

Controller of Estate Duty, Madras

Vs

Alladi Kuppuswamy

Civil Appeal No. 2003 of 1971

(P. N. Bhagwati, N. L. Untwalia, Syed M. Fazal Ali JJ)

03.05.1977.

JUDGMENT

FAZAL ALI, J. –

1. This appeal by certificate is directed against a Full Bench judgment of the Madras High Court dated December 5, 1969 - Alladi Kuppuswami v. Controller of Estate Duty, Madras (76 ITR 500) - by which the reference made to the High Court by the Central Board of Revenue was answered in favour of the accountable person and against the Revenue. The case involves an interesting and important question of law in respect of ambit and scope of Sections 7(1) and (2) as also 39 of the Estate Duty Act, 1953 hereinafter referred to as 'the Act'. In order to decide the question of law arising in the appeal, it may be necessary to set out briefly the facts of the case. Sri Alladi Krishnaswami Iyer died some time before the passing of the Estate Duty Act, 1953, but during his lifetime he had settled certain properties absolutely on his wife Smt. Alladi Venkalakshamma - to be referred in short as 'Smt. Alladi' - and he had also declared certain other properties to form part of the joint family properties. Sri Alladi Krishnaswami Iyer - hereafter to be referred to as "Shri Alladi" - was a member of the Hindu coparcenary consisting of himself, his wife and three sons. In the instant case we are only concerned with the joint family properties left by Shri Alladi. Smt. Alladi dies on January 5, 1956 a few months before the passing of the Hindu Succession Act, 1956 and the Assistant Controller of Estate Duty valued her estate at a total amount of Rs. 7,25,527 including a sum of Rs. 2,02,271 being the value of her one-fourth share in the joint family properties. The dispute in the present case centres round the inclusion of the aforesaid sum of Rs. 2,02,271. The Revenue assessed the estate duty on the footing that as Smt. Alladi was a member of the Hindu coparcenary her interest in the joint family properties passed on her death to the other three sons and the value of this interest being 1/4th the heirs would be liable to pay estate duty on the value of the one-fourth share assessed at Rs. 2,02,271. The accountable persons raised several contentions before the Revenue including the question as to whether or not the Act would apply to agricultural lands as also whether interest on certain fixed deposits in Government securities would be assessable under the Act. It appears, however, that before the High Court the respondent pressed only the question relating to the inclusion of the value of 1/4th share of Smt. Alladi valued at Rs. 2,02,271. The respondent filed an appeal before the Board and contended that as Smt. Alladi died as a Hindu widow she possessed no coparcenary interest which could pass on her death : her interest merged without any benefit accruing or arising to the coparceners and hence Section 7, sub-section (1) had no application. The plea taken by the respondent did not find favour with the Central Board of Revenue which upheld the order of the Assistant Controller of Estate Duty.

2. Thereupon the respondent moved the Board of Revenue to make a reference to the High Court of Madras for decision of the questions of law involved in the case. The Board accordingly referred the

following question to the High Court :

1. Whether, on the facts and in the circumstances of the case, one-fourth share of the deceased in the joint family properties, to which she was entitled under Section 3 of the Hindu Women's Rights to Property Act, 1937, was correctly included in her estate as property deemed to pass on her death under Section 7 of the Estate Duty Act, 1953?
2. Whether the Estate Duty Act, 1953, in so far as it seeks to levy duty on agricultural lands, is ultra vires of the legislative powers of the Union Legislature ?
3. Whether, on the facts and in the circumstances of the case, the accrued interest on fixed deposits and Government securities up to the date of death of the deceased was correctly included in her estate under Section 34(2) of the Estate Duty Act, 1953 ?

Although three questions had been referred to the High Court by the Board, at the hearing of the appeal the respondent gave up questions 2 and 3 and confined his arguments only to question 1 which falls for determination in this case. The High Court, relying mainly on the decisions of the Privy Council in *Attorney-General of Ceylon v. Arunachalam Chettiar* (1957 AC 513 : 34 ITR (ED) 20); and *Gartside v. Inland Revenue Commissioners* (1968 AC 553 : 70 ITR 663 (HL)) came to the conclusion that the interest of Smt. Alladi was not a coparcenary interest which could have passed under Section 7(1) of the Act and as the said interest was incapable of valuation it was not exigible to estate duty. Thereafter the appellant applied to the High Court for granting a certificate of fitness for leave to appeal to this Court and the same having been granted the appeal has now been placed before us for hearing.

3. The respondent reiterated his contentions before us and submitted that Section 7(1) of the Act had no application to the facts of the present case, and therefore, the share of Smt. Alladi was not exigible to estate duty. The appellant, however, submitted that a Hindu widow had a coparcenary interest in the joint Family properties which could be valued on the basis of the factors enumerated in Section 39 of the Act, the High Court was in error in holding that the interest of Smt. Alladi was not capable of any valuation. The appellant, therefore, submitted that the High Court had not correctly appreciated the legal nature and character of the interest of the Hindu widow conferred on her by virtue of the Hindu Women's Right to Property Act, 1937.

4. In our opinion the answer to the problem would naturally lie in a correct interpretation of Sections 7(1) and (2) of the Act as also on a true construction of Section 3(2) of the Hindu Women's Rights to Property Act, 1937 as amended by Act 11 of 1938. It is true that while this Court has had occasions to interpret the provisions of the Hindu Women's Rights to Property Act, 1937 - hereafter referred to is 'the Act of 1937' - on several occasions, yet the exact point which arises in this case has not yet been determined by this Court. In order to understand the implications of the arguments advanced by Counsel for the parties before us, it may be necessary to extract the relevant provisions of the Act as also of the Act of 1937. Section 7, sub-sections (1) and (2) of the Act run thus :

7. Interests ceasing on death, -

- (1) Subject to the provisions of this section property in which the deceased or any other person had an interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the

cesser of such interest, including in particular, a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law

(2) If a member of a Hindu coparcenary governed by the Mitakshara school of law dies, then the provisions of sub-section (1) shall apply with respect to the interest of the deceased in the coparcenary property only -

(a) if the deceased has completed his eighteenth year at the time of his death, or

(b) where he had not completed his eighteenth year at the time of his death, if his father or other male ascendant in the male line was not a coparcener of the same family at the time of his death.

It would be seen that Section 7(1) consists of two parts - the first part refers to the interest of the deceased which ceases on his death and according to his part two conditions are necessary before there is a passing of the interest - (1) that there must be a cesser of the interest by virtue of the death of the deceased; and (2) that as a result of such cesser a benefit accrues or arises. The second part of sub-section (1) contains an inclusive category which brings within the fold of sub-section (1) a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara, Marumakkattayam or Aliyasantana law. In the instant case, we are mainly concerned with the Mitakshara law. We might dispose of a short argument advanced by Mr. S. T. Desai in support of the appeal on this question. It was submitted that the words "governed by the Mitakshara, Marumakkattayam or Aliyasantana law" clearly show that the coparcenary interest has been used in a wide sense and cannot be restricted to the strict coparcenary interest known to the Mitakshara law alone. In the view which we take in this case, however, it is not at all necessary to go into this point. The main question for determination is as to whether the interest acquired by a Hindu widow under the Act of 1937 can be said to be a coparcenary interest in the legal sense of the term. Once a Hindu widow is held to have a coparcenary interest, then there would be no difficulty in treating her as a member of the Hindu coparcenary, in which case her interest could be easily valued according to the relevant provision of Section 39 of the Act which runs thus :

39. (1) The value of the benefit accruing or arising from the cesser of a coparcenary interest in any joint family property governed by the Mitakshara school of a Hindu law which ceases on the death of a member thereof shall be the principal value of the share in the joint family property which would have been allotted to the deceased had there be a partition immediately before his death.

In order to understand the content and character of the interest which a Hindu widow gets by virtue of the statutory provisions contained in the Act of 1937 there can be no doubt that prior to the passing of the Act of 1937 a Hindu woman had no right or interest at all in a Hindu Coparcenary. She was neither a coparcener nor a member of the Coparcenary nor did she have any interest in it, except the right to get maintenance. She also had no right to demand partition of the coparcenary property after the death of her husband. The Act of 1937 introduced broad and important changes by bettering the rights of a Hindu widow and conferring on her the same interest as possessed by her husband Sub-sections (2) and (3) of Section 3 of the Act of 1937 run thus :

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu

joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

The words "the same interest had" in sub-section (2) of Section 3 of the Act of 1937 clearly indicate that the statute gave effect to the well settled doctrine of Hindu Shastric Law that the persona of the husband after his death continues through his wife who is the surviving half of the husband and the husband continues to live through the widow so long as the widow is alive. It was this concept of the Hindu Law which was sought to be recognised and given effect to by the Act of 1937. In these circumstances, therefore, when the Legislature used the expression "the same interest as he himself had" it would include all the bundle of rights possessed by the husband which would devolve on the wife and if there were to be any limitations on those rights they were spelt out by sub-section (3) itself, namely, that while the Hindu widow would have the same right and interest as her husband, her interest would only be the limited interest known as a Hindu Woman's estate, Sub-section (2) of Section 3 of the Act of 1937 further conferred on the widow the right to demand partition and on partition she was entitled to get the same share as her husband. Thus the position appears to be that a Hindu widow was introduced for the first time into the Hindu coparcenary having the same rights as her husband and became as it were a member of the Hindu coparcenary with two qualifications, viz., (1) that she had only a limited interest; and (2) that she could not be a coparcener because having regard to the nature of her entry into the family after marriage with her husband there was no question of her getting interest in the Hindu coparcenary by birth which is one of the most important incidents of Hindu coparcenary. All the other rights of a coparcener were duly conferred on her by the Act of 1937.

5. Dwelling on the content and import of the nature of the interest of a Hindu widow, this Court pointed out in *Jaisri Sahu v. Rajdewan Dubey* (1962) 2 SCR 558, 564-566 : AIR 1962 SC 83) that on the death of her husband the properties, vested in the widow and she fully represented the estate. In this connection, this Court made the following observations :

When a widow succeeds as heir to her husband, the ownership in the properties, both legal and beneficial, vests in her. She fully represents the estate, the interest of the reversioners therein being only spes successions. The widow is entitled to the full beneficial enjoyment of the estate and is not accountable to any one. It is true that she cannot alienate the properties unless it be for necessity or for benefit to the estate, but this restriction on her powers is not one imposed for the benefit of reversioners but is an incident of the estate as known to Hindu law.

6. Similarly in a later case in *Potti Lakshmi Perumallu v. Potti Krishnavenamma* (1965) 1 SCR 26, 33 : AIR 1965 SC 825 : (1965) 2 SCJ 620) this Court reiterated that Hindu widow was the surviving half of her husband and so long as she was alive the husband continued to live in her. This Court observed as follows :

The decisions also recognised that though the widow does not, by virtue of the interest given to her by the new law become a coparcener she being entitled to claim partition of the joint family property is in the same position in which her deceased husband would have been in the matter of exercise of that right. That is to say, according to these decisions her interest is a fluctuating one and is liable to increase

or decreases according a there are accretions to or diminutions of the property. In our opinion these decisions lay down the law correctly.

It may be pertinent to note that in the aforesaid case the Court was considering the nature of the interest which a widow derived by virtue of the statutory substitution contained in Section 3(2) of the Act of 1937 was also pointed out that like other coparceners of a Hindu coparcenary the interest of a widow until separated by a partition contained to be a fluctuating one which was liable to increase or decrease with the deaths or additions in the family.

7. In *Satrugan Isser v. Smt. Subujpari* (1967) 1 SCR 7 : AIR 1967 SC 272) this Court pointed out that the interest conferred on a Hindu widow arose by statutory substitution and the Act of 1937 introduced changes which were so far alien to the structure of a Hindu coparcenary. In this connection the Court observed as follows :

The Act in investing the widow of a member of a coparcenary with the interest which the member had at the time of his death has introduced changes which are alien to the structure of a coparcenary. The interest of the widow arises not by inheritance nor by survivorship, but by statutory substitution :

A Hindu coparcenary under the Mitakshara school consist of males alone : it includes only those members who acquire by birth or adoption interest in the coparcenary property. The essence of coparcenary property is unity of ownership which is vested in the whole body of coparceners White it remains joint no individual member can predicate of the undivided property that he has a definite share therein. The interest of each coparcener is fluctuating, capable of being enlarged by deaths, and liable to be diminished by the birth of sons to coparceners : it is only on partition that the coparcener can claim that he has become entitled to a definite share. The two principal incidents of coparcenary property are : that the interest of coparceners devolves by survivorship and nor by inheritance : and that the and that the male issue of a coparcener acquires an interest in the coparcenary property by birth, not as representing his father but in his own independent right acquired by birth.

As pointed out above the essence of coparcenary property is the unit of ownership which is vested in the whole body of coparceners and the two principal incidents of coparcenary property are that the interest of coparceners devolved by survivorship and not by inheritance and that the male issue of a coparcener acquires an interest in the coparcenary property by birth and not as representing his father. After having described the incidents of a Hindu coparcenary, the Court proceed to observe as follows :

By the Act (Act of 1937) certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unit of possession. But the widow does not on that account become a coparcener : though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest of the other coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshara school of taking that interest by the rule

of survivorship remains suspended so long as that estate ensures. * * * *

She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property.

Again this Court did not approve of the assumption made by some courts that the right vested in the widow was liable to revert to the coparcenary, even where, on demand for partition, it became separated from the coparcenary property, and in this connection this Court observed as follows :

The assumption that though the right vested in the widow by the Act is a right of property which may on demand for partition become separated from the coparcenary property it is still liable to revert to the coparcenary on the determination of the widow's estate, does not give full effect to the statutory conferment upon the widow of "the same right of claiming partition as a male owner."

Finally this Court approved of certain observations made by the Madras High Court in Parappagari Parappa alias Hammanthappa v. Parappagari Nagamma (ITR 1954 Mad 183) where Subba Rao, J., as he then was, made the following observations :

She could ask for partition and separate possession of her husband's share. In case she asked for partition, her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to the other members of the joint Hindu family.

It is, therefore manifest from the aforesaid decision that if the widow has not chose to exercise her right or partition, there is no severance of the Hindu coparcenary and on her death the interest of the widow emerges in the coparcenary property or lapses to the other coparceners. As already indicated above, this Court in Satrugan v. Smt. Subujpari (supra) had taken the same view and had confirmed the Division Bench decision of the Patna High Court in Smt. Sabujpari v. Satrugan Isser (AIR 1958 Pat 405, 410 : 1958 Pat LR 150), where the Patna High Court, after considering the entire law on the subject, observed thus :

After having considered the various authorities and the various aspects of the case, my conclusion are that, under the provisions of the Act a widow of a deceased co-parcener is placed in same position as the deceased coparcener was, for the reason of the fiction that half the body of the deceased husband survived in the widow; that, like her husband the widow also is entitle to effect severance of the joint status of the family by an unequivocal expression of intention to separate; * * * * that in case the widow does separate, the interest of the husband which she enjoyed, goes by survivorship to the other members of the joint family.

We find ourselves in complete agreement with the observations made by the Patna High Court to which one of us (Untwalia, J., as he then was) was a party. The view taken by the Patna High Court in the aforesaid case was later on approved by a Full Bench of the Patna High Court in Mt. Khatrani Kuer v. Smt. Tapeshwari Kuer (AIR 1964 Pat 261).

8. In State Bank of India v. Ghamandi Ram (dead) through Shri Gurbux Rai (1969) 3 SCR 681,

686; (1969) 2 SCC 33, 36 (Para 5), this Court, while dealing with the incidents of Hindu coparcenary, observed as follows :

According to the Mitakshara school of Hindu Law all the property of Hindu joint family is held in collective ownership by all the coparceners in a quasi corporate capacity. * * * * The incidents of coparcenership under the Mitakshara law are : first, the lineal make descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants an art any time work out their rights by asking for partition : thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fourthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara school is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a coparcener with the his adoptive father as regards the ancestral properties of the latter.

Thus analysing the ratio of the aforesaid case regarding the incidents of a Hindu coparcenary it would appear that a Hindu coparcenary has six essential characteristics, namely, (1) that the lineal male descendants up to the third generation acquire an independent right of ownership by birth and not as representing their ancestors; (2) that the members of the coparcenary have the right to work out their rights by demanding partition; (3) that until partition, each member has got ownership extending over the entire property conjointly with the rest and so long as no partition takes place, it is difficult for any coparcener to predicate the share which he might receive : (4) that as a result of such co-ownership the possession and enjoyment of the property is common; (5) that there can be no alienation of the property without the concurrence of the other coparceners unless it be for legal necessity; and (6) that the interest of a deceased member lapses on his death and merges in the coparcenary property. Applying these tests to the interest of a Hindu widow who has been introduced into a coparcenary by virtue of the Act of 1937, we find that, excepting condition (1), all other conditions are fully satisfied in case of a Hindu widow succeeding to the interest of her husband in a Hindu coparcenary. In other words, after her husband's death the Hindu widow under the Act of 1937 has got the right to demand partition, she cannot predicate the exact share which she might receive until partition is made, her dominion extends to the entire property conjointly with the other members of the coparcenary, her possession and enjoyment is common, the property cannot be alienated without concurrence of all the members of the family, except for legal necessity, and like other coparceners she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family. It is manifest that she cannot fulfill the first condition, because she enters the coparcenary long after she is born and after she is married to her husband and acquires his interest on his death. Thus, short of the first condition, she possesses all the necessary indicia of a coparcenary interest. The fact that before the Act of 1956, she had the characteristic of a widow-estate in her interest in the property does not detract any the less from this position. It must follow as a logical corollary that though a Hindu widow cannot be a coparcener, she has coparcenary interest and she is also a member of the coparcenary by virtue of the rights conferred on her under the Act of 1937.

9. There is yet another important aspect of the matter which has to be considered. At the time when the Estate Duty Act was passed in 1953, the Legislature was fully aware of the statutory interest conferred on a widow by virtue of the Act of 1937 and the incidents thereof. In these circumstances

it is not reasonable to infer that the Legislature could have intended that though a Hindu widow has got the same interest as her husband in the Hindu coparcenary and has also the right to demand partition and her interest which is a fluctuating one would lapse to the other coparceners in case of her death without seeking partition in the same manner as that of other coparceners, yet it should be exempt from estate duty.

10. The sheet-anchor of the argument of the respondent was the Privy Council decision in Arunachalam Chettiar's case (supra). In the first place, the facts of that case are clearly distinguishable from the facts of the present case. In that case, the Hindu undivided family consisted of father, son and some female members. According to the Privy Council, the females were merely entitled to maintenance. The females there could not have any interest in the coparcenary nor could my such argument be advanced because there was no statute similar to the Act of 1937. Moreover, in the Estate Duty Ordinance which was being construed by the Privy Council there was neither any provision the inclusive part of the sub-section (1) and sub-section (2) of Section 7 are any provision similar to Section 39 of the Act. In these circumstances, we do not see how the Privy Council decision in Arunachalam Chettiar's case (Supra) can be called in aid to support the contention of the respondent. In the instant case, once it is held, as it must be, that Smt. Alladi was a member of the Hindu coparcenary, her interest was undoubtedly a coparcenary interest which lapsed on her death and merged into the coparcenary. It was also clearly capable of valuation, unlike the position in Arunachalam Chettiar's case where the Privy Council was construing a provision similar to Section 40 of the Act, which in our opinion, has no application in the present case, it being covered by Section 39 of the Act. A fortiori the same observations apply to the case of Gartside v. Inland Revenue Commissioners (supra). That case has no application here where we are concerned with the concept of a Hindu coparcenary which is totally alien to the estates contemplated under the English Acts. For these reasons, therefore, we are clearly of the opinion that the two cases relied upon by the High Court do not appear to be of any assistance in deciding the points at issue in the present appeal, and the High Court was in error in basing its decision on the aforesaid cases ignoring the decisions of this Court as also the peculiar and special provisions of the Act.

11. Finally, it was vehemently contended by Mr. Sastri for the respondent that the right of a Hindu widow under the Act of 1937 was merely a statutory substitution of a new status by her introduction into the coparcenary and she could not be treated either as a coparcener or a member of the coparcenary or to possess any kind of coparcenary interest. While we agree that the widow after the introduction in the coparcenary could not be held to have become a coparcener, because one of the essential characteristics of a coparcener, namely, acquisition of interest by birth, is wholly wanting in her case, yet when the Legislature which was fully aware of the status of a Hindu widow under the Shastric Law chose to improve her status by conferring a new right on her under the Act of 1937, and with this avowed object clothed her with all the rights and concomitants of a coparcener's interest, it is futile to contend that the widow could not be treated either as a member of the Hindu coparcenary or as having been conferred coparcenary interest in the property. Even though the widow is not a coparcener in the strictly legal sense of the term, the interest which she has is the same interest as her husband and that is the coparcenary interest with the only limitation placed on her by Section 3(3) of the Act of 1937, namely, that her interest would be the limited interest of a Hindu widow. The conclusion is therefore inescapable that Smt. Alladi did possess a coparcenary interest which lapsed on her death and merged into the coparcenary and the case was clearly covered by the inclusive part of sub-section (1) of the Section 7 and under Section 39 the value of the benefit occurring or arising from the cesser of her coparcenary interest was to be determined by taking the principal value of the share in the joint family property which would have been allotted to her, had there been a partition immediately before her death.

12. The last plank of the argument of the respondent was that the Estate Duty Act being a fiscal statute should be construed strictly so as to give every behalf of doubt to the subject. There can be no quarrel with this proposition but when the phraseology of a particular section of the statute take within its seep the transaction which is taxable, it is not for the Court to strain and stress the language of the section so as to enable the tax-payer to escape the tax. In the view that we take in this case it is manifest that the legislative intent reflected in the Act of 1937 and the Estate Duty Act, 1953, must be given full effect.

13. Summarising, therefore, the position that emerges is as follows :

13A. By virtue of the provisions of the Act of 1937 a Hindu widow undoubtedly possesses a coparcenary interest as contemplated by Section 7(1) of the Act and she is also a member of a Hindu coparcenary as envisaged by Section 7(2) of the Act. On the death of Smt. Alladi, therefore, there was clearly a cesser of her interest and her interest merged in the coparcenary property and by reason of the inclusive part of sub-section (1) of Section 7, it must be taken to have passed on her death and was hence exigible to estate duty. Since Smt. Alladi was a member of the coparcenary this interest of her's which passed on her death was liable to be valued in accordance with the method provided by Section 39 of the Act.

14. The interpretation of Section 40 of the Act is not free from difficulty, but as the present case squarely falls within the ambit of Section 7(1) latter part and sub-section (2) of Section 7 of the Act which attracts Section 39, it is not at all necessary for us to enter into the complex domain of the scope and ambit of Section 40 of the Act in this case.

15. The result is that the appeal is allowed, the judgment of the High Court is set aside and the question referred to the High Court is answered in the affirmative. There will be no order as to costs.

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