effect that the High Court committed an error in granting interest from the date of the decree purported to be in terms of Section 29 of the Arbitration Act appears to be correct. The learned Subordinate Judge did not grant any interest in terms of Section 29 of the Act. The same was not by way of a clerical or arithmetical mistake which could be corrected by the court in exercise of its power under Section 152 of the Code of Civil Procedure. The remedy of the respondent, therefore, was either to prefer an appeal thereagaint or file a review petition. As the court could not have exercised its

jurisdiction under Section 152 of the Code of Civil Procedure, the High Court in exercise of its revisional jurisdiction could not have interfered therewith. So far as the question of late payment of the bills is concerned, the arbitrator has arrived at a finding of fact that there had been an inordinate delay in respect of 10th R/A bill for Rs.4,85,403.31 which was paid after a lapse of one year from the date of completion of work on 15.1.1988 and a sum of Rs.54,737.53 was awarded as damages @ 12% on the said amount for the period of 343 days to the appellant. So far as Claim Item No.3 is concerned, the question which arose for consideration before the arbitrator was as to whether any extra work had been done or not. The case of the appellant was that the respondent had not done any extra work. The arbitrator had considered the materials on record for the purpose of arriving at a finding of fact that certain extra work had been done by the respondent wherefor only a sum of Rs.84,942.02 was awarded in place and instead of Rs.1,58,862.26.

However, Mr. Sinha is correct in his submission that the learned arbitrator has not taken into consideration the effect and purport of the following clause in the contract:

"Provided always that :

(a) Contractor/Contractors shall not be entitled to any payment for any additional work done unless he/they have received an order in writing from the Superintending Engineer/Sr. Executive Engineer/Executive Engineer for such additional work;

(b) The contractor/contractors shall be bound to submit his/their claim for any such additional work done during any month on or before the 15th day of the following month accompanied by the additional work; and

(c) The contractor/contractors shall not be entitled to any payment in respect of such additional work if he/they fail to submit his/their claim within the aforesaid period."

The question is as to whether the claim of the contractor is de hors the rules or not was a matter which fell for consideration before the arbitrator. He was bound to consider the same. The jurisdiction of the arbitrator in such a matter must be held to be confined to the four-corners of the contract. He could not have ignored an important clause in the agreement; although it may be open to the arbitrator to arrive at a finding on the materials on records that the claimant's claim for additional work was otherwise justified. Claim Item No.4 was rejected.

The award in respect of Claim Item No.5 is not in question. Claim Item No.6 was in relation to penalty amount of Rs.10,000/- which was deducted by way of penalty and was not found to be justifiable, and as such the appellant was directed to refund the said amount. We are furthermore concerned with Claim Item Nos.7 and 11 which are under the headings of 'Losses due to prolongation of work' and 'Material Escalation'. It is not in dispute that a secured advance of 95% of the cost of materials was given in terms of the contract which is to the following effect :

> "Secured Advance will be paid @ 95% of the cost of materials as a special case to get the work completed within 4(four) months as per latest price list of BCCL (copy enclosed), subject to submissions of Indemnity Bond on non-Judicial stamp paper of required value in the approved proforma of BCCL and also Insurance against fire, theft and damages etc. The secured advance will be paid only on the items on which it was payable in BCCL. The secured advance thus paid, will be recovered in five equal instalments from the subsequent running account bills or on the consumption of materials whichever is earlier."

The appellant does not dispute the same. It is also not in dispute that the appellant has not charged any interest in respect of the said advance. It is further not in dispute that cement @ Rs.51/- per bag, mild steel rounds @ Rs.5460/- per metric tonne and tor steel @ Rs.5810/-per metric tonne were supplied by the appellant. However, the claim relating to material escalation was confined to six articles which were allegedly not supplied by the appellant, namely, bricks, AC sheets, angles, doors, frames and shutters etc. So far as these items are concerned, in our opinion, the learned sole arbitrator should have taken into consideration the relevant provisions contained in the agreement as also the correspondences passed between the parties. The question as to whether the work could not be completed within the period of four months or the extension was sought for on one condition or the other was justifiable or not, which are relevant facts which were required to be taken into consideration by the arbitrator.

It is now well settled that the Arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract. In Associated Engineering vs. Govt. of A.P. [(1991) 4 SCC 93], this Court clearly held that the arbitrators cannot travel beyond the parameters of the contract. In M/s. Sudarsan Trading Co. v. The Govt. of Kerala [(1989) 2 SCC 38], this Court has observed that an award may be remitted or set aside on the ground that the arbitrator in making it had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has been determined outside the award, whatever might be said about it in the award by the Arbitrator. This Court further observed that an arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records. In paragraph 577 of Halsbury's laws of England 4th Edition Vol 2, the law has been stated in the following terms:

> "As an arbitrator (and subsequently any umpire) obtains his jurisdiction solely from the agreement for his appointment it is never open to him to reject any part of that agreement, or to disregard any limitations placed on his authority, as, for example, a limitation on his right to appoint an umpire. Nor can he confer jurisdiction upon

himself by deciding in his own favour some preliminary point upon which his jurisdiction depends. Nevertheless he is entitled to consider the question whether or not he has jurisdiction to act in order to satisfy himself that it is worth while to proceed, and an award which expressly or impliedly refers to such a finding is not thereby invalidated."

In 'Commercial Arbitration' by Mustill and Boyd at page 598 it is stated :

"in the first place, it could be argued that an arbitrator who is appointed in respect of a dispute arising under a contract expressly or impliedly governed by English law is authorised by the parties to pronounce upon the issues in accordance with that law, and in no other way. Any decision which proceeds, on a different basis lies outside the scope of the arbitrator's mandate to bind the parties. The award is accordingly void for want of jurisdiction, since the arbitrator has done something which the parties never authorised him to do. Secondly, it would be possible to draw support from a line of authority culminating in three important decisions during the past decade which approach the question whether a tribunal can effectively decide contrary to law by using the word 'jursdiction' in the first of the three senses indicated above. Whilst a reconciliation of this decision is a matter for a treatise on administrative law, there is no doubt that in relation to certain kinds of tribunal the law has recognised a distinction between errors of law which go to jurisdiction and those which do not, and that there is a difference between tribunal which has arrived at a decision by asking itself the wrong question, and one which has correctly identified the question, but has supplied the wrong answer in terms of law. Following up this line of authority, it could be said that an arbitrator empowered to decide the rights of the parties under a contract governed by English law, who asks himself not what England law has to say about those right, but what the rights ought to be if assessed in accordance with his own ideas of an extra-legal concept of justice, is either asking himself the wrong question, or not really asking a question at all."

In Alopi Parshad & Sons Ltd. v. Union of India [(1960) 2 SCR 793], this Court clearly held that if damages are awarded ignoring the expressed terms of the contract, the arbitrator would commit misconduct of the proceedings. Reference in this connection may also be made to Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath [(1968) 1 SCR 821]. In Heyman v. Darwin [1942 (1) All ER 327], it was held that arbitrator as a rule cannot clothe himself with the jurisdiction when it has none.

In paragraph 622 at pages 330-331 Halsbury's Laws of England (4th Edn) Vol2 it has been stated but misconduct occurs, for example; (1) If the arbitrator or umpire fails to decide all the matters which were referred to him.

(2) If by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference, for example, where the arbitrator construed the lease (wrongly), instead of determining the rental and the value of buildings to be maintained on the land; or where the award contains unauthorised directions to the parties, or where the arbitrator, has

power to direct what shall be done but his directions affect the interest of third persons; or where he decided to the parties rights, not under the contract upon which the arbitration had proceeded but under another contract;

(3) If the award is inconsistent, or is uncertain or ambiguous, or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt;"

In Associated Engineering (supra), it has been held:

"If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdiction error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award.

In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary.

The umpire, in our view, acted unreasonably, irrationally and capriciously in ignoring the limits and the clear provisions of the contract. In awarding claims which are totally opposed to the provisions of the contract to which he made specific reference in allowing them, he has misdirected and misconducted himself by manifestly disregarding the limits of his jurisdiction and the bounds of the contract from which he derived his authority thereby acting ultra fines compromissi."

In State of Orissa v. Dandasi Sahu [1988 (4) SCC 12], this Court observed:

"In our opinion, the evidence of such state of affairs should make this Court scrutinise the award carefully in each particular case but that does not make the court

declare that all high amounts of award would be bad per se."

In K.P. Poulose v. State of Kerala [(1975) 2 SCC 236], this Court observed that the case of legal misconduct would be complete if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring the very material documents which throw abundant light on the controversy to help a just and fair decision. In K.V. George v. The Secretary to Government, Water and Power Dept, Tri-vendrum [1989 (4) SCC 595], this Court held :-

> "In the instant case, the contract was terminated by the respondents on April 26, 1980, and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the Arbitrator by the Appellant. This having not been done the second claim petition before the Arbitrator raising the remaining disputes is clearly barred. With regard to the submission as to the applicability of the principles of res judicata as provided in Section 11 of the Code of Civil Procedure to arbitration case, it is to be noted that Section 41 of the Arbitration Act provides that the provisions of the Code of Civil Procedure will apply to the Arbitration proceedings. The provisions of res judicata are based on the principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well."

This Court referred to the decision in Satish Kumar v. Surinder Kumar [AIR 1970 SC 833] and held:

> "The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference..... This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced-between the parties has in fact, or can in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed."

In Union of India vs. Jain Associates and Another [(1994) 4 SCC 665], this Court upon following K.P. Poulose (supra) and Dandasi Sahu (supra) held :

> "8. The question, therefore, is whether the umpire had committed misconduct in making the award. It is seen that claims 11 and 12 for damages and loss of profit are founded on the breach of contract and Section 73 encompasses both the claims as damages. The umpire, it is held by the High Court, awarded mechanically, different

> amounts on each claim. He also totally failed to consider the counter-claim on the specious plea that it is belated counter- statement. These facts would show, not only the state of mind of the umpire but also non-application of the mind, as is demonstrable from the above facts. It would also show that he did not act in a judicious manner objectively and dispassionately which would go to the root of the competence of the arbitrator to decide the disputes."

In Sikkim Subba Associates Vs. State of Sikkim [(2001) 5 SCC 629], this Court held:

> "It would be difficult for the courts to either exhaustively define the word "misconduct" or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of arbitration, when on the face of the award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational that no reasonable or right-thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere."

In Maharashtra State Electricity Board Vs. Sterilite Industries (India) and Another [(2001) 8 SCC 482], it was observed:

> "In the light of this enunciation of law, we are of the view that unless the error of law sought to be pointed out by the learned counsel for the petitioners in the instant case is patent on the face of the award, neither the High Court nor this Court can interfere with the award. The exercise to be done by examining clause 14(ii) of the contract entered into between the parties, construing the same properly and thereafter applying the law to it to come to a conclusion one way or the other, is too involved a process and it cannot be stated that such an error is apparent or patent on the face of the award. Whether under the context of the terms and conditions of a contract, a stipulation in the form and nature of clause 14(ii) operates as a special provision to the exclusion of Section 73 of the Indian Contract Act is a matter of appreciation of facts in a case, and when the decision thereon is not patently absurd or wholly unreasonable, there is no scope for interference by courts dealing with a challenge to the award."

In W.B. State Warehousing Corporation and Another Vs. Sushil Kumar Kayan and Others [(2002) 5 SCC 679], this Court opined:

> "In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant can raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the

> contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction."

The High Court was, therefore, required to consider, the objections filed by the Appellant herein from the aforementioned points of view.

Bharat Coking Coal Ltd. Vs. L.K. Ahuja & Co. [(2001) 4 SCC 86], whereupon Mr. Sinha has placed strong reliance cannot be held to be applicable in this case as therein the court was concerned with hybrid award. The court was not in a position to ascertain as to whether escalation charges had been made against the materials supplied by the principal or also other materials.

It is no doubt true that the jurisdiction of this Court while considering the validity of an award is limited as has been stated by this Court in Ispat Engineering & Foundry Works (supra):

> "4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (Arosan Enterprises Ltd. v. Union of India ((1999) 9 SCC 449)) upon consideration of decisions in Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd. (AIR 1923 PC 66 : 1923 AC 480), Union of India v. Bungo Steel Furniture (P) Ltd. (AIR 1967 SC 1032 : (1967) 1 SCR 324), N. Chellappan v. Secy., Kerala SEB ((1975) 1 SCC
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> 289), Sudarsan Trading Co. v. Govt. of Kerala ((1989) 2 SCC 38), State of Rajasthan v. Puri Construction Co. Ltd. ((1994) 6 SCC 485) as also in Olympus Superstructures (P) Ltd. v.

Meena Vijay Khetan ((1999) 5 SCC 651) has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. This Court in Arosan Enterprises ((1999) 9 SCC 449) categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference would still be not available unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in Champsey Bhara (AIR 1923 PC 66 : 1923 AC 480) stand accepted and adopted by this Court in Bungo Steel Furniture (AIR 1967 SC 1032 : (1967) 1 SCR 324) to the effect that the court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

However, as noticed hereinbefore, this case stands on a different footing, namely, that the arbitrator while passing the award in relation to some items failed and/or neglected to take into consideration

the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct fact. Such an order would amount to misdirection in law. We are, therefore, of the opinion that the matter requires reconsideration. Having regard to the facts and circumstances of this case and particularly keeping in view the fact that the matter relates to pure interpretation of document which gives rise to question of law and instead and in place of remitting the matter to the named arbitrator, we would direct that the disputes in relation to Claim item Nos.3, 7 and 11 be referred to Hon'ble Mr. Justice D.N. Prasad, a retired Judge of the Jharkhand High Court on such terms and conditions as may be mutually agreed upon by the parties. The learned arbitrator is requested to consider the desirability of making his award as expeditiously as possible keeping in view the fact that the matter has been pending for a long time.

These appeals are allowed to the aforementioned extent. No costs.