

SUPREME COURT OF INDIA

Kamlesh C. Shah

Vs.

State of Maharashtra

(Altamas Kabir CJI., Vikramajit Sen and A.K.Sikri JJ.)

03.07.2013

JUDGMENT

ALTAMAS KABIR, CJI.

1. Chapter VIII-A, which was introduced into the the Maharashtra Housing and Area Development Act, 1976, hereinafter referred to as "the 1976 Act", in 1986, pertains to the acquisition of "cessed properties" for co- operative societies of occupiers. Soon after its introduction, its validity was challenged in several cases, including the present writ petition. The present writ petition was tagged with W.P. No. 934 of 1992, another case pending in this Court on the same issue. In view of the questions raised in the writ petitions, the matter was initially referred to a Bench of 7-Judges, but, thereafter, by order dated 20.02.2002, the matters have been referred to a Bench of Nine-Judges and are still pending decision.

2. Since no final decision seems to be in the offing, the writ petitioners have filed IA No. 3 of 2012, for interim reliefs.

3. The subject matter of the present petition is a property known as "Chhotalal Niwas" situated at Laburnam Road, Gamdevi, Mumbai - 400007, comprising a plot of land bearing Survey No. 7A/492, Malabar Cumbala Hill Division, Mumbai. Treating the said property as a "cessed property", within the meaning of Section 103A of the 1976 Act, the same was acquired by the Maharashtra Housing and Area Development Authority (MHADA), as per Section 103B of Chapter VIII-A of the 1976 Act.

4. The apparent reason for the introduction of Chapter VIII-A into the 1976 Act appears to be the refusal of the owners of the buildings to effect repairs thereto on account of the freezing of rents from 1st September, 1940. The return which the landlord could reasonably expect from time to time having been frozen, a stage was reached when where rents were no longer sufficient to cover even the taxes payable for the said properties. As a result, the landlords stopped effecting repairs to the tenanted properties which resulted in rapid deterioration of the buildings. Realizing the gravity of the matter, the Legislature enacted "the Building Repairs and Reconstruction Board Act, 1969", which enabled levy on buildings in Greater Bombay as the Legislature felt that from the recovery of the cess in addition to the contribution of substantial amounts to be made by the State Government and the Bombay Municipal Corporation, it might be possible for the Board constituted under the Act to carry out structural repairs to the old buildings to make them safe for habitation. The Legislature also felt that in case structural repairs did not improve the condition of the building, then the Board could undertake reconstruction of the building by pulling down the dilapidated structure and raising a new structure thereupon.

5. On 26th February, 1986, the Governor of Maharashtra issued Ordinance No. 1 of 1986 to amend the 1976 Act with effect from 26th February, 1986. The Statement of Objects for enactment of the amendment indicates that there are 19,642 cessed old and dilapidated buildings in the island city of Bombay and, out of these, 16,502 buildings were constructed prior to 1st September, 1940, and the majority of the said buildings are about 80 to 100 years old. To make things worse, the freezing of the rents from 1st September, 1940, made it quite impossible for the owners to look after or maintain the buildings, which is one of the reasons for the introduction of Chapter VIII-A in the 1976 Act.

6. Section 103A of the 1976 Act, which was introduced in 1986 as part of Chapter VIII-A, inter alia, provides that the said Chapter would come into force on and from the commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986 and would apply to all cessed buildings, which had been erected before the 1st of September, 1940, and were classified as belonging to Category 'A' under Sub-section (1) of Section 84.

7. Section 103B, which contains the *raison d'etre*, for the introduction of Chapter VIII-A into the 1976 Act, inter alia, provides for acquisition of cessed property for co-operative societies of occupiers. The scheme envisaged in the said Section is

that notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contracts, judgment, decree or order of any court or tribunal to the contrary, a co-operative society formed or proposed to be formed, under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than 70% of the occupiers in a cessed building, may, by written application, request the Board to move the State Government to acquire the land together with the existing building thereupon and where the owner of the building did not own the land underneath or appurtenant to such building, but held the same as a lessee or licensee, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building, in the interest of its better preservation or reconstruction of a new building in lieu of the old one. Sub-section (2) of Section 103B provides that on receipt of the application made under Sub-section (1), the Board shall, after due verification and scrutiny, approve the proposal if it considers that it is in the interest of better preservation of the building or to be necessary for reconstruction of a new building and shall direct the co-operative society, whether registered or proposed, to deposit with the Board, within the periods specified by it in that behalf, 30% of the approximate amount that would be required to be paid to the owner in that behalf. Sub-section (4) of Section 103B provides that if, on receipt of an acquisition proposal under Sub-section (3), the State Government is satisfied about the reasonableness of the proposal, it may approve the same and communicate its approval to the Board. On receipt of the government approval, the Board under Sub-section (5) was required to forward the acquisition proposal to the Land Acquisition Officer for taking further proceedings in the matter.

8. An important element of Section 103B is Sub-section (5A), which provides that when acquisition proceedings have been initiated under Sub-section (5) and a notification under Sub-section (5) of Section 93 has been published, the Collector would take and hand over the possession of the acquired property to the Board in accordance with the provisions of Sub-section (6) of Section 93. Sub-section (6) provides that after the land is vested absolutely in the Board on behalf of the Authority, free from all encumbrances, and the amount to be paid to the owner is determined, the Board shall require the society to get itself registered, if it is not registered, till then and to deposit the remainder of the amount to be paid to the owner with the Land Acquisition Officer. The Board is required simultaneously to pass on the amount deposited by the co-operative society to the Land Acquisition Officer, who shall thereupon make payment of the amount for acquisition or

deposit the same in the Court, as provided in Section 46. Sub-section (7) provides that, subject to the provisions of Sub-section (6), the Authority shall convey the land acquired under this Section to the co-operative society of the occupiers thereof with its right, title and interest therein and execute, without undue delay, the necessary documents in that behalf.

9. As is clear from the above, the scheme introduced by Chapter VIII-A of the 1976 Act was intended to protect tenants who were compelled to reside in buildings which had been constructed prior to 1940, and had become dilapidated as no repairs were effected thereto. The landlords were not keen to repair the buildings as the rents were very low and often the taxes payable for the property were higher than the rents collected from the tenants. The scheme provided for the formation of cooperative societies by tenants of such buildings, who were required to deposit 30% of the compensation payable to the owner, whereupon the lands would stand acquired and would vest in the Mumbai Building Repair and Reconstruction Board for the limited purpose of ensuring that after acquisition, the balance 70% would be deposited by the tenants, consequent whereupon, MHADA under Section 103B(7) was bound to convey the land to the cooperative society for construction of the building.

10. Appearing for the writ petitioners, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the very fact that MHADA was required to convey the land to the cooperative society for constructing the building, establishes beyond doubt that the vesting in the Board amounted to holding the property in trust for and on behalf of the tenants forming the cooperative society, who were the beneficiaries of the said scheme.

11. Mr. Venugopal urged that since the issue was pending before a Nine- Judge Bench and it was unlikely that the matter would be heard in the near future, the tenants and the owner of the building entered into an Agreement by which they themselves agreed to develop the property, instead of waiting for the decision of the Nine-Judge Bench. The essence of the understandings arrived at between the landlord and the tenants was that the tenants would withdraw themselves from the acquisition and instead enter into a Development Agreement with landlord to reconstruct the building. Mr. Venugopal urged that should such a course of action be accepted, then there would be no further need for the proceeding under Section 103B to be continued and upon the property being returned to the owner, the tenants could have the benefit of the offer made by the new builder. This would

enable the tenants to purchase their own flats and the landlord to also get sufficient consideration so that the purpose of the scheme would stand fully satisfied. Furthermore, the Trust would cease to exist as the purpose of acquisition would also cease to exist. Mr. Venugopal urged that the Court may declare the acquisition of the property to be no longer necessary and relevant for the purposes of Chapter VIIIA and the relationship of the owner and the tenant would continue as before. Mr. Venugopal also submitted that since possession has continued with the owner and the tenants and, at no point of time, had such possession been handed over to MHADA, could it be said that the premises in question had vested with MHADA. Mr. Venugopal contended that if the object of the rehabilitation scheme was to be kept in mind, the objective taken on behalf of MHADA that the property had vested in it by virtue of the Notification published at the request of the tenants, was highly technical and was required to be discarded, as the lands were, in fact, being held in trust for the tenants as the beneficiaries thereof.

12. The prayer made on behalf of the Petitioners in I.A. was opposed, on behalf of the State of Maharashtra and its authorities, as being mischievous and was nothing but an attempt to circumvent the challenge thrown to Chapter VIII-A, which was pending before this Court not only in other matters, but in the instant writ petition also. It was urged by Mr. Sanjay V. Kharde, learned Advocate appearing for the Respondent Nos. 1 and 5, that the question to be considered in the context of this interlocutory application is whether the parties can contract out of the statute when they have no locus standi or title in respect of the suit property. It was urged that stay prayed for earlier had been refused by this Court and Chapter VIII-A, inserted by the Maharashtra Act (21 of 1986), in the 1976 Act, continues to be valid and operative. It was submitted that the provisions make it very clear that once the suit property stood vested in MHADA, the same could be utilized only for the purpose of the tenants/ co-operative societies and nobody else. It was urged that the relief sought for by the Petitioners in the present application could not be granted since there is a complete bar on such kind of proceedings after vesting, in view of Section 103C(2) of the 1976 Act. Mr. Kharde urged that symbolic possession of the property had already been taken and the introduction of a third party into the proceedings was with the knowledge that the assignee would approach MHADA for releasing the property for the purpose of development.

13. Mr. Kharde reiterated that once vesting had taken effect under Section 93(5), read with Section 103B(5A), (6) and (7) of the 1976 Act, and the same having been upheld up to this Court, the same could not be released to the owners of the land

and would have to be utilized for a purpose similar for which it had been acquired. Mr. Kharde urged that the I.A. filed on behalf of the Petitioners is liable to be dismissed.

14. Mr. Ashok H. Desai, learned Senior Advocate, who appeared for MHADA and the Mumbai Housing Repairs and Reconstruction Board, submitted that the relief prayed for in the instant I.A. was wholly misconceived since the challenge to the notification dated 20.04.1995 issued by the Respondent No. 4 under Section 93(5) of the 1976 Act, thereby vesting the land and building absolutely in MHADA free from all encumbrances, had been repelled up to this Court. It was urged that the vesting of the property in MHADA having been upheld up to this Court, this application seeking release of the property from acquisition has to be dismissed and the Petitioners have to await the decision to the challenge of the constitutional validity of Chapter VIII-A. Mr. Desai submitted that when the matter involving a constitutional challenge to Chapter VIII-A of the 1976 Act was pending consideration before a Bench of Nine-Judges, the present application could not be decided by any Bench of this Court of a strength of less than Nine- Judges.

15. Mr. Desai submitted that the scope of these pending matters relate to the interpretation of the expression "vesting" of the property with MHADA under the scheme of the Act. Mr. Desai also urged that the property having been acquired for the purposes of Section 103B of the 1976 Act, MHADA was also saddled with an obligation to utilize 30% of the acquired land for similar objects. Mr. Desai submitted that the land could only be used for the benefit of the tenants, if they had formed a co-operative society and registered the same, but not for the purpose of development by a third party, which was completely alien to the provisions of the 1976 Act. Mr. Desai submitted that I.A. No. 3 was wholly misconceived and was liable to be rejected.

16. Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Chief Promoter of the UNAT Co-op. Housing Society, Hashmukh B. Gandhi, contended that since the object of the 1976 Act was to rehabilitate those tenants who were living in dilapidated structures, and the end object of the scheme of arrangement arrived at by the landlord with the promoter was for the same purpose, the same should be accepted and implemented for the benefit of the tenants.

17. Countering the submissions made by Mr. Ashok Desai that once the lands had vested in MHADA under Section 103B of the 1976 Act, the same could only be

utilised for the purposes of construction/ reconstruction as intended under the Act, Mr. Rohatgi submitted that the acquisition in the instant case was specifically for the purpose of rehabilitation of the members of the proposed Punit Cooperative Housing Society, on whose application the acquisition proceedings had been started. Mr. Rohatgi submitted that the land so acquired for the aforesaid Cooperative Society could not be utilised for any other society/tenants and in the event the tenants chose not to continue with the scheme of rehabilitation by resorting to the provisions of the 1976 Act, MHADA could not obstruct the release of the land, as otherwise the tenants would be rendered homeless and they would be deprived of their residences, which they enjoyed in the premises before the acquisition proceedings were mooted. Mr. Rohatgi urged that the entire logic of the 1976 Act was to rehabilitate the tenants of the building which had become dilapidated on account of non-repair thereof by the landlords and the scheme envisaged under Chapter VIII A was tenant- specific and any decision to deprive the tenants, either by taking recourse to the scheme or remaining outside the scheme, would be contrary to the spirit and object of the Act.

18. Since the writ petition is to be heard by a Bench of nine Judges, along with other similar matters, and there is little likelihood of the matter being taken up for final decision in the near future, we have given our serious thoughts to the problem which has been spelt out in the present Interlocutory Application. On the one hand, it is at the request made by a proposed Cooperative Society of the tenants of the building that acquisition proceedings were commenced by the Board under Section 103B of the 1976 Act on 30th October, 1986, on the other, the purpose of the acquisition has not fructified even after 26 years. If, as suggested by Mr. Desai and Mr. Kharde, the tenants have to wait till a decision is rendered by the Nine-Judge Bench, the entire object with which Chapter VIII A was introduced in the 1976 Act, would be rendered completely nugatory. Maybe a situation, such as this, was never contemplated by those who wanted to frame a scheme to rehabilitate tenants who were victims of a situation where they had to reside in unhygienic and maybe dangerous conditions because of lack of repairs on account of the low rents payable by the tenants which had been frozen from 1st September, 1940, and made it virtually impossible for the landlords to maintain the properties when, at times, the municipal taxes were higher than the rents collected; but the Courts have to interpret the law as it is.

19. As indicated hereinbefore, Section 103A was introduced by way of Chapter VIII-A in the 1976 Act, by Maharashtra Act 21 of 1986, when realisation dawned

on the administration that many persons who had been occupying buildings either as tenants or otherwise from before 1st September, 1940, were faced with a peculiar dilemma in which on account of the low rents paid by them, which had been frozen, the landlords were unwilling to effect any repairs to the old structures. Section 103A, whereby Chapter VIII-A was made applicable to all "cessed buildings", reads as follows:

"103A. Application of Chapter VIII-A to certain buildings.

This Chapter shall come into force on and from the commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986, and shall apply to all the cessed buildings which are erected before the 1st day of September 1940 and are classified as belonging to Category A under subsection (1) of section 84:

Provided that, nothing in this Chapter shall apply to any cessed building belonging to Category A if, on the date of commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986, out of the total number of occupiers of such building, fifty per cent, or more occupiers are using the tenements or premises in their possession for commercial or non- residential purpose.

Explanation — For the purposes of this section, any such building where a floor or any part of a building is constructed subsequently and such floor or part is not separable, shall be deemed to be a building belonging to Category A."

20. "Cessed buildings" are buildings in which repairs had not been effected after 1st September, 1940, and were in danger of collapse, but continued to be under the occupation of tenants. In fact, 19,642 cessed and dilapidated buildings have been identified in the island city of Bombay. It is Section 103B, which deals with the procedure for acquisition of cessed property for cooperative societies of occupiers, pursuant to proposals for acquisition submitted under Section 92 of the 1976 Act. In fact, in order to facilitate the repair or reconstruction of the building in question, Section 94 makes provision for temporary and alternative accommodation to be provided to the affected occupiers whose property is acquired. Since much of the case of the parties depend on Section 103B of the 1976 Act, the same, in its entirety, is extracted hereinbelow:

"103B. Acquisition of cessed property for co-operative societies of occupiers.

(1) Notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contracts judgement, decree or order of any Court or Tribunal to the contrary, a co-operative society formed or proposed to be formed under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than seventy per cent of the occupiers in a cessed building may by written application request the Board to move the State Government to acquire the land together with the existing building thereon or where the owner of the building does not own the land underneath or appurtenant to such building but holds it as a lessee or licensee, or where any person holds the building or the land underneath or appurtenant to such building or both under a lease or licence, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building thereon (hereinafter in this Chapter referred to as "the land") in the interest of its better preservation or for reconstruction of a new building in lieu of the old one and intimate their willingness to pay the amount of such acquisition as may be determined under the provisions of this Chapter and to carry out the necessary structural and other repairs or, wherever necessary, to reconstruct a new building, as the case may be, at their own cost.

Explanation I — In this section the expression "seventy per cent, of the occupiers' means the seventy per cent of the occupiers on the date of commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986, and include their successors-in interest or new tenants inducted in place of such occupiers, but does not include the owner or the occupiers inducted by virtue of creation of any additional tenancies or licences by the owner after the date of commencement of the aforesaid Act.

Explanation II — For the purposes of this sub-section, any suit or proceeding for recovery or possession of tenement or premises or part thereof, initiated against the occupier in any court or before any authority whether, before or after making an application under this sub- section, shall not affect the right of such occupier to join or to continue as a member of the

co-operative society of the occupiers of the building, but his membership of such cooperative society shall be subject to the final decision in such suit or proceeding:

Provided that, if, in the meantime before the final decision in such suit or proceeding, the acquisition proceedings under this Chapter are completed and the land is conveyed to the Co-operative society of the occupiers under sub-section (7), the claim for possession made in such suit or proceeding, at any stage where it is pending on the date of execution of such conveyance, shall abate.

(2) On receipt of the application made under sub-section (1), the Board shall after due verification and scrutiny, approve the proposal if it considers that it is in the interest of better preservation of the building or to be necessary for reconstruction of a new building and shall direct the co-operative society, whether registered or proposed, to deposit with the Board within the period specified by it in that behalf thirty per cent of the approximate amount that would be redirected to be paid to the owner if the land is acquired and give intimation in that behalf to the owner.

(2A) Where after the date of application made under sub-section(1),—

(a) any owner has undertaken the work of any repairs to the Building; or

(b) the percentage of the occupiers who had initially agreed to become members of the co-operative society formed under subsection (1) is reduced to less than seventy per cent of the occupiers as a result of some members opting out, or due to the number of additional tenancies or licences created in the building thereafter or due to any other reason whatsoever,

then the power of Board to approve the proposal shall not be affected, and notwithstanding anything contained in sub-section (1), the Board shall approve the proposal and direct the co-operative society to deposit the approximate amount as required under sub-section (2).

(3) On receipt of the amount of deposit as provided in sub-section (2), the Board shall submit to the State Government a proposal to acquire the land for the aforesaid purpose.

(4) If on receipt of an acquisition proposal under sub-section (3), the State Government is satisfied about the reasonableness of the proposal, it may approve the proposal and communicate its approval to the Board.

(5) On receipt of the Government approval, the Board shall forward acquisition proposal to Land Acquisition Officer for initiating and acquisition proceedings in accordance with the provisions- of sub-sections (3), (4) and (5) of section 93 and section 96 of this Act :

Provided that, where any proceedings for acquisition of land are so initiated the notice to be published under sub-section (3) of section 93 in respect thereof need not contain any statement regarding provision of any alternative accommodation to occupiers in such land :

Provided further that, where the proposal involves acquisition of the right or interest of the lessee or licensee in or over the building or land as referred to in subsection (1) , then such building or land on its transfer by the Authority to the co-operative society under sub-section (7) shall be held by the co-operative society on lease or licence, as the case may be,subject, however, to the following conditions, namely:—

(i) where there is a subsisting lease or licence, on the same terms and conditions on which the lessee or licensee held it, and

(ii) where the lease or licence has been determined or where the lessee or licensee has committed breach of the terms and conditions of the lease or licence, as the case may be, on the fresh terms and conditions, particularly in regard to the period of lease or licence and rent as may be stipulated by the owner of the land.

(5A) Where acquisition proceedings have been initiated as provided in sub-section (5) and a notification under sub-section (5) of section 93 is published, the Collector shall take and hand over possession of the land to the Board in accordance with the provisions of sub-section (6) of section 93.

(6) After the land is vested absolutely in the Board on behalf of the Authority free from all encumbrances and the amount to be paid to the

owner is determined, the Board shall require the society to get itself registered if it is not registered till then and to deposit the remainder of the amount to be paid to the owner with the Land Acquisition Officer. The Board shall simultaneously pass on the amount deposited by the co-operative society with it to the Land Acquisition officer. The Land Acquisition Officer shall thereupon make the payment of the amount for acquisition or deposit the same in the court as provided in section 46.

(7) Subject to the provisions of sub-section (6), the Authority shall convey the land acquired under this section to the co-operative society of the occupiers thereof with its right, title and interest therein and execute without undue delay the necessary documents in that behalf."

21. Sub-section (1) of Section 103B begins with a non-obstante clause to the effect that notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contract, judgment, decree or order of any Court or Tribunal to the contrary, a co-operative society formed or proposed to be formed under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than 70% of the occupiers in a cessed building may, by written application, request the Board to move the State Government to acquire the land together with the existing building thereon or where the owner of the building does not own the land, but holds it as a lessee or licensee, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building thereon. The latter part of Section 103B and more particularly Sub-section (5A), is relevant for our purpose and provides that where acquisition proceedings have been initiated as provided in Sub-section (5) and a notification under Sub-section (5) of Section 93 is published, the Collector shall take and hand over the possession of the land to the Board in accordance with the provisions of Sub-section (6) of Section 93. It is at this stage that the land vests absolutely in the Board on behalf of the Authority, free from all encumbrances. At this stage, the Board shall also require the Society to get itself registered, if it is not registered till then, and to deposit the remainder of the amount to be paid to the owner with the Land Acquisition Officer. It is only, thereafter, under Sub-section (7), that the Authority is to convey the land acquired under this Section to the co-operative society of the occupiers thereon, with its right, title and interest therein and execute, without undue delay, the necessary documents in that behalf.

22. As submitted by Mr. Desai and Mr. Kharde, the tenants had already vacated the building in question in favour of the promoter. The million dollar question is whether they were entitled to do so, once Section 103B of the 1976 Act had already come into operation and symbolic possession of the property had been taken by MHADA, through the Board, under Sub-section (5A) thereof. Sub-section (7) of Section 103B provides for the conveyance of the land acquired under Section 103B to the co-operative society of the occupiers together with its right, title and interest therein, and for MHADA to execute, without undue delay, the necessary documents in that behalf, which presupposes that MHADA had already acquired title to the property. Had the title not vested in MHADA, it could not have been vested with the right to convey the same to the co-operative society. The scheme envisaged in Chapter VIII-A, and in Section 92 of the 1976 Act comes into play, upon an application being made by a registered co-operative society or a proposed co-operative society to undertake the restoration of the building.

23. In the instant case, except for an application having been made under Section 92 and steps having been taken thereafter under Section 103B, nothing further has happened. But by operation of law, the land has come to be vested in MHADA. The parties to the agreement, which includes the promoter, were fully aware of this situation since in the agreement itself it is indicated that the tenants would withdraw from the acquisition and would apply to MHADA to release the property from acquisition so that the agreement arrived at could be given effect to instantly. Whether MHADA has any obligation to provide similar accommodation to others in respect of the 30% surplus land, is a controversy which we need not go into and will surely be decided, whenever the Nine-Judge Bench sits to take up these matters. But for the purposes of this case, we regret that in spite of the inordinate delay in the working of the provisions of Chapter VIII-A of the 1976 Act, which was intended for the benefit of a certain section of tenants and occupants of cessed buildings, we are unable to grant the relief prayed for, as the same goes against the very grain of the provisions of Chapter VIII-A of the 1976 Act. Accordingly, we have no other option, but to dismiss the I.A., without going into further details, which will have to be settled by the Nine-Judge Bench.

24. Having regard to the nature of the facts of the case, the parties shall bear their own costs.