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MAHANT RAM PRAKASH DASS

v.

RAMESH CHANDRA AND ORS.

OCTOBER 27, 1999

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[DR. A.S. ANAND, C.J., S. RAJENDRA BABU AND
R.C. LAHOTI, JJ.]

Election :

C *Conduct of Election Rules, 1961—R.63(1) and (2)—Election—Votes—Irregularities in counting—Claim for recounting—Grant of—Counting of votes in six rounds—Election agent of appellant certifying that counting in first five rounds proper—Corrections in Form 20 in sixth round not found in original Form but only in copies—Application for recount rejected by Returning Officer—Election petition before High Court dismissed—Validity of—Held, application for recount should contain valid and precise grounds—Demand for recount should not be ordinarily granted unless a *prima facie* case regarding error in counting effecting result of returned candidate is made out—Since in the instant case, no foundation had been laid down for recount, claim rightly rejected.*

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In the Dasuya Assembly elections, respondent No.1 was declared elected by a margin of 53 votes. Appellant, a defeated candidate made an application for recount which was rejected by Returning Officer.

*Thereafter, appellant filed an Election Petition which was dismissed by High Court holding that the allegations of irregularities were not *prima facie* established. Hence the present appeal.*

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On behalf of appellant it was contended that the Returning Officer instead of rejecting the application ought to have ordered recount; and that in cases where the victory margin is very small, the claim for a fresh counting should not be summarily brushed aside.

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On behalf of respondent No. 1, it was contended that the first 5 rounds of counting has been certified by the election agent of appellant himself as proper and there could not be any complaint in regard to those rounds; and that there was no plea in the petition regarding irregularities in 6th and final round. As to corrections in Form 20 it was pointed out that there were no

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corrections in the original form but only in the copies, some errors had crept in which were corrected. Thus, there was absolutely no basis for High Court to interfere with the result of elections. A

Dismissing the appeal, the Court

HELD : 1.1. No foundation had been laid by appellant for recount either at the stage of filing the application before the Returning Officer or at the stage of the filing of the Election Petition before the High Court. Thus, appellants's claim for recount has been rightly rejected. [151-D-F] B

1.2. A candidate or his agent has an opportunity to ask for recount at two stages: first, before election result is finally declared, and second, by way of election petition before the High Court. An application under Rule 63(2) of the Conduct of Election Rules is to be given immediately after the votes secured by each of the candidates is announced under Rule 63(1), but such an application cannot be given after the candidate is declared elected under Rule 64. If an application is made under Rule 63(2) the Returning Officer shall decide the matter either by allowing the application in whole or in part or may reject in its entirety, if it appears to him to be frivolous or unreasonable. The application for recount should contain valid precise grounds on which the recount is asked for. When the Rules provide for enough opportunity to a candidate or his agent to watch the counting process before the result is declared and if an objection is raised as to the validity of any ballot paper and if such objection is rejected improperly, it would afford a basis for recount in an election petition. The secrecy of the vote has to be maintained and demand for recount should not ordinarily be granted unless the election petitioner makes out a *prima facie* case with regard to error in counting of such magnitude that the result of the election of the returned candidate may be affected. Smallness of victory margin by itself may not be a sufficient ground for recount. However, if *prima facie* case is made out as to error in counting, small margin by which the returned candidate succeeded in the election assumes significance, inviting recount. [157-E-F-G-H; 158-A] C

1.3. In the instant case, PW 5, an election agent of B.S.P. candidate has categorically deposed that election agent of appellant has signed the statements of votes counted in token of correctness thereof in appropriate forms. Thus, since the appellant's election agent himself had certified that the counting was proper in the first five rounds, the allegations made in the complaint regarding those rounds cannot stand close scrutiny. Further, regarding the 6th and final round, no irregularity was pointed out even at the stage of the D E F G H

A filing of the election petition. The only allegation regarding sixth round was of certain corrections made in Form 20. On perusal it was found that there was no corrections in the original Form 20. It was only in the copies that were typed thereafter, that discrepancies crept in, which were corrected. On the basis of such copies no case of irregularity in counting has been made out by the appellant. [158-C-D-E-F-G-H; 159-A]

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M. Omkar v. Revuri Prakash Reddy & Ors., [1999] 4 SCC 508, referred to.

Baldev Singh v. Teja Singh Swantantr (Dead) & Ors., [1975] 3 SCR

C 331; *Nathu Ram Mirdha v. Gordhan Soni & Anr.*, 38 ELR 16; *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra & Ors.*, [1980] Supp. SCC 53 = AIR (1980) SC 1362; *R. Narayanan v. Semmalai & Ors.*, [1980] 2 SCC 537 and *Satyanaarain Dudhani v. Uday Kumar Singh & Ors.*, [1993] Supp. 2 SCC 82, held inapplicable.

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2. Though the pleadings regarding recount contained in the election petition were based on the information of the election agent of appellant, the said election agent was not examined in the case. [159-D-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3131 of

E 1998.

From the Judgment and Order dated 16.1.98 of the Punjab and Haryana High Court in E.P. No. 2 of 1997.

F Ms. Rani Jethmalani, Sanjay M. Tripathi, Ms. Gauri Karuna Das and Ms. Leena Prasad for the Appellant.

Raju Ramachandran, Neeraj Kr. Jain Manish Mohan and Ugra Shankar Prasad for the Respondents.

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The Judgment of the Court was delivered by

RAJENDRA BABU, J. Respondent No. 1 was declared elected from the 51, Dasuya Assembly Constituency to the Punjab Vidhan Sabha in the election held on February 7, 1997. The appellant secured 31,701 votes, while respondent No. 1 secured 31,754 votes. The appellant raised an election dispute by filing

H a petition in the High Court of Punjab and Haryana for a declaration that the

election of respondent No. 1 is void and that the appellant is duly elected as A he has secured majority of the valid votes.

The appellant in his petition before the High Court set out that the counting of votes cast in the said election was conducted in a hall measuring 78 ft. by 23 ft. There were 14 counting tables in addition to a separate table for the Returning Officer. All the ballot papers were put in a huge box and were mixed and, thereafter, packets of 25 ballot papers in each packet were made. In each round 40 packets of 25 ballot papers each were entrusted to the staff at the counting tables. The staff consisted of five persons including a Supervisor. In the first five rounds 1,000 ballot papers were given on each table and in the sixth round 1,000 ballot papers each were entrusted to the personnel on 12 tables and only 132 ballot papers were entrusted to the staff on the 13th table. The total votes polled were about 82,176. 1,278 votes were rejected. Thereby 80,898 valid votes were counted. B C

It is alleged in the petition that the Returning Officer was obliged to respondent No. 1 who was a Minister of State in Punjab and the Returning Officer did not heed to the objections raised by the appellant and his counting agent orally as well as in writing to the effect that a lot of material irregularities took place in counting the ballot papers; that the appellant's election agent Shri Hardial Singh made an application to the Returning Officer for re-check and recounting of the votes; that the application was also signed by the election agent of the candidate from the Bahujan Samaj Party (BSP); that the said application was presented at 6 p.m. but was not properly considered nor the grievance made therein was duly enquired into by the Returning Officer; that although the appellant was assured by the Returning Officer that he was seeking a direction from the Election Commission of India regarding recount, he announced that the application had been rejected; that about 250 votes had been wrongly rejected as invalid and the counting agents of the appellant had objected to the rejection of such votes, but the Returning Officer and the counting staff were adamant in not treating them as valid votes; that in the second, third and fourth rounds about 150 votes had been put in the bundles of respondent No. 1; that the counting staff at table Nos. 4,5,7 and 14 mixed these votes and the packets of valid votes containing votes in favour of the appellant were treated as if cast in favour of respondent No. 1 and counted in his favour; that similarly, about 150 valid papers which were invalid were wrongly counted in favour of respondent No. 1; that, upto fourth round respondent No. 1 was leading but after the fifth and sixth rounds the position had changed and at about 5.30 p.m. lights went D E F G H

- A off for about two minutes and during that period the counting staff had managed to change the bundles to favour respondent No. 1. The appellant relied upon some corrections made in Form 20 to support his assertion that the votes polled in his favour were reduced and those in favour of respondent No. 1 were increased. In addition, it is alleged, there were irregularities in the counting of the postal ballot papers. The appellant contends that there was fencing wire between the counting agents and the supervisory staff and the Returning Officer rejected the votes without allowing the appellant and his election agent or counting agent to note down the serial number of the ballot papers. The appellant maintains that the staff, including the Returning Officer, was bent upon declaring respondent No. 1 as elected by wrongful
- B counting of votes in his favour and such improper reception and rejection of the votes had materially affected the result of the election. The appellant also contends that the Returning Officer did not give reasonable opportunity to him in regard to the demand of recounting of votes and the order passed by the Returning Officer could not be treated as one duly passed in eye of law inasmuch as the same had been passed without due application of mind; that
- C the verdict of the electorate is not truly reflected in the result. In the circumstances, the appellant in the election petition sought for inspection and scrutiny of the ballot papers in accordance with Rule 93 of the Conduct of Election Rules and, after scrutiny and inspection of the ballot papers, he sought for a direction for total recount of votes and further reliefs set out
- D above.

In the written statement respondent No. 1 raised several preliminary objections as to lack of pleadings to constitute cause of action, absence of affidavit in support of the allegations and copy of petition supplied by the appellant to him was not true. However, all these objections were either

- F rejected or conceded in favour of the appellant.

Respondent No. 1 in his written statement pointed out that he had a lead of 2,155 votes at the end of the first round which increased by 1,405 votes in the second round, 461 votes in the third round and 196 in the fourth round. Therefore, at the end of fourth round he was leading by 4, 217 votes.

- G At the end of fifth round, the lead was reduced by 1,817 votes. He had thus a lead of about 2,400 votes and the election agent of the appellant had conceded the defeat and left the hall. The counting had ended, according to respondent No. 1, by 5 p.m. of February 9, 1997 and the number of votes polled in favour of each candidate were mentioned on the black-board and
- H the total result of six rounds clearly showed that he had secured the maximum

number of valid votes. However, the result was declared on early morning of February 10, 1997. He denies the allegation of irregularity in the process of counting and maintains that the counting was done in orderly and peaceful manner. He contends that the candidates or their election agents had accepted the validity of the counting at the end of each round and had put their signatures on a statement in token of the correctness of the counting and none of the candidates or election agents or for that matter the counting agents had raised any objection during the counting; that the State and Central Observers who visited the counting hall also did not notice any irregularity or illegality in the counting; that the allegations in the election petition have been concocted for the purpose of the case by the appellant. The respondent denies that he was responsible for the posting of the Returning Officer and nor was he a Minister at the relevant time and he had nothing to do with his posting. He alleges that the appellant being head of one of the two religious Deras in the constituency in question exercised influence not only on the Returning Officer but also on his subordinates. He alleges that no objection was raised on February 9, 1997 at 6 p.m. and it appears that the same had been fabricated in connivance with the Returning Officer and no application was filed in the presence of respondent No. 1. He claims that no case had been made out for recount. He denied the allegation that 250 votes were wrongly rejected and no objection had been raised to such rejection at the time of counting. The appellant was not leading at any stage of the counting. Respondent No. 1 contends that vague allegations made by the appellant did not disclose any cause of action. He pointed out that in the original Form 20 there are no corrections. It is only while preparing a certified copy, mistakes have crept in which are corrected. He denies the allegations made by the appellant in regard to postal ballot papers and no ground has been made out for recount. He claims that the attempt of the appellant is only to seek a roving and fishing enquiry which is not permissible under law.

Ten witnesses on either side have been examined.

Sri R.K. Srivastava, PW 2, Under Secretary in the Election Commission of India, produced several papers pertaining to the 51, Dasuya Assembly Constituency where the election held on February 7, 1997. He stated that on February 10, 1997 a report, the two orders made on the application of Shri Hardial Singh, election agent of the appellant and Shri Ujagar Singh, election agent of BSP candidate for recounting of votes in respect of the election to the said constituency, with documents which are Exhibit PW2/1 to Exhibit

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- A PW2/6, were sent by the Returning Officer to the Election Commission of India along with Proforma for seeking permission for declaration of result. By a fax message the Returning Officer was permitted to declare the result of the election. The appellant examined himself as PW 3 and he reiterated the various contentions made in the petition. Although he was able to identify the signature of Shri Hardial Singh in Exhibit PW3/R-1 application for recount,
- B he was not able to do so in respect of Exhibit No. PW3/R-1 to Exhibit No. PW3/R-5 which are statements of votes prepared at the end of counting at rounds 1 to 5. He does admit that neither he nor his counting agent had filed objections in writing with regard to the process of counting. Only oral objections had been raised which had been rejected by the Returning Officer
- C Shri Ujagar Singh, the election agent of Smt. Swaran Kaur, who was a BSP candidate to the election, has been examined as PW 5. His evidence is significant in so far as his cross-examination is concerned. He states that whatever irregularity had been noticed by them in the counting had been stated in the complaint Exhibit PW3/1 and apart from that complaint no other complaint had been made. He admits that at the end of each round the
- D Returning Officer prepared a statement regarding votes secured by each candidate and the election agents or the counting agent representing different candidates signed the said statements in token of the correctness of the votes mentioned therein and even he had signed such statements. Similarly, Shri Hardial Singh, election agent of the appellant, had also signed such
- E documents and they are Exhibits PW3/R-1 to Exhibit PW3/R-5. Although several other witnesses have been examined in the case their evidence is not material or significant.

- F Respondent No. 1 examined himself as RW1. He reiterated the statement made by him in the course of written statement and nothing worthwhile has been elicited from him in the course of cross-examination. PW6, Shri R.K. Srivastava, had brought certain records and stated that Shri D.N. Sharan was the General Observer and Shri B.K. Bansal was the Observer to keep track of the expenditure incurred by the candidates during the election. The documents produced by him are marked as Exhibit RW6/1 and Exhibit RW6/2. In a Khaki paper cover a video cassette was produced and an objection was raised as to the production of the said cassette or admission of the same in evidence. PW 8 was examined to show that there was no tripping or power failure on February 9, 1997. He stated that there is no entry regarding failure of power in their books on that day.

- H On an analysis of the evidence made available the High Court concluded

as follows:-

(i) No objection had been raised by any one regarding the process of counting at any stage prior to the submission of the complaint, Ex.PW3/1.

(ii) The observers had visited the hall where counting was in progress. At least one of them had clearly moved from table to table and checked the ballot papers. There was no evidence of protest or complaint having been made (orally or in writing) by either any candidate or his agent.

(iii) The result of counting was being duly recorded by the Returning Officer at the end of each round. The petitioner's election agent Hardial Singh had signed these documents Ex.PW3/R-1 to R-5. PW5 has categorically stated that Hardial Singh had signed these documents. It has also been admitted that there was no complaint except that mentioned in Ex. PW3/1. Thus, Mr. Hardial Singh was not produced as he was likely to be confronted with the documents and his testimony would have given a lie to the allegations as sought to be made in the petition or during the course of evidence. Still further, in the petition, there is no allegation regarding any irregularities having been committed in the 6th round. In para 19, the only suggestion is that there were irregularities during the second to 5th rounds of counting.

(iv) The documentary evidence on record and the video cassette belie the suggestion of the petitioner that the counting was not properly conducted.

(v) The report sent by the observers and the order passed by the Returning Officer seem to be in conformity with the factual position at the spot.

(vi) The evidence on record does not make out any case, much less than a case of 'high degree of probability' that there were any irregularities so as to justify a recount of the votes. The allegations cannot be said to have even *prima facie* established. In fact, there seems to be an attempt to improve upon the allegations at every stage.

Ms. Rani Jethmalani, learned counsel appearing for the appellant, urged that the will of the people who have exercised their franchise in an election has got to be appropriately reflected in the result declared by the

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- A Returning officer. She submitted that where the victory margin is very small, as in the present case, the claim for a fresh count should not be summarily brushed aside. She strongly urged that if any defect had been pointed out in the matter of counting of votes, the same should have been taken note of; that many arithmetical inaccuracies may set in as a result of fatigue of the counting officials and in such an event the Returning Officer should not stand on prestige but ought to be practical; that he should be fair and realistic in appreciating the grievance of a candidate and ought to be liberal in recheck and recount. As, after all, fairness in the polls must not only be manifest but misgivings thereof should also be cleared at the earliest. She further stressed that in the present case the margin of votes in the victory of the respondent
- B is only 53 votes and, therefore, when the appellant's election agent made a complaint by way of an application, instead of rejecting the same, the Returning Office ought to have ordered recount. She further submitted that in the conditions prevalent in the counting hall it was not possible to note down the number of the ballot papers or other details thereof. She submitted that the Returning Officer has not passed the order on the application for recount filed by the appellant's election agent after due application of mind and hardly any reasons are set out in rejecting the said application. She has drawn our attention to the decisions of this Court in *Baldev Singh v. Teja Singh Swatanter (Dead) & Ors.*, [1975] 3 SCR 381; *Nathu Ram Mirdha v. Gordhan Soni & Anr.*, 38 ELR 16, *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra & Ors.*, [1980] Supp SCC 53 = AIR 1980 SC 1362, *R. Narayanan v. Semmalai & Ors.*, [1980] 2 SCC 537 and *Satyanarain Dudhani v. Uday Kumar Singh & Ors.*, [1993] Supp. 2 SCC 82.

- F Shri Raju Ramchandran, learned senior advocate appearing for the respondents, submitted that in the present case there cannot be any doubt as to the correctness of the counting that has taken place. There were six rounds of counting and upto 5th round of counting the election agent of the appellant himself certified on the appropriate forms that the counting was in order and the same may be announced. In this state of affairs, the only examination that has to be done is as to the correctness of 6th round of counting. In regard to 6th round of counting he submitted that there is no plea raised in the election petition as to in what manner any defect arose in counting, except to state that in the record made in the forms there is some scoring and alterations as authenticated by the Returning Officer in the certified copies of Form 20 supplied to the parties. He submitted that an examination of the original of Form 20 will clearly indicate that there are
- G no corrections at all. Corrections, if any, are only in the certified copies

given to the parties. He further pointed out that the application filed by the election agent of the appellant after all the counting was over was only a desperate attempt made on behalf of the unsuccessful candidate and such an application could not have been entertained at all and rightly the Returning Officer has rejected the same by giving cogent reasons. Considering the smallness of the victory margin the Returning Officer sought for permission from the Election Commission of India to announce the result which was subsequently granted upon which the results were duly announced. While seeking permission the Returning Officer reported to the Election Commission of India the fact of the appellant having made the complaint and its rejection. He, therefore, submitted that there is absolutely no basis for the High Court to interfere with the declaration of the result that has been made in the case. He further pointed out that even after eschewing video cassette from consideration there was ample material on record to which reference has been made by the learned Judge of the High Court to come to the conclusion that there is no irregularity in the counting.

The sole question therefore to be decided in the present case is as to whether there has been any irregularity in the counting in any of the rounds of counting.

A candidate or his agent has an opportunity to ask for recount at two stages: the first, before election result is finally declared, and the second, by way of election petition before the High Court. An application under Rule 63(2) of the Conduct of Elections Rules is to be given immediately after the votes secured by each of the candidates is announced under Rule 63(1), but such an application cannot be given after the candidate is declared elected under Rule 64. If an application is made under Rule 63(2) the Returning Officer shall decide the matter either by allowing the application in whole or in part or may reject in its entirety, if it appears to him to be frivolous or unreasonable. The decision shall be in writing containing reasons therefor. The application for recount should contain valid precise grounds on which the recount is asked for. When the Rules provide for enough opportunity to a candidate or his agent to watch the counting process before the result is declared and if an objection is raised as to the validity of any ballot paper and if such objection is rejected improperly, it would afford a basis for recount in an election petition. The secrecy of the vote has to be maintained and demand for recount should not ordinarily be granted unless the election petitioner makes out a *prima facie* case with regard to error in counting of such magnitude that the result of the election of the returned candidate may

A be affected. Smallness of victory margin by itself may not be a sufficient ground for recount. However, if *prima facie* case is made out as to error in counting, small margin by which the returned candidate succeeded in the election assumes significance, inviting recount.

B We will not place any reliance upon the video cassette produced before the High Court inasmuch as no evidence is adduced as to who recorded the cassette, nor does any witness speak to the veracity of recording, much less is there any material as to whether any editing was done.

C PW5 Ujagar Singh is an important witness. He acted as an election agent of Swarn Kaur who was a B.S.P. candidate who contested in the election. He stated that the respective counting agents had signed statements of votes counted in token of correctness thereof in the appropriate forms as Ex.PW-3/R-1 to Ex. PW-3/R-5 and the same bears his signature as well as that of Hardial Singh the election agent of the appellant. However, he maintained in the course of his evidence that there were irregularities in the counting. In D the light of the certificate given by them in Ex.PW-3/R-1 to Ex.PW-3/R-5 it is clear that there could not have been any complaint in regard to the first five rounds of counting. The complaint, if any, stood contradicted by this noting made by them on the said exhibits. Therefore, on such material the High Court rightly rejected the case put forth on behalf of the appellant that there was any defect in the counting of first five rounds. In none of the decisions relied upon by the learned counsel for the appellant such a situation had arisen. Therefore, those decisions can have no bearing upon the present case at all and in our view there is no need to refer to any one of them.

F So far as round six, which is the last and the final round, is concerned, the charge made by the appellant at Para 6 of the petition is in the following terms:-

G "Round no. 6, serial no. 79/9 i.e., table no. 9, there is a cutting on the votes secured by the petitioner as 462. None of these cuttings, alterations has been authenticated by the Returning Officer or any other officer concerned at any stage."

H We have seen the original Form 20 and we do not find any corrections made therein. It is only in the copies, that were typed thereafter, that discrepancies have crept in, which have been sought to be corrected and copies thereof are furnished to the appellant. On the basis of such copies no case could have been made out by the appellant. Thus there is no plea at all

so far as round 6 is concerned pointing out any discrepancy or irregularity A in the matter of counting. Hence we find no case is made out by the appellant in the course of the petition. In the absence of any pleading thereof, we find it difficult to accept the case put forth by the appellant that there was any irregularity in the 6th round of counting.

Now we shall advert to the contention put forth as to the manner in which the Returning Officer dealt with the complaint made and claim for recount. The only ground stated for counting of votes is that his staff had done many wrong things in spite of objections and that his staff had mixed votes cast in their favour with that of the Congress candidate. The allegation made in this complaint so far as the first five rounds are concerned cannot stand close scrutiny for the reasons already stated that the appellant's election agent himself had certified that the counting was proper in those rounds. If that is so, and when no irregularity is pointed out even at the stage of the filing of the election petition in the 6th round, were hardly find there is any substance in the complaint made and the Returning Officer has rightly rejected the same stating there is no substance in the application. In a somewhat similar case in *M. Omkar v. Revuri Prakash Reddy & Ors.*, [1999] 4 SCC 508, where an application for recount was made to the Returning Officer stating that sufficient irregularities had taken place in deciding the votes and lot of mischief had been committed by the staff at the time of counting and the difference of margin is as low as 100 votes this court characterised these allegations as hopelessly vague and the Returning Officer rightly rejected the complaint holding that the facts disclosed in the application would not justify the recount. The situation in this case is not any better than in that case. B C D E

We may further advert to one important feature of this case namely that pleadings regarding the counting are contained in para 15,16,18 to 23, 30 and 34 of the petition which are based on the information received from the election agent Hardial Singh, but significantly Hardial Singh has not been examined in the case at all. Thus we find the appellant's case to be hopelessly bad and no foundation had been laid for recount either at the stage of filing the application before the Returning Officer or at the stage of the filing of the election petition before the High Court much less before us. F G

In the result this appeal stands dismissed. However, in the circumstances of the case there shall be no order as to costs