

Raj Rani Vs. Subhash Chander

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Court : Delhi

Decided On : Dec-07-1982

Reported in : 23(1983)DLT240

Judge : Rajindar Sachar and; M.L. Jain, JJ.

Acts : Guardian and Wards Act, 1890 - Sections 7; [Hindu Minority and Guardianship Act, 1956](#) - Sections 6

Appeal No. : Letter Patent Appeal No. 223 of 1981

Appellant : Raj Rani

Respondent : Subhash Chander

Advocate for Pet/Ap. : Madan Bhatia,; Mukul Rohatagi and; S.K. Bhatia, Advs

Judgement :

Sachar, J.

(1) This is an appeal against the order of the learned single Judge by which he affirmed the judgment of the trial court, dismissed the application filed by the appellant (mother) under Section 7 and 25 of the Guardian and Wards Act for custody of the child (son).

(2) The parties were married on 23-11-1976. A male child was born to them in November 1977. Unfortunately right since the beginning the parties have not had a happy married life. According to the parties they are at variance as to at what particular point of time the wife left the husband's house and came back and again went away. The husband's case being that for the first time she left the house sometime in March 1978, (leaving the child behind). But after a couple of months, she came back and stayed on till 19-3-1979 when she is said to have left again. All this time the child is said to have been with the father. She is said to have come back in July 1979 and stayed on till 8-5-1980, when she is said to have gone away leaving the child behind. The wife of course denied that she ever left the house in March 1978. Her case is that she was turned out of the house on 19-3-1979. She says the child remained with her at her parent's house when she was brought back by the husband on 9-7-1979 and stayed on with the husband till 8-5-1980, when she was turned out of the house. Her case further is that she was brought back to the house on 1-3-1981 but was again driven out on 4-3-1981. The husband denies this and rather maintains that she along with her parents came to kidnap the child and even a police report was lodged by his younger brother. On 4-3-1981 the appellant also put in a police report and also got herself medically examined.

(3) By 24-3-1981 the husband moved an application for divorce. That application is still pending and has been adjourned sine die, because the husband/respondent had failed to pay the maintenance pendente lite which has been granted by the court below. The divorce has been asked for on the ground of cruelty, desertion and unsoundness of mind. By 5-5-1981 the present application under Section 7 and 25 of the Guardians and Wards Act and under Section 6 of Hindu Minority and Guardianship Act 1956 was moved praying that she be appointed as a guardian of the person of the minor and that respondent be directed to hand over the custody of the minor to the appellant. The courts below have dismissed her application and that is why the present appeal.

(4) The matter came up before us a number of times and ultimately the parties had agreed on how the custody of the child was to be given between the two of them and about the educational need of the child. The appellant, therefore, did not press

her appeal on merits, and the appeal was disposed of in terms of the agreement between the parties by our order of 21-5-1982. Unfortunately that agreement was not seen through. The appellant moved an application being C. Misc. 11401/1982 that as the respondent is not carrying out the terms agreed upon the order be recalled and appeal heard on merits. Though the respondent denied that he was responsible for not carrying out the terms of the agreement, his counsel Mr. S. K. Bhatia did not oppose the recalling of the order of 21-5-1982, that is why we restored the appeal and heard it on merits today.

(5) A preliminary objection is raised by the counsel for the respondent as to the competency of the appeal in fact to the competency of the very application moved by the appellant. Mr. S. K. Bhatia says that admittedly the child was in the custody of the respondent the natural guardian when the application was moved by the appellant, and therefore he urges that in application under Section 25 of Guardians and Wards Act, custody cannot be given to the appellant because of prohibition of Section 19(b) of the said Act which says that nothing shall authorise the court to..... appoint or declare a guardian of the person of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor. The contention being that so long as the father is alive there is no question of any one else being appointed a guardian because Section 19(b) is a complete prohibition. He sought to refer us to a number of authorities which apparently have taken the view that in view of Section 19(b), in the presence of the father no one else can claim custody of the child notwithstanding that the court may be of the opinion that it is for the welfare of the minor that some other person should have the custody of child. We feel that these arguments are of no avail in view of *Rosy Jacob V. Jacob* : [1973] 3 SCR 918 wherein it was observed that, 'the contention that if the husband is not unfit to be the guardian of his minor children, then the question of their welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. 'In our opinion the dominant consideration in making orders under Section 25 is the welfare of the minor children.' The court has clearly stated that the controlling considerations governing the custody of a child is the welfare of the child concerned and not the right of the parents, and further 'the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of

minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim an indefeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has'. The Supreme Court has also stated in para 15 that to the extent that the view taken by them of Section 25 of the Guardians and Wards Act runs counter to any of the authorities they must be held to be wrongly decided. The Supreme Court held the minors' custody should be with the mother and not the father. This view was reaffirmed in *Thirty Hoshie Dolikuka V. Hoshiam Shavaksha Dolikuka* : [1983]1SCR49 . Reference may also be made to *S. K. Chaudhary V. Smt. Satirani* : AIR1969 Cal573 where noticing Section 19 and even holding that the father is not unfit to be a guardian it was held that because of Section 13 of the Hindu Minority and Guardianship Act the prime and sole consideration will be the welfare of the minor and Section 19 of the Guardians and Wards Act will, therefore, have to be read subject to Section 13 of the Hindu Minority and Guardianship Act so far as Hindus are concerned. Reference may also be made to *Lalita Prasad V. Ganga Sahai* where also the learned Judge after noticing section 19 of the Guardians and Wards Act and Sections 2 & 13 of the Hindu Minority and Guardianship Act held that construing them together the rigour of prohibition contained in clause (b) of Section 19 of the Guardians and Wards Act must be considered to have been relaxed to a considerable extent in the interest of minor's welfare as laid down in Section 13 of the Hindu Minority and Guardianship Act.

(6) Reference by Mr. S. K. Bhatia to *Dr. Sudershan Kumar V. Dr. (Mrs.) Satish Arora & another* : 1974RLR299 is of no avail. As a matter of fact if anything the observations in this case go against him, because at page 891 the Bench has reproduced some of the considerations for the appointment of a guardian and has categorically stated that the well being of an infant is a paramount consideration (as distinct from the same being subordinate to the parents) in the sense of the same not being the sole consideration but the paramount consideration, other considerations being subordinate. And the mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children. In that case though both the mother and the father were highly qualified medical

practitioners the child was allowed to go and live with the mother in America, notwithstanding the contention that the child was being sent to a different cultural atmosphere than India. Mr. Bhatia referred us to *Ram Chandra v. Annapurni Ammal* : AIR 1964 Ker 269 which held that under Section 25 the mother cannot be given the custody of the child, a ratio obviously erroneous because it runs counter to the Supreme Court decision in Jacob's case (supra.). In *Ram Singh v. Lila Devi* (1969) V. D L T 619 in an application under Section 25 the mother was held not entitled to custody of the child as the child was in the custody of the guardian i.e. the father. It is however, significant that it was clearly stated therein that the mother could make an application under Section 7 for being appointed a guardian of a person of the minor and may then claim for the return of the minor to her custody which can be granted to her if it is for the welfare of the minor in the opinion of the Court. This authority also accepts the welfare of the minor as of paramount consideration. All these arguments basing on Section 25, apart from being without merit as shown above ignores the patent fact that the application moved by the appellant is also for the appointment of the guardian under Section 7 which empowers the court where it is satisfied that it is for the welfare of a minor that an order should be made appointing the guardian of the person or property of the child. It was not even disputed by counsel for the respondent that if the appellant is appointed as guardian of the minor, the custody of the child can be given to her. The preliminary objection, therefore, fails.

(7) Now as to merits Mr. S. K. Bhatia the learned counsel for the respondent contended that the mother had of her own left the child in the custody of the father, and that she was an unnatural mother having no affection. He complained that since 8-5-1980 when she left the house she made no effort to find out about the welfare of the child till March 1981. The appellant denies and has stated that she went to the house of her husband on 11-5-1980, but was turned away. We cannot find anything unusual in the appellant having waited to move the present application only after the respondent had moved an application for divorce. The reasons are not far to seek. It would be normal for her to hope that just as she had been driven out before but had been taken back she might still be brought to the husband's house and would be with the child. The in-built dread of Indian wife to break the marriage is so great that she is willing to put up with the greatest

of indignities. That can only explain why in spite of bitter and miserable experience she has repeated before us even today what she had stated in her evidence that she was still ready and willing to stay with the respondent. The helplessness and the awe of social custom of an Indian woman who has been deserted by the husband cruelly but still wants to go back may not be capable of rational explanation but is actual stark reality. Arguments based on the concept of modern women are totally out of focus when examining the life style of a lower middle class married woman. The husband is not agreeable for reconciliation in a male dominated society he has an advantage. That is why the question of appointing a guardian has to be decided in these proceedings. The counsel for the respondent's contention that whenever the appellant had gone out of the house of husband she had never cared to take the child with her is without merit and against record. It is true that the respondent has stated in his evidence that the child stayed with him when she left the house in March, 1979. But this is a false statement. A reference to Ex. Public Witness 9/2 dated 19-3-1979 which (a report lodged by the appellant in the Police Chowki) mentions that she was not being allowed to see her parents by her husband and her in-laws and she also stated that they were asking and complaining that dowry was less, and that they had also beaten her earlier and that she got herself examined medically. What is important to note is that on this report in the endorsement of action by the police it is clearly mentioned that her child Sonu who was a small kid was given to the mother by the Police after this report was given. This obviously negatives the respondent's case that the child was with him when she was driven out of the house in March, 1979. As mentioned before from July, 1979 she was again back in the husband's house. The husband obviously was rankling at the police report which was lodged earlier. That alone can explain the existence of a letter purported to have been written sometime in July, 1979 by the appellant to her father (Ex. D-7), which we have no doubt was written under the pressure of the respondent as indeed has been deposed to by the appellant. But even this letter mentions that when after coming to her husband's house on 9-7-1979, she sent her husband to bring the child from her father's house they refused to send the child back and her telephone had no effect and that she had to get the child back by getting the assistance of Police. Whatever the circumstances in which this letter is written, it does show that the child was with the

mother when she went out of the husband's house, for all these months. It is not therefore, correct for the counsel for the respondent to urge that the appellant has no sensitivity or affection for the child. This letter was also naturally relied upon by the counsel for the respondent to urge that the real mischief makers are the parents of the appellant. A bare reading of the letter shows the unnatural contents because the type of abuse showering, and blaming her parents can only be understood in the context of the appellant a poor helpless woman who is trying to please her 'Lord' a 'Master' the 'husband' and his family even at the cost of making reckless allegations against her own parents. We can find no reason what the parents of the appellant were to gain by spoiling her marriage considering that she had no property of her own nor were the parents of the appellant in any way dependent on her financially. We can only describe the letter got written by the husband as a crude and undeserving attempt to create evidence. This is more so, because the letter is typed and copies are sent to all the relations obviously to publicise it. Similarly there is another letter of 8-5-1980 which again is addressed to no one in particular excepting it contains the statements signed by the appellant that she had gone to the Hospital with her child and that she does not now want to stay in her husband's house nor does she want to take the child and she was going to her parent's house now. This letter was produced in evidence and sought to be proved by the evidence of R.W.7, who says that the appellant came to his house and delivered this letter. This witness also proves a letter claimed to have been written on 27-3-1978 in which again the appellant is stated to have written that she wants divorce from her husband and that she does not want the child and is leaving him behind and has no relationship with the husband's family. Both the times according to this witness she came to his shop, left the child with him and the letter. It is hard to understand why this clumsy, senseless device should have been adopted by the appellant if she was keen to walk out and that too without the child. One would have thought that the simplest thing was just to walk out if she was not to take the child who would be at home with his grant parents. It is not the case that because there was no body at the house of the husband with whom the child could have been left. We are convinced that these letters were got written under pressure to create evidence to show that she did not care for the child. We have shown above how this story of child having been left behind in 1979 is untrue. Here

is a woman who had been driven out of the house and whenever she came back she was pressurised to write such letters. Wanting a matrimonial home, she had no alternative but to accede to the husband's directive. The argument, therefore, that the appellant is not entitled to ask for the custody of the child and to be appointed as guardian of the child because she had given up the child on her own and had no love for him, has no foundation and must be rejected.

(8) There of course still remains the question as to what is for the welfare and in the interest of the child. It will be seen that the application was moved by the wife in 1981, the child was then about 3.5 years. Section 6 of the Hindu Minority and Guardianship Act which provides that the natural guardian of a Hindu minor shall be the father and after him the mother except by the proviso that the custody of the minor who has not completed the age of 5 years shall ordinarily be with the mother. The tenderness of the age overwhelmingly requires the maternal affection. The fact that the usual vagaries and delays of the litigation have led to a situation where the child is now probably a few days over 5 years (though was 4.5 years had the matter been decided on merits on 21-5-1982, but for the agreement which did not ultimately materialise) cannot obliterate the fact that at the time when she moved the application the child was just over 3 years. Even if the child is now a little beyond 5 years is no reason by itself to ignore the factum of tenderness of the age of the child and other relevant circumstances. The important circumstance in this case is that the father is a young man who is naturally busy with his business. That the respondent is financially and comparatively more affluent than the appellant admits of no doubt. The fact is that the father has admittedly to remain busy with his work the whole day and evidently cannot bestow personal affection and personal care on the child throughout the day. There are of course the grandparents who are at home and could possibly look after him and might be conceded that in the normal course would have usual affection for their grand child. But one very important aspect which has come in evidence is that unfortunately the father as well as the grand parents are of very low literacy. The husband has stated that he has studied up to Higher Secondary. The grand parents are illiterate. The appellant is a graduate. Not only that she is also doing the teaching job in Manavsthal School. A certificate to this effect was shown to us and which shows her as having been teaching in the school up to March, 1983. Appointments are

made for a year at a time, and that is why the certificate is in this form. Counsel for the respondent Of course draws our attention to Order 41 Rule 47 of the Code of Civil Procedure and says that if we wish to refer to this fact it must be proved as the documents are proved by evidence. He also sought to suggest that this must be done by giving him opportunity. So far as the later aspect is concerned we may mention that this document was produced before us months back at the time when the appeal was disposed of on the agreement of the parties. In the terms of the agreement of the parties it was stated by the appellant that she was teaching in the Manavsthal School and she would get the child admitted there. The respondent had agreed to this. Obviously the respondent accepted that the appellant was a teacher in the school and could use her influence to get the child admitted. All the time the respondent had proceeded on the basis that she was teaching in the School. As a matter of fact even in the matter of fixation of maintenance in the divorce petition filed by the husband, the later had got the order that he was to pay Rs. 600 p.m. instead of Rs. 1000 p.m. from the day the appellant had started drawing Rs. 400 pay as a teacher. The objection seems pointless when it is not suggested even half heartedly that the statement of the appellant that she is teaching in the School and the certificate is from the School is in any way wrong. This aspect is important because as the Supreme Court says in Jacob's case (supra.) that court has to see primarily to the welfare of the children in determining the question of custody in the background of all relevant facts having a bearing on their health, maintenance and education (para 14). We are saying this because the child is now at an age when education is the uppermost consideration. No doubt the child has to be fed and his physical requirement must be looked after. Physical requirement was the argument which the counsel for the respondent put in the foremost by drawing the 'classical' illustration of deprivation to child of eating a chocolate ice cream costing Rs. 10 (314 of the appellant's salary for a day) if the child was given to the mother. We would have thought that if the child does not get a chocolate ice cream every day, he would only be avoiding physical indigestion but at least getting intellectual food, while the deprivation of proper education but rich food will only give him bad liver and poor mind. Surely in the world of competition mental and intellectual equipment must overwhelm other consideration. It is also not as if the appellant can not give the child reasonable

physical comforts. She might even be in a position to give him the chocolate ice cream if the respondent who is showing his solicitude for the physical comfort of the child was only to carry out the court's order by paying regularly the maintenance allowance. We hope that considering that we intend to give custody of the child he will not cavil at carrying out his legal obligation. The absence of proper education can do permanent damage. The schooling of the child does require most of the home work to be done with the assistance of either or both parents but necessarily requires one of the parents to devote a lot of attention to the child's education. These days it is common to find even educated fathers devoting time to child's home work. In any case the mother if she is literate is compulsorily bound and tied to be devoting time to the child after school hours. Absence of home help will seriously hinder the development of child's studies. Had the parties been living together it is the mother who alone would have had to do this duty. In the present case, therefore, the child will be completely deprived of any help that necessarily requires for his education development if he lives and remains under the guardianship and custody of the respondent father. We feel, that the child, who is at the start of his educational career requires a home and an atmosphere of education, literacy, which he can only have under the custody and guardianship of the mother, considering her academic qualifications and especially that she herself is in teaching line and thus will be able to give him the necessary guidance, the help which a small child would need.

(9) We are not suggesting that the father is not keen that the child should have the best of the education and we have no doubt that if the respondent [father puts forth a proposal to put the child in the best of school there would be no objection by the appellant provided that the necessary expenses are borne by him. But the custody must be with the mother.

(10) It is well settled that the welfare of the ward is a pre-eminent factor and consideration in deciding the matter about the guardianship and custody of the child and in that context the conduct of the parties has also an important bearing, See *Re : F. (an infant)* (1969) 2 All. E.R. 766(8). In the present case an aspect of the conduct of the respondent has been highlighted which does not show him in a flattering situation. The respondent has stated in the evidence that on one day he

had come to the High Court and had seen his wife Along with a man. According to him they had gone to Lodhi Garden, then to a Hotel, obviously suggesting adulterous conduct on the part of the appellant. He had even produced a witness to support this version. This allegation had been found to be false by the trial court and the learned single Judge. This finding would show the reckless disregard for truth and an attitude of mind which in order to support his case will even stoop to making any scandalous and unfounded allegations against his own wife and in other of his child. It also shows the lack of sensitivities of the character and the temperamental instability in the respondent father. It is well settled that in matrimonial cases allegations of unfounded adultery have been held to amounting to cruelty, and one may be justified in saying that there is a streak and element of cruelty in the character of the respondent. Whether this should amount to the unfitness of the respondent as counsel for the appellants suggested, it at least shows him worse in comparison with the appellant, who has not resorted to making any wild allegations against the husband. On the contrary the appellant who is well read lady and has shown commendable fortitude and patience notwithstanding these provocative allegations and has in the larger interest of the child's welfare even agreed to go back to the husband. Not only that but even when in May, 1982, when the parties were talking of compromise in these proceedings it was the wife who had offered that as she was more keen that the child should get proper education at proper age and had for that purpose been willing to forego her rights of guardianship provided the matter was settled in a satisfactory manner in the interest of child's education. That did show the consideration and a sense of subordinating her own personal interest to the high interest and welfare of the child. On that view also the scale must tilt in favor of the appellant | mother.

(11) In this matter of guardianship and custody one has also to consider what was mentioned in >1969 (2) All.E.R. 766 what sort of father substitute or mother substitute the child will have. It is apparent that if the child was to remain with the father there will be no mother substitute since the presence of the grand mother will not be at all the mother substitute because she being old and illiterate lady may overwhelm him with sentimentality and emotion and the child may have lopsided development divorced of practical realism. The appellant is living with her brothers who also have family and children and the child, therefore, will have the

company of children of his own age and will also have the love of his uncles and which to some extent will satisfy the emotional need of the child for father-substitute. Since the mother is a working lady in a school she will be able to guide the child in education. It is well recognised that the young children have greater need for the mother rather than for the father, more so when on comparative merit the appellant is able to satisfy the educational and cultural needs of the child because of vast difference in respective mental equipment.

(12) In arriving at a conclusion that the custody should remain with the father the learned single Judge was persuaded mainly by three factors; one that the financial superiority of the respondent father was overwhelming. The learned Judge also had doubts whether the appellant had any job at all because the teaching job which she was supposed to have was expiring in a couple of months. Of course so far as the overwhelming financial superiority is concerned there is no doubt that it rests with the father, but that the appellant is not without a job is established because we were shown the certificate and Mr. Bhatia counsel for the appellant made a statement at the bar that the mother was having a job which admittedly goes up to next year and in the normal course would also be renewed. To refuse the guardianship and custody of the child simply on the ground of lesser financial strength than the father would non-suit almost 90 per cent of the mothers, and reduce the criteria of welfare of a minor not to be judged by the higher values but solely by the cash nexus a situation totally unacceptable. The second reason which weighed with the learned single Judge was that he found that when the mother tried to talk to the child he was reluctant and appeared to be quite attached to the father. We can understand the initial hesitation of the child to go to the mother considering that the child had been with the father ever since 1980. For the period in interval the mother is not at fault because after having failed in reconciliation her application moved in May, 1981 has had to pass through various vicissitudes of litigation. At the time she moved the application the child was just over three years and if the wheels of litigation had moved quickly and correctly the child would have been with her long time back. But nevertheless in order to satisfy ourselves that the child would not suffer the psychological and emotional upset if he was given to the mother we had during the process of hearing spread over for months required the child to be produced in court. We had on these days permitted the child to spend

some time with the mother away from the company of the father and the grandparents separately in the court compound. We were satisfied to find that after one or two days of familiarisation the child was found playing with and responding to the mother in a normal manner. This has given us reassurance that by giving the custody of the child to the mother he will not suffer any emotional upset as the child had got used to with the mother in a very short time. Both these reasons, therefore, which persuaded the learned Judge to give custody to the father are unsustainable. The learned Judge also has held that on 8-5-1980, the appellant left of her own accord leaving the child behind. We have already held above that a similar stand of the respondent that she had gone away in 1979 leaving the child behind is untrue. We have given reason for holding that letter of 8-5-1980 is unnatural and was forced. We must, therefore, differ with the finding of the learned single Judge.

(13) We, therefore, are of the view that both in the interest and for welfare of the minor and on a consideration of the comparative merits between the mother and the father, guardianship and the custody of the child should be given to the mother. We are convinced that it will be in the interest of the child and welfare if the appellant is appointed guardian of the person of minor, and we hereby do so order. We do realise that in these matters a difficult choice has to be made because the custody of one parent necessarily denies the other the company of the child for most of the time but then when parties are unfortunately unable to live together or do not wish to live together and even the common affection for the child is not enough to persuade them to sink their own differences and live together the court is left with no alternative but to seek to decide the question of guardianship and the custody of the child keeping in view the overall consideration and welfare of the minor. We can also accept that it is not easy to define the precise considerations that would be the determining factors with regard to the competency of each parent to be appointed the guardian of the minor and have his custody. This situation may pose problems but then we can find solace from what was said by Megarry in *Re. F. (An infant)* F V V 1969 2 Ch. Div. 238 and which was referred to with approval in *Dr. Sudarshan Kumar Arora v. Dr. (Mrs.) Satish Arora and another* 1974 1 Delhi 885 ; 'If it is objected that this formulation does little to define or explain the process, I would reply that it is precisely a process such as this which calls for the

quality of judgment which inheres in the Bench, and this is a quality which in its nature is not susceptible of detailed analysis. There is a limit to the extent to which the court can fairly be expected to expound the process which leads to a conclusion not least in the weighing of imponderable. In matters of discretion it may at times be impossible to do much more than ensure that the judicial mind is brought to bear with a proper emphasis, on all that is relevant to the exclusion of all that is irrelevant.'

(14) As a result we would set aside the orders of the courts below and appoint the appellant as guardian of the person of child Sonu whose name is Pawan Kumar.

(15) As we have now appointed the appellant as guardian of the child it is apparent that the custody must also be given, to her. The child is at present with the respondent. We would, therefore, direct the respondent to bring the child to the court on 15-12-1982 at 10.30 A.M. when the child will be given to the appellant. Of course notwithstanding that the appellant has been appointed as a guardian and the custody is being given to her, the respondent should nevertheless have proper access to the child, (the being the father). We do not wish to put the child in a situation where he should not have either the paternal or the maternal access denied to him completely.

(16) We are also keen that the education of the child should not suffer. If the mother is able to get the child admitted in Manavasthali School either at Rajinder Nagar or Pusa Road the child may be shifted there after taking care that this does not mean a break in his education. But so long as the admission is not available in the said school the appellant will see that the child's education continues in the school where he is studying at present. This is necessary because we do not wish that the child's education suffers because that has been one of the main considerations in giving the guardianship and custody to the mother.

(17) As a result of the above, the appeal is allowed as above, the judgments of the courts below are set aside and the application of the appellant is granted. There will be no order as to costs.

