

K. BASAVARAJAPPA

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v.

TAX RECOVERY COMMISSIONER, BANGALORE AND
OTHERS

OCTOBER 11, 1996

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[DR. A.S. ANAND AND S.B. MAJMUDAR, JJ.]

Income Tax Act, 1961, Income Tax Rules,—Rule 60 of the Second Schedule—Locus Standi of proposed purchaser to make application for setting aside auction sale—Deposited the amount—Held by mere agreement to sell the appellant got no interest in the property put to auction and cannot claim to get the auction sale set aside by making an application and depositing the amount.

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Rule 16(1) and 16(2) Read with Rules 51 & 48 Agreement of sale—Defaulter—No permission of tax recovery officer—Held entering into an agreement bypassing the statutory requirements cannot claim any legal interest for setting aside the auction sale.

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D has committed default in payment of Income Tax for the relevant assessment year. He has entered into an agreement of sale of certain property with the appellant. The appellant filed a suit for specific performance when D failed to execute the sale deed. In the meantime, tax recovery officer attached the property and auctioned it for recovery of the tax dues from the defaulter. The appellant within 30 days from the date of auction sale filed an application under Rule 60 of the Second Schedule to the Income Tax Act. The Appellant also deposited the tax dues of the defaulter and prayed for setting aside of the auction sale. When the application of the appellant was refused he approached the High Court in Writ Petition challenging the rules. The said writ petition was allowed by the High Court holding that the application made by the appellant was maintainable under Rule 60. The Division Bench of the High Court reversed the order of the Single Judge.

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In this appeal, it was contended by the appellant that he has made an application within 30 days of the auction sale along with authority letter entitling him to deposit the tax amount on behalf of the defaulter; that he has sufficient locus standi as his suit for specific performance was pending

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A on the date of auction sale and was decreed by consent of parties the very next day, and that the High Court erred in taking the view that his application under Rule 60 was not maintainable.

B Revenue contended that the application moved by the appellant could not have been entertained and was rightly refuted by the tax authority as such agreement was violative of Rule 16 sub Rule (1) and Rule 51 read with Rule 48, and that the appellant could not be said to be a person having any legal interest in the property put to action.

Dismissing the appeal, this court

C HELD : 1. The original defaulter whose property was put to auction had *locus standi* to move an application himself or through general power of attorney holder under Rule 60 of the Income Tax Rules for getting it set aside. In this case, the applicant himself has moved an application as a prospective purchaser of property. On the date of application he was not armed with any decree granting specific performance of the agreement. By D mere agreement to sell, the appellant got no interest in the property to auction to enable him to apply for setting aside under Rule 60.

[530-B, 532-B, 534-C]

E 2. When the defaulter agreed to sell off his property to the appellant he totally bypassed the requirement of Rule 16(2). If a party with an open eye bypasses the statutory requirement of Rule 16(1) and gets an agreement to sell executed by defaulter, he cannot on the basis of such an agreement claim to get the auction sale of defaulter's property set aside by depositing the amount. It would amount to circumventing statutory provision of Rule 16(1) and 2 read with Rules 51 and 48. Therefore the appellant had no locus F standi to move an application for getting the auction sale set aside. [532-E, 533-D, 534-F]

D.V. Satyanarayana and Others v. Tax Recovery Officer and Others, (1992) 197 ITR 407, approved.

G *M. Rajagopal v. Secretary, State Transport Authority, Trivandrum and Others*, (1978) 115 ITR 864, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 13049-50 of 1996.

H From the Judgment and Order dated 13.2.92 of the Karnataka High

Court in W.A. No. 293-721 of 1991.

P.P. Rao, A.V. Palli and Mrs. Pekha Palli for the Appellant.

Harish N. Salve, R.R. Mishra, A.A. Kulkarni, Mukul Mudgal, Y.P. Mihajan, B.K. Prasad and S.N. Terdol for the Respondents.

The Judgment of the Court was delivered by

S.B. MAJMUDAR, J. Leave granted in these Special Leave Petitions.

By consent of learned advocates of contesting parties the appeals were heard finally and are being disposed of by this Judgment.

A short question falls for our consideration in these two appeals arising out of a common judgment of Division Bench of the Karnataka High Court in Writ Appeal No. 293 of 1991 connected with Writ Appeal No. 721 of 1991. The question is whether the common appellant in these appeals who was original petitioner no. 2 in these Special Leave Petitions had any *locus standi* to prefer an application under Rule 60 of the Second Schedule to the Income Tax Act, 1961 for setting aside the sale of immovable property of the defaulter income tax assessee from whom he is alleged to have greed to purchase the said property and which property was sold in auction by the Income Tax Department in execution of Certificate of Recovery of Income Tax issued against the defaulter, owner of the property.

In order to answer this question the backdrop facts may be noted at the outset. One Y.S. Devendra Murthy who was the owner of the property auctioned by the Income Tax Department had committed default in payment of income tax dues assessed against him for the relevant assessment years. The Tax Recovery Officer under the Income Tax Act issued notice to him on 3rd September 1973 as per Rule 2 of the Second Schedule to the Income Tax Act which deals with 'Procedure for Recovery of Tax'. The said defaulter Shri Y.S. Devendra Murthy entered into an agreement dated 20th November 1982 with the common appellant to sell his property being agricultural land being Survey No. 20 and part of Survey No. 21 for Rs. 2,80,000 and received an advance of Rs. 1,62,000. The Sale Deed was to be executed by said Shri Y.S. Devendra Murthy within eight months which time limit was further extended by five months. The appellant

- A filed a suit for specific performance of the Agreement to Sell on 2nd January 1984 alleging that said Shri Y.S. Devendra Murthy had failed to execute the Sale Deed pursuant to the Agreement. Earlier an *ex parte* decree was passed in the said suit being Original Suit No. 5 of 1984 but the said decree was set aside and the proceedings remained pending. In the meantime by an order dated 11th February 1988 the Tax Recovery Officer attached the aforesaid properties belonging to Y.S. Devendra Murthy and thereafter a proclamation of sale was issued for putting the said properties to auction sale for recovering the tax dues of the defaulter. The Tax Recovery Officer brought the said attached properties to sale on 14th March 1988. The third respondent herein was the successful bidder at the said auction and he became auction purchaser of these properties. Thereafter on 12th April 1988, that is, within thirty days from the date of the auction sale the appellant filed an application under Rule 60 of the Second Schedule to the Income Tax Act. To the said application was annexed a letter from the general Power of Attorney holder of the defaulter Shri Y.S. Devendra Murthy authorising him to deposit the amount of tax arrears. The appellant along with the said application sought to deposit the interest and solatium at the rate of 5% with costs. The appellant also deposited Rs. 3,42,322 being the arrears of tax with interest and solatium with costs with the Tax Recovery Officer on the same day, that is, 12th April 1988. He accordingly prayed for setting aside the auction sale. The Tax Recovery Officer by his order dated 20th April 1988 rejected the said application by holding that as he was directed by the Commissioner of Income Tax, Karnataka II, Bangalore to confirm the auction sale he had confirmed the auction sale and hence the application of the appellant was rejected. The appellant carried the matter in appeal before the Tax Recovery Commissioner who rejected the said appeal and passed order dated 13th June 1988. At that stage the appellant along with the general Power of Attorney holder of Y.S. Devendra Murthy, named Shri Y.S. Surender filed a writ petition in the Karnataka High Court challenging the orders of the Tax Recovery Officer and Tax Recovery Commissioner. A learned Single Judge of the High Court by his order dated 14th December 1990 allowed the writ petition and quashed the orders dated 20th April 1988 passed by Tax Recovery Officer and dated 13th June 1988 passed by Tax Recovery Officer and dated 13th June 1988 passed by Tax Recovery Commissioner. The learned Single Judge held that application moved by the appellant was maintainable under Rule 60 and as he had in the

meantime withdrawn the deposited amount he permitted the general
 Power of Attorney holder of Y.S. Devendra Murthy to make deposit within
 four weeks and directed the Tax Recovery Officer to deal with the matter
 in accordance with law. An amount of Rs. Rs. 4,45,783 was accordingly
 deposited with the Tax Recovery Officer. The aforesaid order of the
 learned Single was challenged by the Tax Recovery Commissioner, Kar-
 nataka II, Bangalore and Tax Recovery Officer by way of Writ Appeal no.
 293 of 1991 while respondent no. 3 preferred Writ Appeal no. 721 of 1991
 against the very judgment and order of the learned Single Judge as by the
 said order of the learned Single Judge the auction sale in favour of
 respondent no. 3 was liable to be set aside if the remanded proceedings
 under Rule 60 were successful. Both these writ appeals were heard
 together by a Division Bench of the Karnataka High Court consisting of
 S.P. Bharucha, C.J. (as he then was) and Justice Shivraj Patil. The Division
 Bench of the High Court came to the conclusion that the appellant's
 Application under Rule 60 was not maintainable and he had not *locus*
standi to file such an application. Consequently the writ appeals were
 allowed and the writ petition was dismissed with the result that the order
 of the Tax Recovery Officer dated 20th April 1988 and the further order
 of the Tax Recovery Commissioner dated 13th June 1988 came to be
 confirmed. Aggrieved by the common order of the Division Bench of the
 High Court in the aforesaid two writ appeals two Special Leave Petitions
 were moved in this Court initially by two petitioners the first petitioner was
 Y.S. Surendra, the general Power of Attorney holder of the defaulter and
 the present appellant was petitioner no.2 But during the proceedings at
 notice stage the original petitioner no. 1, the Power of Attorney holder or
 the defaulter, Y.S. Surendra withdrew from contest with the result that
 original petitioner no.2 remained the solitary petitioner in both the S.L.Ps
 and has now pursued the present two appeals as the sole appellant.

Learned senior counsel, Shri P.P. Rao, for the appellant submitted
 that the Division Bench of the High Court erred in taking the view that
 the appellant's application under Rule 60 of Second Schedule to the
 Income Tax Act was not maintainable. That his application was backed up
 by the authority letter entitling him to deposit the tax amount on behalf of
 the defaulter and that authority letter was duly signed by the Power of
 Attorney holder of the defaulter and that application was moved within
 thirty days of the auction sale. It was, therefore, perfectly maintainable and

- A it was too much to contend that the defaulter cannot get the amount deposited through anyone much less through the appellant who had interest in the property as his suit for specific performance was not only pending on the date of the auction sale but had got decreed by consent on the very next day of moving such application. Shri P.P. Rao submitted that the
- B application was moved on 12th April 1988 and the suit in favour of the appellant was decreed by consent of parties on the next day, that is 13th April 1988. Thus on the day on which the Tax Recovery Officer rejected the appellant's application he was already having the full title in this property as successor-in- interest of the defaulter. It was vehemently submitted that even assuming it is held that the defaulter through his Power
- C of Attorney holder had not filed a separate application under Rule 60 and had merely supported the application of the appellant even then as per the said Rule the appellant had sufficient *locus standi* as he was interested in the property which was subject- matter of the auction sale and that Revenue was only concerned with its tax dues. Once the deposit fully met
- D the said claim of the Revenue it could not insist on such a technicality that the appellants' application was not maintainable qua the auction purchaser respondent no. 3 who did not get any better right by the auction in his favour which was liable to be set aside on payment of tax dues within thirty days of the auction by the defaulter on by any of his agents. In support of
- E this contention strong reliance was placed on the decision of a learned Single Judge of the Kerala High Court in the case of *M. Rajagopal v. Secretary, State Transport Authority, Trivandrum and others*, (1978) 115 I.T.R. 364.
- F On the other hand learned counsel for the Revenue as well as learned senior counsel Shri Salve for respondent no. 3, auction purchaser vehemently contended that the Division Bench of the High Court was perfectly justified in taking the view that appellant's application was not maintainable under Rule 60 of the Rules as his alleged agreement to
- G purchase the property was void from the inception as the said agreement dated 20th November 1982 flew in the face of statutory prohibition engrafted by Rule 16 sub-rule (1) of the Rules in the Second Schedule of the Income Tax Act. It was also submitted that once the defaulter's property was attached on 11th February 1988 as per Rule 51 of the Rules the attachment related back to the date of service of notice that is 3rd
- H september 1973 and, therefore, the agreement itself became void. In any

case according to Shri Salve the application moved by the appellant could not have been entertained and was rightly rejected by the Tax authorities as because of such an agreement which was violative of provisions of Rule 16 sub-rule (1) and Rule 51 read with Rule 48 the appellant could not be said to be a person having any legal interest in the property put to auction. That such an interest must be of a person who had acquired some legal right or interest in the property prior to the issuance of notice under Rule 2 of the Second Schedule and would not cover a person whose transaction with the defaulter was within the sweep of the prohibition of Rule 16 sub-rule (1) and Rule 51 read with Rule 48 of the Rules. In Rejoinder learned senior counsel Shri Rao for the appellant submitted that the application moved by the appellant could not be said to be by an unauthorised person or a stranger to the property as he was having sufficient legal interest in the property and his agreement was not void *ab initio* but was subject to the superior right of recovery of the tax by the Revenue and once that was assured by the appellant by depositing the entire amount with interest and costs the Revenue could not contend that it would still insist on going ahead with the auction and getting it confirmed. That the appellant had moved application under Rule 60 within the permissible limit of thirty days from the date of auction.

In the light of the aforesaid rival contentions we now proceed to deal with the question posed for our consideration. Rule 60 of the Rules in the Second Schedule to the Income Tax Act reads as under :

"60. (1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing.

(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of fifteen per cent per annum, calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

A (2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule."

B It is no doubt true that original defaulter Shri Y.S. Devendra Murthy whose property was put to auction had sufficient *locus standi* to move an application under Rule 60 within thirty days of the sale for getting it set aside on his depositing the requisite amount as laid down by the said provision and his general Power of Attorney holder could also legitimately contend that he had *locus standi* to move such an application on behalf of the defaulter.

C However for reasons best known to him he had not done so. It is not the case of the appellant that Shri Y.S. Devendra Murthy or his Power of Attorney holder Shri Y.S. Surendra had moved such an application. On the contrary his consistent case is that he himself had moved such an application but he was supported by the authority given by the Power of

D Attorney holder of Y.S. Devendra Murthy to deposit the amount of tax arrears. Shri P.P. Rao, learned senior counsel for the appellant was right when he contended that once an appropriate application is moved by the defaulter or his Power of Attorney holder under Rule 60, the further question as to from which source he gets money for being deposited or through whom he gets the money deposited would pale into insignificance

E and that even a peon of the defaulter can also carry out the ministerial act of actually depositing the money on his behalf. But unfortunately for the appellant such is not the case here. When we turn to the application dated 12th April 1988 moved by the appellant under Rule 60 it becomes at once clear that it was not the defaulter or his Power of Attorney holder who was

F moving this application but it was only the appellant who was armed with an agreement to purchase the property put to auction who was moving this application and the moneys were being deposited by him on his own behalf and for which action he had got authority from the power of Attorney holder of the defaulter. The following pertinent recitals in the application made this position clear :

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"I am the prospective purchaser of the properties bearing Nos. 20/1, 2, 3 and 21. situated at Byaderahalli village. Viswaneedam Post, Bangalore - 560 091, and Y.S. Devendra Murthy has executed an agreement in this behalf agreeing to sell the properties. I have filed the suit for specific performance of the contract to enforce

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the said agreement in O.S. No. 5/1984 on the file of the Additional Civil Judge, Bangalore. I have paid the amount also in advance. In the meantime, your Hon'ble Authority was pleased to hold auction on 14.3.1988 in respect of Survey No. 201, 2, 3 for the recovery of arrears due in respect of Sri Y.S. Devendra Murthy. Still there is time to pay the amount by the said Y.S. Devendra Murthy. As I am having right and interest over the property that has been auctioned I am ready and willing to pay the amount in full. To this effect. Shri Y.S. Surendra the brother and the Power of Attorney Holder of Sri Y.S. Devendra Murthy has authorised me to pay the amount. The said authorisation letter is enclosed herewith. Accordingly. I am prepared to pay the amount that your Hon'ble Authority is entitled to recover from Y.S. Devendra Murthy. The amount detailed below may kindly be accepted and the sale may kindly be set aside."

In the prayer clause of the said application it has been stated that above application is filed under Rule 60 of Schedule II of Income Tax Act. 1961 and the sale be set aside by accepting the amount deposited by him. It is, of course, true as contended by learned senior counsel Shri Rao for the appellant that along with this application he also annexed the authority letter given to him by the Power of Attorney holder of the defaulter. He invited our attention to the said letter annexed to the appellant's application under Rule 60. The said letter is addressed to the Income Tax Commissioner by the Power of Attorney holder of the defaulter Shri Y.S. Devendra Murthy. By the said letter the Power of Attorney holder has informed the Income Tax Commissioner that he was prepared to pay the amount that was due to his brother as his Power of Attorney holder and in this behalf he had authorised K. Basavarajappa, plaintiff in Original Suit No. 5 of 1984 on the file of Additional Civil Judge, Bangalore (the appellant herein), to pay the amount. Now it becomes clear that this letter addressed to the Income Tax Commissioner, Third Circle, Bangalore, could by no stretch of imagination be considered to be an application under Rule 60, moved by the defaulter or his Power of Attorney holder Shri Y.S. Surendra as such an application has to be moved before the Tax Recovery Officer who has conducted the auction sale with the prayer to get it set aside. This letter is merely an intimation to the Income Tax Commissioner that he had authorised the appellant, Plaintiff of the suit, to

- A make payment on behalf of his defaulter brother. Such a letter, therefore, could not constitute an appropriate application under Rule 60 by the defaulter or his Power of Attorney holder for getting the auction sale set aside. So far as the appellant is concerned he no doubt moved that application under Rule 60. But his application was moved on the basis that
- B he had already filed a civil suit for specific performance of his agreement to purchase the suit property which was subject-matter of auction. Thus he was putting forward his own claim as prospective purchaser of the property. On the date of the application he was not armed with any decree granting specific performance of the agreement. We also find considerable
- C substance in the submission of Shri Salve, learned senior counsel for the auction purchaser that when equities are to be balanced between the two rival claimants, namely, the prospective purchaser of the auctioned property under an agreement to sell on the one hand and the auction purchaser who had purchased the property in the tax recovery proceedings on the
- D other, it has to be seen whether the appellant could claim any legal interest and even a preferential interest in the property which would entitle him to get the auction sale set aside. In this connection Rule 16(2) on which strong reliance was placed by Shri Salve, is found clearly to have hit the said agreement in favour of the appellant. To recapitulate, notice under Rule 2
- E of the Second Schedule of the Income Tax Act was issued to the defaulter on 3rd September 1973. It may be that the attachment might have taken place years afterwards but on 20th November 1982 when the defaulter agreed to sell off his property to the appellant he totally bypassed the requirement of Rule 16(2) which lays down that where a notice has been
- F served on the defaulter under Rule 2 the defaulter or his representative-in-interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax Recovery Officer, nor shall any civil court issue any process against such property in execution of a decree for the payment of money. By
- G entering into such an agreement to sell his property the defaulter had clearly committed breach of Rule 16(1) and had bypassed the procedure laid down therein for getting permission of the Tax Recovery Officer. In this connection Shri P.P. Rao, learned senior counsel for the appellant was right when he contended that such dealing with the property by the
- H defaulter was not absolutely prohibited but it was subject to the permission of the Tax Recovery Officer while under sub-rule (2) of Rule 16 once an

attachment has been made under this sub-rule any private transfer or delivery of the property attached or of any interest therein and any payment to the defaulter of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment. However this does not improve the situation for the appellant for the simple reason that once attachment was levied on 11th February 1988 by virtue of Rule 51 it related back to the date of the notice, that is, 3rd September 1973 and the appellant's agreement was in between. It was contended by Shri P.P. Rao relying on the judgment of the Kerala High Court in the case of *M. Rajgopal* (supra) that all that Revenue was concerned with was security of its dues and consequently even though any transaction which was hit by the provisions of Rules 16(1) and (2), the parties to such transaction would have sufficient interest to move an application under Rule 60 for setting aside the auction sale on offer to deposit full tax dues. It is not possible to countenance this submission. If a party within open eyes bypass the statutory requirement of Rule 16(1) and gets an agreement to sell executed by the defaulter, it cannot on the basis of such an agreement claim to get the auction sale of defaulter's property set aside by depositing the amount after the property is put to auction for recovering the tax dues of the department. It would amount to circumventing statutory provisions of Rule 16(1) and (2) read with Rule 51 and 48 of the Rules. It must, therefore, be held as rightly submitted by Shri Salve, learned senior counsel for respondent no.3 that the appellant had no *locus standi* to move the application dated 12th April 1988 for getting the auction sale set aside. It is also to be noted that he had no legal interest in the said property on the date of the application. It is axiomatic that mere agreement to sell creates no legal interest or right in the property which is the subject-matter of the agreement. In this connection a Division Bench of the Karnataka High Court in *D.V. Satyanarayana & Ors. v. Tax Recovery Officer & Ors.*, (1992) 197 I.T.R. 407 has taken the view that a person who had obtained an agreement to sell which is hit by Rule 16 of the second schedule to the Income Tax Act cannot make an application under Rule 61 for setting aside the sale as a person holding interest in the property. On the scheme of the Rules aforesaid this view represents the correct legal position. On the same analogy such an agreement holder cannot equally apply under Rule 60 in his own right to get such auction sale set aside. The decision of the learned Single Judge of the Kerala High Court heavily relied upon by learned senior counsel for the appellant is of no assistance

- A to him for the simple reason that in that case the court was not concerned with any attachment following the notice under Rule 2 of Schedule II to the Income Tax Act. The Court was concerned with the short question whether the Tax Recovery Officer could issue any notice to the transferee from the defaulter who had received notice under Rule 2 and whether such a power flew from rule 16 sub-rule (1). It is no doubt true that it has been observed that there would be time lag between the service of notice and attachment of property and such time lag was fairly long since the Revenue might take time to ascertain the properties the defaulter is possessed of. And because of Rule 51 any attachment of immovable property is made operative from the date of service upon the defaulter to pay the arrears.
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- C The question in the present case is entirely different. By mere agreement to sell the appellant got no interest in the property put to auction to enable him to apply for setting aside such auction under Rule 60 and especially when his transaction was hit by Rule 16(1) with Rules 51 and 48. Consequently he could not be said to be having any legal interest to entitle him to move such an application. Consequently no fault could be found with the decision of the Division Bench of the High Court rejecting the entitlement of the appellant to move such an application. It is, however, pertinent to note that though originally the power of Attorney holder of the defaulter was also a party to these proceedings as petitioner no. 1, pending these proceedings he had withdrawn from these proceedings and he has acquiesced in the order of the High Court rejecting the appellant's claim from being entitled to move such an application. The order of the High Court qua the defaulter and his Power of Attorney holder has become final. Therefore, as on date the appellant is not supported by the defaulter or his Power of Attorney holder either. He has to swim or sink on his own.
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- F Under these circumstances, therefore, the appellant must be held to be devoid of any *locus standi* for moving an application under Rule 60 of the Rules for setting aside this auction sale.

In the result these appeals fail and are dismissed. In the fact and circumstances of the case there will be no order as to costs.

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S.V.K.I.

Appeals dismissed.