

B. N. Nagarajan and Ors.

Vs

State of Mysore and Ors.

Civil Appeals Nos. 430-461 of 1964

(CJI P. B. Gajendragadkar, M. Hidayatullah, K. N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

01.03.1966

JUDGMENT

SIKRI, J.

These appeals, by special leave, are directed against the judgment of the High Court of Mysore at Bangalore in 16 Writ Petitions filed before it, quashing the notification of the Government bearing No. P.W. 10 SAG 59 dated October 31, 1961, and the appointments made thereunder of 88 Assistant Engineers in the Public Works Department of the State Government.

To appreciate the arguments addressed to us on behalf of the appellants and the respondents, it is necessary to give, in chronological order, the events, leading up to the filing of the above writ petitions and their significance. On December 12, 1957, the Governor of Mysore made rules called the Mysore Public Service Commission (Functions) Rules, 1957, hereinafter called the Functions Rules, relating to the functions of the Mysore Public Service Commission. Rule 3 of these rules provides for recruitment by examination and r. 4 with which we are primarily concerned provides for recruitment by selection. Rule 4 is as follows :

"When recruitment to a service or post is to be made by selection, and consultation with the Commission is required, the Commission shall

- (1) advise the Government in regard to the conditions of eligibility of candidates;
- (2) after the rules to be made have been approved by Government and a requisition for recruitment is received, invite applications from intending candidates after giving due publicity to conditions of eligibility, nature of competition, number of vacancies to be filled where possible, and any other relevant material;
- (3) consider all applications received and when necessary interview such candidates as fulfill the prescribed conditions and whom it considers most suitable for appointment;

Note. - Nothing contained herein shall preclude the Commission from considering the case of any candidate possessing the prescribed qualifications brought to its notice by Government, even if such a candidate has not applied in response to the advertisement of the Government.

- (4) forward to the Appointing Authority a list consisting of such number as it may

fix, of the candidates whom the commission considers most suitable for appointment in order of preference;

Provided that the Commission may invite Government to nominate an Officer to represent the Service or the Department for whom recruitment is being made, to be present at the interview referred to in clause (3) to assist the Commission in its work of selection."

We may here dispose of the point whether rules are executive rules or statutory rules made under art. 309 of the Constitution. The High Court held that "there can be little doubt that to the extent the Rules deal with the topic of regulating recruitment to Civil Services under the State, the source of the power could only be the proviso to art. 309 of the Constitution." In our opinion, these rules are not rules made under art. 309. First, the rules do not expressly say so, and secondly, the rules are dealing with the functions of the commission rather than with laying down the rules regarding recruitment to services or posts. Under art. 320 (3) of the Constitution, it is the duty of the Government to consult and the duty of the Public Service Commission to advise, inter alia "on the principles to be followed in making appointments to civil services and posts... and on the suitability of candidates for such appointments, promotions or transfers." Sub-rule (1) of r. 4 clearly provides the same thing as does art. 320(3)(b) and the other sub-rules are really administrative arrangements apparently arrived at between the Commission and the Government as to how the Government and the Public Service Commission will take steps to recruit persons for the State Services or posts.

To resume the narrative, on February 10, 1958, the Governor of Mysore, in exercise, of the powers conferred by the proviso to art. 309 of the Constitution, made the Mysore State Civil Services (General Recruitment) Rules, 1957, hereinafter called the General Recruitment Rules. There is no dispute that these are statutory rules and in so far as they direct anything to be done in a particular way, the Government would have to comply with the directions. Rule 3 of these Rules, on which reliance has been placed by the learned counsel for the respondents to urge that the Government cannot recruit Assistant Engineers without framing rules, is in the following terms :

"Method of recruitment. - Recruitment to the State Civil Service shall be made by competitive examination or by promotion. The method of recruitment and qualifications for each State Civil Service shall be as set forth in the rules of recruitment of such service specially made in that behalf."

It would be convenient to deal with this argument at this stage. Mr. Nambiar contends that the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf" clearly show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to art. 309 to make rules of recruitment, etc., before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in *Ram Jawaya Kapur v. The State of Punjab* ((1955) 2 S.C.R. 225) that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these law. We see nothing in the terms of art. 309 of the Constitution which abridges the power of the executive to act under art. 162 of the Constitution without a law. It is hardly necessary to

mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under art. 162 of the Constitution ignore or act contrary to that rule or act.

In the background of this position we are unable to interpret r. 3 of the General Recruitment Rules as suspending the executive power of the State till rules of recruitment of a service are specially made in that behalf. Rules usually take a long time to make; various authorities have to be consulted and it could not have been the intention of r. 3 of the General Recruitment Rules, 1957, to halt the working of the public departments till rules were framed. This Court considered a similar point in *T. Cajee v. U. Jormanik Siem* ((1961) 1 S.C.R. 750, 762-764) and arrived at a similar conclusion. The following observations of Wanchoo, J., who delivered the judgment on behalf of the majority, bring out clearly the fallacy in Mr. Nambiar's argument :

"The High Court has taken the view that the appointment and succession of a Siem was not an administrative function of the District Council and that the District Council could only act by making a law with the assent of the Governor so far as the appointment and removal of a Siem was concerned. In this connection, the High Court relied on para 3(1)(g) of the Schedule, which lays down that the District Council shall have the power to make laws with respect to the appointment and succession of Chiefs and Headmen. The High Court seems to be of the view that until such a law is made there could be no power of appointment of a Chief or Siem like the respondent and in consequence there would be no power of removal either. With respect, it seems to us that the High Court has read far more into para 3(1)(g) than is justified by its language. Paragraph 3(1) is in fact something like a legislative list and enumerates the subjects on which the District Council is competent to make laws. Under para 3(1)(g) it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and this would naturally include the power to remove them. But it does not follow from this that the appointment or removal of a Chief is a legislative act or that no appointment or removal can be made without there being first a law to that effect."

"Further once the power of appointment falls within the power of administration of the district the power of removal of officers and others so appointed would necessarily follow as a corollary. The Constitution could not have intended that all administration in the autonomous districts should come to a stop till the Governor made regulations under para 19(1)(b) or till the District Council passed laws under para 3(1)(g). The Governor in the first instance and the District Councils thereafter were vested with the power to carry on the administration and that in our opinion included the power to appoint and remove the personnel for carrying on administration. Doubtless when regulations are made under para 19(1)(b) or laws are passed under para 3(1) with respect to the appointment or removal of the personnel of the administration, the administrative authorities would be bound to follow the regulations so made or the laws so passed. But from this it does not follow that till the regulations were made or the law were passed, there could be no appointment or dismissal of the personnel of the administration. In our opinion, the authorities concerned would at all relevant times have the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule. The view therefore taken by the High Court that there could be no appointment or removal by the District Council without a law having been first

passed in that behalf under para 3(1)(g) cannot be sustained.

Mr. Nambiar in this connection also relied on arts. 15 and 16 of the Constitution. He urged that if the executive is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to art. 309, arts. 15 and 16 would be breached because the appointments in that case would be arbitrary and dependent on the mere whim of the executive. We are unable to hold that arts. 15 and 16 in any way lead us to this conclusion. If the Government advertises the appointments and the conditions of service of the appointments and makes a selection after advertisement there would be no breach of art. 15 or art. 16 of the Constitution because everybody who is eligible in view of the conditions of service would be entitled to be considered by the State.

In conclusion we hold that r. 3 of the General Recruitment Rules, 1957, did not prevent the State from exercising its executive power of appointing Assistant Engineers and determining their conditions of service by executive order.

Mr. Nambiar had at one stage contended that rules existing in the constituent parts of the new State of Mysore would be available for recruitment as they had been continued under the States Reorganisation Act, but it seems to us that these rules would not be available for recruitment purposes because the Government would be recruiting Assistant Engineers for the whole State and not for each of the constituent parts of the State. We may clarify that these remarks only deal with recruitment rules.

This brings us to the next event, and that is Notification No. E. 2666-58-9PSC dated October 1, 1958, issued by the Mysore Public Service Commission inviting applications in the prescribed form from qualified Indian citizens for recruitment of 40 Probationary Assistant Engineers in Executive Cadre of the Mysore Public Works Department. The Notification prescribes the qualifications, pay, age limit, other conditions for eligibility, fee payable and the particulars of the candidates required to be furnished. On March 4, 1959, the Governor of Mysore in exercise of the powers conferred by the proviso to art. 309 prescribed the maximum age limits for direct recruitment of graduates in Engineering for the posts of Supervisors and Assistant Engineers in the Mysore Public Works Department. These age limits were to prevail until the rules of recruitment specially applicable to Mysore Public Works Department were promulgated. The Maximum age limits were made retrospective. It was further provided that "anything done or any action taken by the Public Service Commission or other authority in respect of recruitment of Probationary Assistant Engineers between September 1, 1958 and the date of this Notification shall be deemed to have been done or taken under the provisions of this Notification."

On the same date the Secretary to the Government of Mysore, Public Works Department, Bangalore, wrote to the Secretary, Public Service Commission, Bangalore, stating inter alia, that;

"The Public Service Commission has already taken action to recruit forty probationers in the Public Works Department of being absorbed as Assistant Engineers in due course after satisfactory completion of their training. I am to request the Public Service Commission to take action straightway to invite applications and send a list of 80 candidates in all for appointment as Probationers in the Department."

This clearly shows that the Government was aware of the action taken by the Public Service

Commission in issuing the Notification dated October 1, 1958.

After receipt of this letter, the Public Service Commission issued a Notification on May 4, 1959, inviting applications "from qualified Indian citizens of all classes for recruitment of 80 Probationary Assistant Engineers in the Executive Cadre of the Mysore Public Works Department, including the 40 posts already advertised in this office Notification No. E-3666-58 P.S.C. dated October 1, 1958". This Notification laid down the qualifications, pay during the period of probation, age limits etc. The age limits prescribed were the same as in the State Government Notification dated March 4, 1959. The Public Service Commission Notification further included the usual particulars required to be furnished by the candidates. On March 1, 1960, the Governor issued a Notification containing Order No. GAD 7 ORR 60 dated March 1, 1960, ordering "that for direct recruitment to appointments and posts in the services of the State, reservation for Scheduled Caste and Scheduled Tribes shall be 15% and 3%. The reservation for other backward classes shall be 25%. The rest of the appointments and posts shall be filled up on the basis of merit and shall be open to all classes."

The Public Service Commission then issued a Notification dated April 1, 1960, inviting applications for filling up of various posts in the several departments of Government of Mysore, including the 80 Probationary Assistant Engineers in the Public Works Department. These were included in Part 'A' of the Notification, and it was provided inter alia in para 22 of the Notification as follows :

"22. IMPORTANT NOTE :

(i) The vacancies detailed in Part 'A' of the Statement were previously advertised in this office notifications noted in column 8 against each item and such of the candidates who have already applied for the said vacancy/vacancies in response to the previous notification need not apply again. But they may furnish additional information, if any, if they so desire.

(ii) Applications already received in this office for the vacancies under Part 'A' will be considered on the basis of the revised classification issued by Government in their Order No. GAD 7 ORR 60, dated the 1st March, 1960.

(iii) The qualifications, period of experience/training or service, the minimum and maximum age limits and all other requirements to be satisfied by the candidates for all the vacancies under Part 'A' in the statement shall be determined as on the dates noted against each item of vacancy/vacancies in column 9 of the statement.

(iv) Such of the candidates who do not satisfy these conditions as on the dates noted in column 9 of the Statement in respect of Part 'A' vacancies, will not be eligible for the posts."

Column 8 of the statement mentions the previous notifications dated May 4, 1959 and October 1, 1958, and column 9 mentions the date "June 8, 1959". Column 5 prescribed the qualifications as follows :

"A degree in Engineering (Civil or Mechanical) or an equivalent Examination. In addition candidates must have also either undergone practical training or rendered a service in the Technical Cadre of the P.W.D. for a minimum of 6 months. (A certificate to that effect issued by the Principal of the college or superior officer under whom they have undergone training or are working must accompany the

application."

The maximum age limits were prescribed as under :

"33 years for Scheduled caste and scheduled tribes, 31 years for others, 35 years in the case of government servants holding substantive appointments or having continuous government service for a period of not less than 3 years."

In October 1960 the Mysore Public Service Commission interviewed the candidates and on November 2, 1960, the Commission sent to the Government a list of 80 candidates selected by them. On December 3, 1960, the Government of Mysore sanctioned the establishment of the State Service Cadre in respect of Mysore Public Works Engineering Department Service. On the same date, in exercise of the powers conferred by the proviso to art. 309, the Governor of Mysore made the rules called the Mysore Public Works Engineering Department Service (Recruitment) Rules, 1960. It prescribed, in respect of each category of posts specified in column 1 of the Schedule, methods of recruitment and the minimum qualifications and the period of probation, if any. For Assistant Engineers, the method of recruitment prescribed was 40 per cent by direct recruitment by the Public Service Commission after interview and oral test; 50 per cent by promotion from the cadre of Junior Engineers, and 10 per cent by promotion from the cadre of Supervisors. It prescribed the minimum qualifications and age as follows :

"For Direct Recruitment

Age - Not above 31 years. A pass in Civil or Mechanical Engineering or a Certificate or Diploma from the Institute of Engineers that the candidate has passed Parts A.B. of the Associate Membership of the Institute of Engineers or equivalent qualification with practical training for not less than 6 months during or after the course."

One G. Govindaraju, Junior Engineer, filed a petition under art. 226 of the Constitution for a mandamus to the State Government prohibiting the appointment of 80 persons selected by the Public Service Commission. It was contended by him that on December 3, 1960, under the proviso to art. 309 of the Constitution the Governor had made rules regulating the recruitment to the posts of Assistant Engineers, and that under those rules, forty per cent of the appointments alone could be made by the Public Service Commission after an interview and an oral test. Various other arguments were urged before the High Court. The Advocate-General stated before the High Court on behalf of the State Government that the list having been prepared by the Public Service Commission in response to the request made by the State Government in the exercise of its executive power which it possessed under art. 162 of the Constitution, the State Government was not bound to make appointments only in accordance with that list, and that it was open to the State Government not to appoint any of those persons or to appoint only those persons who, in its opinion, should be appointed amongst them. The High Court felt that this statement made before it by the Advocate-General rendered unnecessary any investigation into the contention urged on behalf of the petitioner at that stage. The High Court further observed as follows :

"It would be for the State Government before it takes a decision on that question, to consider the effect of Rule 4(2) of the Public Service Commission (Function) Rules, made on December 10, 1957, Rules 3 and 4 of the Mysore State Civil Services General Recruitment Rules, which came into force on February 10, 1958, and of the Mysore Public Works Engineering Department Service (Recruitment) Rules, which

came into force on December 3, 1960, and to further consider whether in the light of those provisions, appointments could be made to the posts of Assistant Engineers, except in accordance with the provisions of the Rules which came into force on December 3, 1960. On this question, we should not, in my opinion, express any opinion at this stage."

With these observations, the High Court dismissed the petition as premature. This order was passed on September 29, 1961. On October 23, 1961, in exercise of the powers conferred by the proviso to art. 309 of the Constitution and all other powers enabling him in that behalf, the Governor of Mysore made certain amendments to the Mysore Public Works, Engineering Department Services (Recruitment) Rules, 1960. The effect of these amendments, if valid, was to make the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960, retrospective with effect from the first day of March, 1958. Para 3 of this Notification further provided :

"3. To rule 2, the following proviso shall be added and shall be deemed always to have been added, namely :-

"Provided that in respect of direct recruitment of Assistant Engineers for the first time under these rules the percentages relating to direct recruitment and recruitment by promotion specified in column 2 of the Schedule shall not be applicable and the minimum qualifications and the period of probation shall be the following, namely :-

Qualification - The candidates must be a graduate in Engineering (Civil or Mechanical) or must have passed an equivalent examination and must have either undergone practical training or render service in a technical cadre in the Public Works Department for a minimum period not less than six months. A certificate to that effect issued by the Principal of the College or Superior Officer under whom he has undergone training or is working must be enclosed to the application;

Age limits must not be above -

(i) 35 years in the case of Government servants - holding appointment substantively or who have been in continuous Government service for a period in not less than 3 years and political sufferers;

(ii) 33 years in the case of candidates belonging to Scheduled Castes and Scheduled Tribes;

(iii) 31 years in the case of Backward Classes;

(iv) 28 years in the case of others; on the last date fixed for the receipt of applications.

Period of Probation. - Two years."

On October 31, 1961, the Governor of Mysore appointed 88 candidates as Probationary Assistant Engineers in the Mysore Public Works Department and it is these appointments that were challenged before the Mysore High Court in the 16 writ petitions mentioned in the beginning of this judgment.

Mr. Setalvad contends that under the proviso to art. 309 the Governor is entitled to make

retrospective rules and the position of the Government while acting under the proviso to art. 309 is in no way different from the powers conferred on the legislature under art. 309 read with arts. 245 and 246 and item 41 of List II. Mr. Setalvad further contends that the Government is not acting as a delegate of any legislature while exercising powers under the proviso to art. 309; it is exercising a power conferred by the Constitution directly on the executive and the Constitution has not prescribed any guiding principles to be followed by the State Government while it is exercising powers under the proviso to art. 309, because the Constitution treats it having the same powers as the legislature. He further says that the State Government can amend and repeal any existing law relating to State Services continued in force by art. 313 of the Constitution. He urges that if the Constitution makers had intended to place any fetters on the powers of the State Government under the proviso, these would have been mentioned specifically, and he says that we cannot treat it on the same basis as delegated legislation and, therefore, even if it be the law, which he does not concede, that the executive when acting as a delegate under an act of Parliament or an act of a State Legislature, cannot make rules retrospectively, this principle does not apply to the exercise of powers under the proviso to art. 309 of the Constitution.

Mr. Nambiar contends that under an act of Parliament or an act of a State Legislature the executive cannot frame rules retrospectively unless the act specifically empowers it to do so. According to him the position is the same under the proviso to art. 309. In our opinion, it is not necessary to decide this point in these cases because we are of the view that the appeal can be disposed of on another ground. Assuming for the sake of argument that Mr. Nambiar is right that the Mysore State Government could not make rules retrospectively and that the rules are thus void, so far as they operate retrospectively, we must ignore these rules and see whether the appointments made on October 31, 1961, can be upheld. We have come to the conclusion that these appointments can be considered to have been validly made in exercise of the executive power of the State under art. 162 of the Constitution. The three notifications issued by the Public Service Commission on October 1, 1958, May 4, 1959 and April 1, 1960, must be treated to have been issued with the consent of the State Government. These notifications are not rules made under art. 309 of the Constitution, as contended by Mr. Nambiar; they are mere executive notifications issued by the Public Service Commission at least with the implied consent of the State Government. The passage reproduced above from the letter of the Government dated March 4, 1959, clearly shows that Government was well aware of what the Public Service Commission was doing. It was aware of the action being taken by the Public Service Commission, and indeed, it can safely be assumed that the Government was aware of each step being taken by public Service Commission including the publication of these notifications. The position is that if we accept Mr. Nambiar's arguments that these rules purported to be made by the Mysore State Government had no retrospective validity, there were no statutory rules to govern the appointment of the 88 persons as Assistant Engineers. We have already held that the Mysore State Civil Service (General Recruitment) Rules, 1957, did not debar the Government from making appointments without making statutory rules. Therefore, we hold that these appointments were validly made.

Mr. Nambiar sought to impeach the appointments on another ground. He said that the appointments violated Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960, dated December 3, 1960, because the appointments were made on October 31, 1961, and according to him, these appointments had also to be made under the statutory rules made on December 3, 1960. We are unable to sustain this contention because it took about two years for the Public Service Commission to publish notifications, interview candidates and recommend names for appointment. The whole procedure having been followed, it could not have been the intention of the Government while framing the rules to cover appointments made in pursuance of the recommendations of the

Public Service Commission made in November 1960 after interviewing candidates in October 1960.

It was urged in the alternative that the advertisement made by the Public Service Commission notification dated April 1, 1960 was different from the rules of March 4, 1959, in the matter of fixing the age limits, i.e., while the rules provided 28 years as the maximum age in the case of others, the notification provided the maximum age as 31 years. In our view the respondents are not entitled to make a grievance of this difference because there is nothing on the record to show that the ages of those appointed were against the rules of March 4, 1959. The learned counsel has not been able to satisfy us that they have suffered in any manner because of this difference in age.

There remains one question and that is the question of mala fides which was alleged in the petition. There were 16 petitions but we will take the allegations from the first petition. Paras 16 and 17 in Writ Petition No. 1248 of 1961, before the High Court, in which the allegations of mala fides have been made read as under :

"Further selection made by the Public Service Commission is arbitrary and made out of collateral considerations. Amongst the selected candidates, the following viz., (1) Sri D. C. Channe Gowda, who is the son-in-law of the 2nd member of the Public Service Commission, an ordinary B.E. Graduate with only 49% of marks; (2) Sri Kencharase Gowda, who is the sister's son-in-law, an ordinary B.E. have been selected to the exclusion of myself and several others, who had superior qualification, both academically and by virtue of seniority in service.

17. Similarly, relations of prominent members of the local Legislature and of Parliament, relations of high placed officials including a Minister and an ex-Minister have been selected."

The Chairman of the Mysore Public Service Commission files a counter-affidavit and replied to the above paras 16 and 17 as follows :

"3. Paragraph 16 of the Petitioner's affidavit - The statement that the selection made was arbitrary and made out of collateral considerations is incorrect. It is true that Sri D. C. Channe Gowda was among the candidates selected. The then Second Member of the Public Service Commission abstained from participating in the interview of that candidate. I was not aware at the time of the selection, of the relationship of Kencharase Gowda, Sri T. Krishna, Sri Hanume Gowda and Sri M. N. Narase Gowda to the then Second Member of the Public Service Commission. The then Second Member of the Public Service Commission, Shri M. K. Appajappa is since dead. The dominant factor in making the selection was the performance of the candidate at the interview and the marks secured by the candidate in the Degree Examination was only one of the factors that was taken into consideration.

4. Paragraph 17 of the Petitioner's Affidavit - I was not aware of the relationship, if any, of the candidates to prominent members of the local Legislature and of Parliament or of high placed official including a Minister and an ex-Minister. I submit that it is also incorrect to suggest that the selections were influenced by any such relationship."

The High Court found it unnecessary to investigate this matter because it felt that the selections

impugned were invalid on other grounds, but it observed as follows :

"There is no denying the fact that the facts stated in the pleadings, especially in the light of the manner, in which they are traversed, in the counter-affidavit of the Chairman of the Public Service Commission, do raise a strong suspicion."

The High Court might well have abstained from expressing its strong suspicion if it was not going to give its final views on the question of mala fides. We are unable to appreciate that the manner in which the counter-affidavit of the Chairman of the Public Service Commission is expressed calls for any comment. In para 15 of the affidavit in support of Writ Petition No. 1269 of 1961 more details are given of the selected candidates and the counter-affidavit filed by the Chairman of the Public Service Commission is common to all the petitions. But even so, the details mentioned did not call for any detailed reply. For example, it was alleged in para 15 that one Shri D. C. Channe Gowda who is the son-in-law of the Second Member of the Public Service Commission, Shri Appajappa, was an ordinary B.E. Graduate with only 49.8% marks. But even if he had only 49.8% of the marks, this is not conclusive to show that he should not have been selected because the whole object of interviewing candidates is to judge their eligibility or suitability apart from the standard displayed by them in the written examination. We are unable to hold that on these facts any mala fides or collateral object has been proved.

In the result the appeals both of the State and the other appellants are allowed and judgment of the High Court set aside. We may mention that some of the appellants have not prosecuted their appeals but there is no reason why they should not have the benefit of this judgment, and exercising our powers under art. 142 of the Constitution, we direct that in order to do complete justice they should also have the benefit of the judgment given by us. There will be no order as to costs.

Appeals allowed.

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