

Gauhati High Court

Rup Jyoti Das vs Beron Saikia on 3 January, 2006

Equivalent citations: AIR 2006 Gau 125

Author: A Saikia

Bench: B S Reddy, A Saikia

JUDGMENT A.H. Saikia, J.

1. Issue in lis:

Whether the marriage solemnized between the appellant, Smt. Rupjyoti Das and the respondent Sri Beron Saikia under Hindu rites and rituals can be dissolved by a decree of divorce on being sought by the appellant on the ground of Cruelty and Desertion as embodied in Section 13(1)(ia) and (ib) respectively under the Hindu Marriage Act, 1955 (for short, 'the Act').

Tenets of Hindu Marriage and Divorce:

2. It is considered that the judgment would be benefited if purity and sanctity of the institution of marriage vis-a-vis scope of divorce as mandated under old Hindu Law is highlighted herein and the same is accordingly discussed.

(i) Ancient Textual concepts:

3. In Manusmriti, IX, P. 64-68, Manu declared that due performance of religious rites, faithfully worship, performance yagnas, highest conjugal happiness and heavenly bliss for ancestors and oneself all depend upon the wife. Hence wife is not just patni (wife) but dharnapatni (partner) in performance of duties, spiritual, religious and others inasmuch as among Hindus there are many yagnas i.e. religious and spiritual sacrifices, rites and ceremonies, which a man without wife cannot perform. Dictate of Vedas is that marriage is a union of 'bones with bones, flesh with flesh and skin with skin, the husband and wife as if they were one person'. In the Dharmashastras, the husband is referred to several designations as he is known as bhartri because he is to support his wife, he is known as pati because he is to protect her. Similarly the wife has several names. She is called jaya because one's ownself is begotten on her. She is grihini, the lady of the house, so sachie, wise counsellor; sakhi, confidante; she is the dearest disciple of her husband in his pursuits (Dr. Paras Dwan's Hindu Law, Ist Edition, 1995, p. 470). Manusmriti-V 147-54 has ordained that the husband must be obeyed as long as he lives and the wife should remain faithful to his memory after his death.

4. Hindu marriage is, thus, a sacrament. Hindus conceived their marriage not merely a sacrosanct and inviolable union, but also an eternal union-a union which subsists not merely during this life but for all lives to come. Derrett in his 'A Critique of Modern Hindu Law (1970) p. 287' candidly put "the intention of the sacrament is to make the husband and wife one, physically and psychically, for a secular and spiritual purpose, for this life and for after lives. It can, therefore, be easily said that it is a tie which once tied cannot be untied.

5. In view of the above historical background pertaining to the concepts of Hindu marriage, Divorce was unknown to general Hindu Law. Generally Hindu Law does not recognize divorce because marriage in Hindu Law is regarded as an indissoluble union of the husband and the wife extending to the next world. Although Hindu Law does not contemplate divorce, yet it has been held that where it is recognized as an established custom, it would have the force of law. Manu succinctly declared "Let mutual fidelity continue till death; this in brief may be understood to be the highest Dharma of man and wife". Duty of a wife continues even after her death. Basically the custom of divorce existed among the lower caste. Only in a very few high castes, divorce by custom has been available. The importance of customary divorce is accepted even after the reform and codification of Hindu Law of Marriage. In some cases, marriage can be dissolved by mutual consent. Under Kautilya Arthasasthra, marriage might be dissolved by mutual consent in case of unapproved form of marriage.

6. However, in India in the later part of the 19th century, divorce was introduced by two sets of enactment for two classes of persons; (i) those who converted to Christianity and consequent thereof their spouses refused to live with them through the Native Converts Marriage Dissolution Act, 1866 and (ii) as per Indian Divorce Act, 1869 those who were Christians and performed Christian marriages. But divorce was not yet available in high caste Hindus some of whom, under the impact of western education and contract, had enlightened views and preached social reforms, including enactment of divorce laws.

Prevailing legal position:

7. After independence, the Hindu Marriage Act, 1955 was enacted introduced vital and dynamic changes in the Hindu law of Marriage and Divorce. The clear provisions for divorce in certain circumstances have been laid down in the Act. The subject is very much dealt within Sections 13, 14 and 15 of the Act By 1976 Amendment of the Act, Section 13(B) has been inserted permitting divorce by mutual consent. Section 13 prescribes the circumstances in which right to divorce accrues. This Section gives husband and wife both the right to petition to the Court for divorce on any of the grounds mentioned in that Section. Section 14 limits the right to obtain a divorce by laying it down that a petition for divorce may not be made within one year from the date of marriage according to the latest Amendment Act, 1976, when Section 15 lays down the limitations of right of divorce person to marry again.

8. Divorce can be obtained in any of the grounds enumerated under Section 13 of the Act. Amongst those, cruelty and desertion may be referred to, being relevant for adjudication of the case in hand. Section 13(1)(ia) and (ib) which prescribe the ground of cruelty and desertion, read as under:

13. Divorce (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the

presentation of the petitioner; or....

9. Since the marital relationship between the husband and wife should not be tinkered lightly, the Act provides for reconciliation. Sub-sections (2) and (3) of Section 23 contemplate such reconciliation. Section 23(2) requires that it shall be the duty of the Court in the first instance, before proceeding to grant any relief under this Act, to make every endeavour to bring about a reconciliation between the parties when petition of divorce is made except on the ground of change of religion (Section 13(1)(ii)) or unsoundness of mind (Section 13(1)(iii)), or leprosy (13(1)(iv)), or venereal disease (13(1)(v)), or renunciation of the world (13(1)(vi)) and/or presumption of death (13(1)(vii)). In other words, in ease of seeking divorce on the grounds of cruelty and desertion, it is imperative on the part of the Court to make an attempt for reconciliation amongst the parties to save the marriage so as to help the parties to resolve amicably aftermath-divorce problems, for example; custody, maintenance and education of the children, financial support to the needy spouse and settlement of property with mini-mum possible anxiety to the parties and with maximum fairness and speed. Section 23(3) stipulates that the divorce proceeding may be adjourned for a reasonable period not exceeding fifteen days, if the parties so desire or if the Court thinks it just and proper to do so only for the purpose of aiding the Court in bringing about such reconciliation.

Brief facts outlined:

10. In the backdrop of Hindu doctrine of marriage and divorce both past and present above discussed, we now proceed to narrate the facts of the Instant case in a nutshell. The appellant filed a petition under Section 13(1)(ia) and 13(1)(ib) of the Act before the learned Principal Judge, Family Court, Kamrup at Guwahati seeking dissolution of marriage with the respondent-husband by a decree of divorce stating inter alia that she was married to the respondent and their marriage was solemnized before the Marriage Registrar, Guwahati and then on 9-2-2000 at Sukleswar Temple, Guwahati as per Hindu customs and rites since both the parties are Hindus and governed by prevailing Hindu Law. Prior to solemnization of their marriage, the appellant gave birth to a male child through respondent on 8-1-2000 whose present age is about 4 years. The birth of the said male child has also been admitted by the respondent in his deposition. At the beginning of the marital life, the relation between the appellant and the respondent was quite happy and peaceful and such relation continued till mid part of March, 2001. Gradually afterward the appellant noticed that the respondent started day by day behaving indifferent in discharging his marital rights and duties towards her and also showed negligence in all respects. On being asked by the appellant about such behaviour, the respondent told her that he did not intend to stay with her. That apart, the respondent even became suspicious about the conduct of the appellant in day to day affairs. He used to doubt the appellant whenever she talked to her near relatives and in that process he created obstacles when she used to visit her home. Days being passed, the appellant became the doll of torture and humiliation as because the respondent used to return home at late night under influence of liquor, and when the appellant protested against such things the respondent became angry and used to thunder upon her by using filthy language not only to the appellant but also to her parents. Being unable to tolerate such torture, the appellant in the middle part of May, 2001 left the house of the respondent and since then she has been taking shelter in her parental house with the minor child.

11. The petition of divorce was contested by the respondent-husband by filing written statement denying all the averments and allegations made therein. It was pleaded in the written statement that immediately after the solemnization of the social marriage, the respondent along with the appellant-wife used to reside in his parents' house for very short period. However she developed turbulent atmosphere with his parents. She totally disregarded and disrespected parents of her husband with indifferent behaviour. To pacify the atmosphere and also to keep the appellant happy so as to end bitter relationship between the appellant and her in-laws, the respondent took a rented house in the area of Beltola at Guwahati. After several months later, he took another rented house in Sixmile area in Guwahati.

12. In the month of April/May, 2001, the respondent took the step-father of the appellant to Hyderabad of his treatment of kidney ailment and during that period when the respondent was at Hyderabad, the appellant left her husband's rented house without informing anybody to stay with her mother.

13. While returning back from Hyderabad, the respondent requested the appellant-wife to come back and stay with him, she simply refused. Again after couple of days, respondent went to appellant and requested her to join him as he had been facing difficulties to manage his house as well as doing his outside work to earn his livelihood. Surprisingly the appellant not only refused to come but picked up quarrel without any reason and informed him that she would stay with her mother as long as she wished. It was also stated in the written statement that while she was at her mother's house, the respondent had the information that she used to mix-up with other persons, however, he did not take the matter seriously. Ironically her maid servant one day informed him that the appellant had affairs with one Rahul Bordoloi. When he enquired about such facts, the entire family of the appellant including herself were silent and did not deny the relationship of the appellant with Mr. Rahul Bordoloi.

Proceeding and Decision of the Trial Court:

14. On consideration of the pleadings of the parties, the learned Principal Judge, Family Court, Kamrup at Guwahati framed as many as four issues which are as follows:

1. Whether the respondent (Sri Beron Salkia) after the solemnisation of marriage treated the petitioner (Sri Rupjyoti Das alias Saikia) with cruelty?
2. Whether the respondent (Sri Beron Saikia) has deserted the petitioner for a continuous period of not less than 2 years immediately proceeding the presentation of this petition?
3. Whether petitioner (Sri Rupjyoti Das alias Saikia) is entitled to get a decree of divorce as prayed for ?
4. To what relief/reliefs, the parties are entitled?

15. During trial, the appellant as petitioner examined as many as three witnesses including herself when the respondent adduced four witnesses including himself.

16. Upon hearing the learned Counsel for the parties and on appreciation of the deposition of the witnesses including the relevant materials on record, the learned Judge decided the issue Nos. 1 and 2 which pertain cruelty and desertion respectively, against the appellant holding that the appellant's allegations against the respondent were without any substance and were not sufficient to constitute the ingredients of cruelty and desertion and with such findings recorded therein, the divorce petition was dismissed by the learned Judge by his judgment and order dated 8-3-2004 which is now put under challenge before this Court by the appellant-wife in this matrimonial appeal.

Effort on reconciliation:

17. When the matter was taken up for hearing, our attention was invited to order dated 1-12-2005 by which parties were directed to appear in person before this Court on 20-12-2005 so that an attempt for reconciliation could be made on that day. This Court was informed that both the parties were present in person before the Court on the day when the matter was posted for hearing and accordingly the Court made an attempt for reconciliation in terms of Section 23(2) of the Act. Both the parties were heard separately in person in the chamber of Hon'ble the Chief Justice and this Court tried to persuade and impress upon the spouses to save the sanctity of marriage between them avoiding final separation keeping the basic philosophy of Hindu marriage, as noticed herein, in view and also that they should lead an ideal married life as the same was always good not in individual capacity but also for the society and they should not break the tie especially when their only innocent minor child would suffer most in the wedding struggle between themselves. However, the conciliation process failed despite Court's utmost persuasion. Parties being educated particularly the appellant who had a convent education background and studied in Bangalore, was determined and unbending not to continue the conjugal relation asserting that after living separately for last more than 4 years since May, 2001 she was maintaining herself along with her child in a comfortable and 'well-to-do' manner as she got her due share from her wealthy mother who was having both movable and immovable properties within Guwahati City. Although the respondent wanted to take his wife-appellant back to restart his martial tie, he admitted that he was earning his livelihood by running a business of Tent-house.

18. Due to collapse of reconciliation, eventually the matter was taken up for full-dressed hearing.

Deliberations on behalf of the rival parties:

19. Heard Mr. M. U. Mahmud, learned Counsel for the appellant as well as Mr. D. R. Gogoi, learned Counsel representing the respondent.

20. Mr. Mahmud, learned Counsel for the appellant, assailing the impugned judgment, contended that the learned Principal Judge lost sight of the ingredients of cruelty as well as desertion which were duly established by the appellant seeking dissolution of her marriage with the respondent. Even the learned Judge did not appreciate the evidence so adduced by the parties in its proper

perspective. The element of suspicion pointed towards the appellant by the respondent questioning about her character which manifestly constitute the ingredients of mental cruelty was not at all considered by the learned Judge. At the same breath, the ground of desertion also was brushed aside ignoring the material facts being supported by the evidence to the effect that since May, 2001 the respondent did not care to maintain and continue the marital relationship with the appellant while she was forced and compelled to stay at her parents house due to unbearable torture and inhumane assault inflicted on her by the respondent both physically and mentally.

21. Supporting the impugned findings recorded by the learned Judge in dismissing the divorce petition, Mr. Gogoi, learned Counsel for the respondent argued that the appellant absolutely failed on all fronts to prove her case for cruelty under issue No. 1 as her own witnesses did not even whispered as regards the allegations of cruelty so complained to have been meted out against her. Neither the plea of physical nor mental cruelty was established on overall scrutiny of the facts and circumstances of the case. According to him, the learned Judge rightly held that had there been any cruelty inflicted upon her, she could have easily informed about the same to her parents or near relatives when she left initially from the matrimonial house for some days and later on from 3 different rented houses. Drawing attention of this Court to the ground of desertion, it was contended by the learned Counsel for the respondent that from the pleadings filed by the appellant itself it was candidly evident that it was the appellant only who left the respondent's house and started residing separately, without indicating any reasonable cause, from the middle part of May, 2001 in her parental house and despite repeated requests made by the respondent, she was not incline to reside with respondent in her matrimonial house. That piece of fact situation clearly reflected that the respondent did not desert her. In consideration of such circumstances, the trial Court rightly dismissed the issue No. 2 holding that the appellant lived with the respondent till May, 2001 and the petition for divorce was filed on 1-6-2002 before completing the period of two years immediately preceding the presentation of the petition for which ground of desertion was negated by the Court.

Reasonings supported by case laws:

22. Having given our thoughtful consideration to the arguments so advanced by the learned Counsel appearing for the rival parties and on meticulous scanning of the pleadings exchanged by and between the parties along with the deposition of the witnesses so examined by both of them, this Court finds that though in the deposition of the witnesses examined on behalf of the appellant nothing was brought out in support of the accusation of suspicion concerning the character of the appellant to form the ingredients of the cruelty i.e. moral cruelty, the averments made in the written statement in paragraph 6 clearly depicts the story of doubting the appellant's loyalty and fidelity to the respondent.

23. For proper resolution of the issue as regards mental/moral cruelty, the relevant portion of paragraph 6 of the written statement is extracted as under:

...Though she (petitioner) mixed up with the other persons your opposite party did not take the matter seriously otherwise because your opposite party at no stretch of imagination could believe that, his wife would do anything which might taint her character to detriment her reputation and

also of the opposite party. But, in the month of August, 2001 one evening the petitioner went to his (opposite party) father's house and enquired about the maid servant namely Putuli as to whether she came there (opposite party's father's house) and after getting negative reply from her father-in-law, she went out. Next day your opposite party came to know that, the maid servant (Putuli) provided by him fled away and took shelter in the house of your opposite party's relative which is situated near by the petitioner's house. Your opposite party and his father went to their relative's house and asks the said maid servant, as to why she fled away. In reply the maid servant told that last afternoon the wife of your opposite party (petitioner) kept herself with one Mr. Rahul Bordoloi inside her bed room by locking the door from inside. When the maid servant namely (Putuli) saw the incident and discussed over the matter with another servant of the petitioner's mother and the matter went to the ears of the petitioner and her mother, then both of them assaulted and warned her with dire consequences if ever she discloses the matter to anybody specially to your opposite party. After that your opposite party went to his wife's house with the maid servant and asked his wife about the matter in front of her mother, brother and other relatives, but they were silent and did not deny the incident happened with Mr. Rahul Bordoloi. After that your opposite party took the above incident very seriously and discussed the matter with his father mother and close relatives in his house. During the time of discussion maid servant (Paran Khan) of the opposite party told that he heard about the incident of his wife with Mr. Rahul Bordoloi and also disclosed that once he also saw your opposite party's wife with Mr. Rahul Bordoloi in the Udeshna Cinema hall, while he also went to witness a Assamese feature film 'Nayak' but, at that time he was scared to tell the matter to your opposite party...

24. This averment would clearly reveal that the respondent put aspersion questioning her character as regards faithfulness as an ideal Hindu wife and this aspect of factum is, in our view, sufficient to form the ingredients to constitute cruelty of moral/ mental in nature. Even the witnesses namely Sarat Ch. Saikia, father of the respondent, (DW-2) and Audit Haque (DW-4) deposed respectively as follows:

...I suspect that the 1st party is having an affair with someone called Rahul. But I do not know who is Rahul..." (D.W.2).

I know the parties. They are husband and wife. Around 6.30 p.m. one day some four months ago, I met the 1st party at the GNRC hospital. When I asked her why she had gone there, she said that it was because of her father-in-law's illness. Father-in-law means Rahul's father. I often see the 1st party with Rahul. I do not remember the day or date when I saw her with Rahul" (D.W. 4).

25. In view of such deposition as well as averments made in the written statement, we find, without any hesitation, that the appellant was impelled to suffer mental cruelty due to such accusation affecting her character exposing her to be unfaithful and disloyal. Insofar as the ground of desertion is concerned, from the conjoint reading of the petition filed by the appellant and the written statement submitted by the respondent, it would appear that no specific case to substantiate the plea of desertion has been made out. The pleadings abundantly reflect that the petitioner left the house of the husband in the mid part of May, 2001 and the petition for divorce was filed on 1-6-2002 which was apparently before completion of two years immediately preceding the

presentation of the petition as required under Section 13(1)(ib) of the Act, noticed already hereinabove, which provides that desertion of the petitioner (appellant) is to be for a continuous period of not less than 2 years immediately preceding the presentation of the petitioner. Accordingly, we are in full agreement with the findings of the learned Judge that the ground of desertion was not available in the case in hand in favour of the petitioner. However, it is admitted position that since May, 2001 both the appellant and respondent have been living separately without having any direct or indirect relation essential for maintenance of the sacredness and holiness of the relationship of husband and wife. In all practical purposes, it appears to us that the marriage becomes dead and the same has irretrievably broken down.

26. The Supreme Court in a case of *Chanderkala Trevedi (Smt.) v. Dr. S.P. Trevedi* held in paragraph 2 that on consideration of the facts and circumstances of the case, the marriage appeared to be practically dead as from cruelty alleged by the husband it turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife. In the said case, the appellant was married to respondent-husband while he was doing internship at the J.J. Hospital, Bombay and from their wedlock a daughter was born. Differences which appeared to have arisen after nine years of their marriage due to alleged intimacy of the husband with another lady doctor which ultimately led to filing of the petition for divorce by the husband on the ground of cruelty. When written statement was filed and allegations of adultery were made against the husband, he set up a case of undesirable association of his wife with young boys. Unfortunately for the appellant even the matrimonial Court which dismissed the petition, found that her behaviour was not of a Hindu married woman. The Apex Court observed that whether allegation of husband that she was in the habit of associating with young boys and the findings recorded by the three Courts were correct or not but what was certain that once such allegations were made by the husband and wife as was made in this case then it was obvious that the marriage of the two could not in any circumstances be continued any further.

27. In a recent case of *Durga Prasanna Tripathy v. Arundhati Tripathy* the Apex Court, while dealing with a divorce case of a Hindu couple on the ground of both cruelty and desertion, held in paragraphs 21, 28 and 29 that desertion by the wife and cruelty meted out by the wife to her husband were proved and since both parties were living separately almost for 14 years an endeavour to effect reconciliation between them failed due to insistence of the wife to remain separate from her in-laws, there was no possibility of resuming the normal marital life between them and thus the marriage had irretrievably broken down and the divorce granted by family Court was affirmed. In arriving at the aforesaid decision the Apex Court relied on and discussed a plethora of judicial pronouncements of the same Court including *Chanderkala Trevedi (supra)* and *Romesh Chander v. Savitry*.

28. In *Romesh Chander's* case (*supra*), the Supreme Court by exercising its power under Article 142 of the Constitution in doing complete justice directed the dissolution of marriage between the parties though both the Courts below including High Court found that the allegation of cruelty, being the basis of the appeal, was not proved.

29. However, emphasis to maintain the piety of Hindu marriage has all along been there. In this regard, it would be pertinent to refer herein another important decision of the Supreme Court, *Hirachand Srinivas Managaonkar v. Sunanda*. In paragraph 16, the Court held that it had to be kept in mind that the relationship between spouses was a matter concerning human life which did not run on dotted lines or charted course laid down by statute. Before granting the prayer of the petitioner to permanently snap the relationship between the parties to the marriage, it had to be kept in mind that every attempt should be made to maintain the sanctity of the relationship which was important not only for the individuals or their children but also for the society. It was further categorically observed that whether relief of dissolution of marriage by a decree of divorce was to be granted or not always depended on the facts and circumstances of the case.

30. In the present case, as alluded earlier, an attempt was made to conserve and protect the sanctity of the marital life of the parties by bringing about reconciliation but unfortunately this Court was unsuccessful in effecting such effort especially due to arrogance of the appellant who did not desire at all to honour conjugal tie as, according to her, she crossed the point of no return. A workable solution, in our opinion, was certainly impossible. The parties could not, at this stage, reconcile themselves and live together by adopting 'forget and forgive' principle.

31. It is to be mentioned that in the process of reconciliation the Court faces difficulty as in the instant case where happy conclusion could not be brought in. Had the effort succeeded, the Court and counsel both would have derived spiritual fulfillment and get satisfaction.

32. In a case of *V.K. Gupta v. Nirmala Gupta* the Supreme Court was successful in a reconciliation process and the Court categorically in paragraphs 1, 2, 4, 5 and 6 observed as follows:

It is fundamental that reconciliation of ruptured marriage is the first essay of the Judge aided by counsel in this noble adventure. The sanctity of marriage is, in essence, the foundation of civilization and therefore, Court and counsel owe a duty to society to strain to the utmost to repair the snapped relations between the parties. This task becomes insistent when a innocent offspring of the wedding struggles in between the disputed parents.

...At the end of this conciliatory journey it is possible to reach a happy destination resulting in the restoration of the conflict between the parties eventual restoration of the conjugal home.

...On our gentle persuasion, they may move to live together, and we may be glad that story ends happily.

...We should impress the spouses that an ideal marriage, life is always good and they should not break the tie...judicial monitoring is a salutary prophylactic.

Since the Court could not effect reconciliation as required under the law as well as in terms of the above cited cases, the Court has no alternative but to decide the matter on merit.

Findings:

33. In the instant case, on thorough scrutiny of the materials available on record and in view of the above reasonings, observations and discussions, it appears to us that since the accusation of association of the appellant with one Rahul Bordoloi was directly made casting doubt in her behaviour which amounts to cruelty and the parties have also been residing separately for more than four years, it is a fit case warranting interference with the impugned judgment and order and as such it would be in the interest of justice to grant the relief of dissolution of marriage by a decree of divorce.

Comment:

34. Before parting with this case, we would like to put on record the following:

We are pained to grant the dissolution of marriage of the parties by way of a decree of divorce as marriage is divine and is fixed in heaven and the concerned man and woman in this earth are only ordained to implement the same. Admittedly, in the case in hand, the appellant delivered a male child of the respondent prior to their marriage and in order to maintain the sanctity of the relationship of the man and wife, the parties herein were wedlocked following Hindu rites and rituals, when marriage, according to ancient Hindu law, being a sacrosanct and the word 'divorce' is being absolutely alien. Despite love and affection which has been emanated by the conduct of the parties before their marriage, it was really sad that the marriage could not be maintained and marital knot was to be dislodged. However we would like to emphasise that although in the present case reconciliation process failed, endeavour is always a path finder for the Courts including the subordinate Courts in dealing with the family or like disputes. It is commendable to the Bar as well as the judiciary inasmuch as it is true function of both Bench and Bar to unite the parties driven as under.

Conclusion:

35. Consequently the appeal stands allowed and the relief of dissolution of marriage is granted in favour of the petitioner/ appellant by decree of divorce.

36. In the result the appeal succeeds and stands allowed. However, there shall be no order as to costs.