



GAHC010161282022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5469/2022

KAMINI KUMAR DAS
S/O. SHRI DHIREN CHANDRA DAS, R/O. KUTHIPARA, P.O. DHANPUR, P.S.
DHUBRI, PIN-783337, DIST. DHUBRI, ASSAM.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE SECRETARY TO THE GOVT. OF ASSAM, JUDICIAL DEPTT.,
DISPUR, GUWAHATI-781006.

2:THE REGISTRAR GENERAL
THE GAUHATI HIGH COURT
PRINCIPAL BENCH
P.O. GUWAHATI 781001
P.S. LATASIL
DIST. KAMRUP (M)
ASSAM.

3:THE REGISTRAR (ADMIN) CUM I/C CENTRALISED RECRUITMENT
THE GAUHATI HIGH COURT
PRINCIPAL BENCH
P.O. GUWAHATI-781001
P.S. LATASIL
DIST. KAMRUP (M)
ASSAM.

4:THE CHAIRMAN
SELECTION BOARD
DHUBRI DISTRICT JUDICIARY
P.O. DHUBRI
P.S. DHUBRI
DIST. DHUBRI
ASSAM.



5: THE DISTRICT AND SESSIONS JUDGE
DHUBRI
P.O. DHUBRI
P.S. DHUBRI
DIST. DHUBRI
ASSAM.

6: SHRI SUNILAM DEV ADHIKARY
S/O. LT. SUDHIR CHANDRA DEV ADHIKARY
R/O. GAURIPUR WARD NO.8 (NEW) 3 (OLD) P.O. GAURIPUR 783331
P.S. GAURIPUR
DIST. DHUBRI
ASSAM

Advocates :

Petitioner : Mr. S. Dihingia, Advocate
Respondent no. 1 : Mr. K. Gogoi, Addl. Sr. Govt. Advocate, Assam
Respondent nos. 2-5 : Ms. S. Sarma, Standing Counsel, GHC
Date of Hearing & Judgment : 26.09.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

In the present writ petition instituted under Article 226 of the Constitution of India, the petitioner has challenged a part of an Order no. 31 issued under Memo no. DJ.XII-7/2018/920-41/E dated 03.03.2022 issued by the respondent no. 5, whereby, the respondent no. 6 has been promoted to the post of Supervisory Assistant [SA] in the Pay Band of Rs. 14,000/- – Rs. 60,500/- with Grade Pay : Rs. 8,000/-, with the further observation that the inter-se seniority of the respondent no. 6 shall be counted above the petitioner.

2. The relevant background facts leading to the passing of the Order dated 03.03.2022

can be, briefly, stated at first. On 15.02.2022, a notice was published by the respondent no. 5 informing the persons named therein which included the petitioner and the respondent no. 6, that oral interview/viva-voce for promotion to higher post[s] was scheduled on 17.02.2022 in the office chamber of the respondent no. 5. As on 15.02.2022, both the petitioner and the respondent no. 6 were serving in the post of Upper Division Assistant [UDA] in the establishment of District & Sessions Judge, Dhubri. By the Notice dated 15.02.2022, 5 [five] Upper Division Assistants [UDAs] including the petitioner and the respondent no. 6, were asked to appear before an Interview Board as per schedule indicated therein. On the scheduled date for oral interview/viva-voce, that is, on 17.02.2022, the Interview Board constituted and headed by the respondent no. 5, interviewed the candidates called by the Notice dated 15.02.2022 including the petitioner and the respondent no. 6, to consider them for promotion to the post of Supervisory Assistant [SA]. After the oral interview/viva-voce, the Order no. 31 dated 03.03.2022 has been passed, whereby, the respondent no. 6, an Upper Division Assistant [UDA], then working in the office of the respondent no. 5, has been promoted to the post of Supervisory Assistant [SA] vice one Sri Iftikar Azad promoted/upgraded. By the Order no. 31 dated 03.03.2022, a number of other members of the Assam District & Sessions Judge Establishment [Ministerial] Service have also been promoted to different posts. In the Order no. 31 dated 03.03.2022, it has *inter alia* been observed that the inter-se seniority of the respondent no. 6 as Supervisory Assistant [SA] is to be counted in terms of his merit position in the interview above the petitioner, an Upper Division Assistant [UDA].

3. The Assam District & Sessions Judges Establishment [Ministerial] Service Rules, 1987 [hereinafter referred to as 'the Rules, 1987' or 'the 1987 Rules' or 'the Rules, 1987', for easy reference], framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, regulate and govern the matters of recruitment and conditions of service of persons appointed to the Assam District & Sessions Judge Establishment [Ministerial] Service. As per Rule 2[1], 'Appointing Authority' means the District & Sessions Judge. Rule 2[3] has provided that 'District & Sessions Judge Establishment' means and includes all non-gazetted ministerial staff in the Office of the District & Sessions Judge, Additional District & Sessions Judge, Assistant District & Sessions Judge, Special Judge and

Munsiffs of the District. As per Rule 2[5], 'Member of the Service' means a member of the Assam District & Sessions Judges Establishment [Ministerial] Service and as per Rule 2[10], 'Service' means the Assam District & Sessions Judges Establishment [Ministerial] Service.

4. The categories of posts in the Assam District & Sessions Judge [Ministerial] Service cadres are found mentioned in Rule 3 of the 1987 Rules. Rule 3 has provided as under : -

Service 3.

[1] The Service shall comprise of the following categories of posts –

- [i] Sheristadar of District & Sessions Judge.
- [ii] Sheristadar of Additional district & Sessions Judge.
- [iii] Sheristadar of Assistant District & Sessions Judge.
- [iv] Head Assistant.
- [v] Supervisory Assistant / Sheristadar of Munsiff / Upper Division Assistant.
- [vi] Lower Division Assistant.

[2] Each of the categories of posts in sub-rule [1] shall form an independent Cadre. Members of a lower cadre shall have no claim for appointment to any of the higher cadres except in accordance with the provisions made in these rules.

5. Though the post of Supervisory Assistant [SA], Sheristadar of Munsiff and Upper Division Assistant [UDA] are shown in the same category, it emerges from Schedule - II, which is made relatable to Rule 14, that though an incumbent in the post of Supervisory Assistant [SA]/Sheristadar of Munsiff/Upper Division Assistant [UDA] enjoy the same Pay Scale, a Special Pay is allowed to an incumbent holding the post of Sheristadar of Munsiff and Supervisory Assistant [SA]. Rule 14 of the 1987 Rules has provided that the Scale of Pay admissible to members of different cadres shall be as shown in Schedule – II, subject to such revision as may be made by the Government from time to time. Thus, it is evident that the post of Supervisory Assistant [SA] is higher in status than the Upper Division Assistant [UDA] as a Special Pay is allowed to an incumbent holding the post of Supervisory Assistant [SA].

6. Sub-rule [3] of Rule 6 has *inter alia* prescribed that the post of Supervisory Assistant

[SA] is to be filled up by promotion from amongst the Upper Division Assistants [UDAs] of the District & Sessions Judges Establishment [Ministerial] concerned on the basis of 'seniority-cum-merit', who have rendered not less than 7 [seven] years of service in the District & Sessions Judges Establishment [Ministerial] concerned out of which at least 3 [three] years shall be of continuous service as Upper Division Assistant [UDA] on the 1st day of the year in which the promotion is made. The Note appended to sub-rule [3] of Rule 6 has provided that for the purpose of promotion of Upper Division Assistant [UDA], the District & Sessions Judge shall prepare a select list at the beginning of each year taking into account the number of vacancies likely to occur during the year in question. The District & Sessions Judge shall associate the Additional District & Sessions Judge, Assistant District & Sessions Judge and Munsiff in the selection process. The criteria for selection shall be on the basis of 'seniority-cum-merit' and the select list is to remain valid for 1 [one] year from the date of recommendation of the Selection Board.

7. Rule 9 has provided for a Gradation List and it states that a Gradation List of the staff of the amalgamated establishment is to be prepared every year and the same shall be approved by the District & Sessions Judge concerned and is to be published once a year. As regards the matter of seniority in the cadre of Upper Division Assistant, it is stipulated in sub-rule [ii] of Rule 12 that in the Upper Division [including Sheristadar of Munsiff] cadre, the seniority shall be according to the position in the select list from which the promotion to the post of Upper Division Assistant [UDA] is made. Thus, the matters regulating recruitment and conditions of service of the petitioner and the respondent no. 6 are regulated and governed by the provisions of the Rules, 1987.

8. In terms of Rule 9 of the Rules, 1987, the respondent no. 5 published a Combined Gradation List of the members holding posts in Grade-III and Grade-IV cadres in the District & Sessions Judge Establishment, Dhubri for the year 2021. The names of the petitioner and the respondent no. 5 along with others have figured in the Combined Gradation List. The said Combined Gradation List has recorded the inter-se seniority positions of the petitioner and the respondent no. 6 in the following manner :-

		Writ petitioner		Respondent no. 5	
Serial no.		11		13	
Name of office		District & Sessions Judge, Dhubri		District & Sessions Judge, Dhubri	
Name of incumbent		Shri Kamini Kr. Das		Shri Sunilam Deb Adhikary	
Name of post held at present		UDA		UDA	
Qualification		HS		S. Sc. [Royal] D. El. Ed.	
Appointment/Promotion	Post	LDA	UDA	LDA	UDA
	Date	01.06.2006	01.09.2015	01.06.2006	01.09.2015
Whether the incumbent is made Permanent or Temporary		Permanent		Permanent	
Date of Confirmation		22.10.2014		22.10.2014	
Date of Birth		30.06.1978		29.09.1976	
Date of Superannuation		30.06.2038		30.09.2036	

9. From the Order no. 31 dated 26.05.2006 as well as from the Combined Gradation List prepared under Rule 9 and approved by the respondent no. 5 as the Competent Authority, for the year 2021, it has emerged that seniority position of the petitioner was above the respondent no. 6 at the time of their initial appointments in the cadre of Lower Division Assistant [LDA] on 26.05.2006 as well as in the cadre of Upper Division Assistant [UDA]. It has also been admitted in Paragraph 6 of the affidavit-in-opposition filed by the respondent no. 5, to the effect that in the Gradation List of the staff of the office of the District & Sessions Judge Establishment, Dhubri for the year 2021, the respondent no. 6 whose name had figured at Serial no. 13 therein, is junior to the petitioner, whose position has figured at Serial no. 11 of the Gradation List.

10. It is in the above facts and circumstances, the validity of the order of promotion made in favour of the respondent no. 6 to the post of Supervisory Assistant [SA] vide the Order no. 31 dated 03.03.2022 is to be considered.

11. At this stage, it appears necessary to mention a few other previous relevant facts and events. By an Order no. 31 dated 26.05.2006, a total of 10 nos. of candidates including the petitioner and the respondent no. 6, came to be appointed as Lower Division Assistant [LDA] - cum - Typist pursuant to a process of selection undertaken for that purpose. The Order no. 31 dated 26.05.2006 further mentioned that the appointments were made in terms of a selection list published on 19.05.2006 and communicated under Memo no. DJ.XII-

4/2005/2947-49 dated 19.05.2006. It further mentioned that all the 10 [ten] Lower Division Assistants [LDAs] - cum - Typists were appointed in the establishment of District & Sessions Judge, Dhubri, subject to the then extant rules and police verification. The Order further stated that seniority of the said 10 [ten] appointees would be counted as per merit list, if they join within 15 [fifteen] days from the date of receipt of the order. In the Order no. 31 dated 26.05.2006, the name of the petitioner figured at Serial no. 5 and the name of the respondent no. 6 figured at Serial no. 7, meaning thereby, the position of the petitioner was above the respondent no. 6 in order of merit in the Selection List and at the time of their appointments on 26.05.2006.

12. I have heard Mr. S. Dihingia, learned counsel for the petitioner; Mr. K. Gogoi, learned Additional Senior Government Advocate, Assam for the respondent no. 1; and Ms. S. Sarma, learned Standing Counsel, Gauhati High Court [GHC] for the respondent nos. 2 – 5. Despite the service of notice upon the respondent no. 6, the respondent no. 6 has chosen not to contest in the writ petition by appearing before the Court.

13. Mr. Dihingia, learned counsel for the petitioner has submitted that the Selection Board headed by the respondent no. 5, had deviated from the criteria of seniority-cum-merit in promoting the respondent no. 6 to the post of Supervisory Assistant [SA] as it is *prima facie* evident that the respondent no. 6 has been promoted just because he scored higher marks than others in the interview/viva-voce held by the Selection Board. There is no indication in the Minutes of the Meeting that there is a base criterion which a candidate appearing in the interview/viva-voce has to achieve. In the absence of the same, the decision to promote the respondent no. 6 on the basis of his only scoring higher marks in the interview/viva-voce is liable to be interfered with. Though the petitioner and the respondent no. 6 were same date appointees, the position of the petitioner was higher than the respondent no. 6 in the merit list at the time of their original appointments in the post of Lower Division Assistant [LDA] and the position of the petitioner was also higher than the respondent no. 6 in the Gradation List prepared for the members of the Assam District & Sessions Judge Establishment [Ministerial] Service in the cadre of Upper Division Assistant [UDA] in the establishment of the District & Sessions Judge, Dhubri.

14. Ms. S. Sarma, learned Standing Counsel, GHC for the respondent nos. 2 – 5 has submitted, by referring to the Minutes of the Meeting of the Selection Board dated 17.02.2022, that all the candidates were called for interview/viva-voce and it was on the basis of the performance of the candidates scored in the interview/viva-voce, the decision to promote those candidates, who have scored higher marks than others, was taken. Both the petitioner and the respondent no. 6 along with others were interviewed by the Selection Board and as the respondent no. 6 scored higher marks than others including the petitioner, the respondent no. 6 was promoted to the post of Supervisory Assistant [SA] from the post of Upper Division Assistant [UDA].

15. The issue which has, thus, fallen for consideration is as to whether the criteria of seniority-cum-merit, as required to be followed for effecting promotion from the post of Upper Division Assistant [UDA] to the post of Supervisory Assistant [SA] in terms of Rule 6[3] read with the Note appended thereto, has been followed in the case in hand or not.

16. It is well settled principle of service jurisprudence that the principle of seniority-cum-merit, for promotion is different from the principle of 'seniority' and the principle of 'merit-cum-seniority'. Where promotion is on the basis of seniority alone, merit does not play any part at all. In the event where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit also plays a significant role in the matter of promotion to be made on the principle of seniority-cum-merit. The standard method of seniority-cum-merit is to subject all the candidates within the zone of consideration and in the feeder cadre possessing requisite qualification and experience to a process of assessment of a specified minimum necessary merit and then promote the candidate who is found to possess minimum necessary merit strictly in the order of seniority.

17. It has been held in **Rajendra Kumar Srivastava and others vs. Samyut Kshetriya Gramin Bank and others**, reported in [2010] 1 SCC 335, that the minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination

of either two or all the three of the aforesaid methods. There is no hard-and-fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit. It is also settled that 'seniority-cum-merit' means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority.

18. It has been observed in **Union of India vs. Lt. Gen. Rajendra Singh Kadyan**, reported in [2000] 6 SCC 698, to the effect that 'seniority-cum-merit' postulates the requirement of certain minimum merit or *satisfying a benchmark previously fixed*, and subject to fulfilling the said requirement, the promotion is based on seniority. It has been further observed that requirement of assessment of comparative merit is absent in the case of seniority-cum-merit. If an employee is within the zone of consideration, then it is a fundamental right for him to be considered for promotion though the right to promotion is not a fundamental right. When the promotion is to be based on seniority-cum-merit, an employee cannot claim promotion as a matter of right by virtue of his seniority alone and if is found unfit to discharge the duties of the higher post, he may be passed over and an employee junior to him may be promoted.

19. The principle of seniority-cum-merit has come to be considered by a three-Judge Bench of the Hon'ble Supreme Court of India in **B.V. Sivaiah vs. K. Addanki Babu**, reported in [1998] 6 SCC 720, wherein the criteria for promotion on the basis of seniority-cum-merit has fallen for consideration with regard to *same day appointees*. It has been held that while the principle of seniority-cum-merit has laid greater emphasis on seniority, the principle of merit-cum-seniority has laid greater emphasis on merit and ability, with seniority playing a less significant role. The decision has further observed as follows :-

18. We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the

minimum standard that is required and also prescribed the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

19.1. Following **B.V. Sivaiah** [supra], the Hon'ble Supreme Court of India in **Harigovind Yadav vs. Rewa Sidhi Gramin Bank**, reported in [2006] 6 SCC 145, has reiterated the principles by holding that where the procedure adopted does not provide the minimum standard for promotion, but only the minimum standard for interview and does the selection with reference to comparative marks, it is contrary to the rule of 'seniority-cum-merit'. Thus, it is clear that when the principle of granting promotion on the basis of seniority-cum-merit is to be applied, it is the inter-se seniority of all candidates who are eligible for consideration for promotion which are to be considered and such candidates are to be identified on the basis of length of service or on the basis of the seniority list as prepared and it is such seniority which gives a candidate a right to be considered for promotion on the basis of seniority-cum-merit.

20. In **Rajendra Kumar Srivastava** [supra], the following two questions arose for consideration :- [i] Whether minimum qualifying marks could be prescribed for assessment of past performance and interview, where the promotions are to be made on the principle of seniority-cum-merit ? and [ii] Whether the first respondent Bank was justified in fixing a high percentage [78%] as the minimum qualifying marks [minimum merit] for promotion?

20.1. While answering the first question, the Hon'ble Supreme Court has observed as under :

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13. Thus, it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of 'seniority-cum-merit'. What would offend the rule of seniority-cum-merit is a

process where after assessing the minimum necessary merit, promotions are made on the basis of merit [instead of seniority] from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit.

20.2. In answering the second question, it has been observed to the effect that what should be the minimum necessary merit for promotion, is a matter, that is decided by the employer having in mind the requirement of the post to which the promotion is to be made. The employer has the discretion to fix different minimum marks, for different categories of posts, subject to the relevant post. It has been cited as an example that for promotion at lower levels, it may fix lesser minimum qualifying marks and fix a comparatively higher minimum qualifying mark for higher post. Whether the guidelines or rules adopted for assessing the minimum necessary merit by prescribing marks under several heads or by prescribing a specific minimum marks, is reasonable or arbitrary, would depend upon the facts of each case. If it is demonstrated that the minimum marks were fixed with the intention of favouring someone or to specifically exclude someone, the courts may interfere. Similarly, where the minimum marks are shown to have been fixed to defeat or nullify the mode of seniority-cum-merit for promotion, there may be a cause for interference. In other cases, there is very little scope to interfere with the procedure adopted to ascertain the minimum required merit.

21. Coming back to the fact situation obtaining in the case in hand, it is not in dispute that the petitioner was senior to the respondent no. 6 at the time of their initial appointments in the post/cadre of Lower Division Assistants [LDAs] vide Order no. 31 dated 26.05.2006 as the appointments were stated to be made on the basis of a Selection List published on 19.05.2006. The name of the petitioner figured at Serial no. 5 whereas the respondent no. 7 had figured at Serial no. 7 in Order no. 31 dated 26.05.2006. Similarly, in the Combined Gradation List for the year 2021, published in respect of the members of the District &

Sessions Judge Establishment, Dhubri, the name of the petitioner figured at Serial no. 11 and the name of the respondent no. 6 figured at Serial no. 13 and both of them are same day appointees. It has been found from the discussion made above that if the employer contemplates to assess suitability of an employee for any higher post by adopting a process of oral interview to assess the suitability of such employee, in addition to scrutiny of the Annual Confidence Reports [ACRs] for a certain minimum number of years and the inter-se seniority positions on the basis of Seniority List/Gradation List prepared in accordance with the extant service rules then it is incumbent on the part of the employer to prefix certain minimum merit or certain benchmark if such standard/benchmark is not prescribed in the rules. It is also settled that for effecting promotion on the principle of seniority-cum-merit, a comparative assessment of merit is not required to be made.

22. The Minutes of the Meeting of the Selection Board dated 17.02.2022 on the basis of which the impugned decision has been taken, does not reflect any pre-fixation of benchmark, which is required to be achieved by the candidates, called for interview/viva-voce, during the interview. It has been simply recorded that the Selection Board has taken decision not to consider the case of the petitioner for promotion for the time being on the basis of his overall assessment of his eligibility for the higher post of Supervisory Assistant [SA]. The Selection Board has further observed that it is on the basis of the performance of the candidates in the interview/viva-voce, it has decided to promote the respondent no. 6 as Supervisory Assistant [SA] as he has scored higher marks than the petitioner. There is no reflection that in the Minutes of the Meeting of the Selection Board dated 17.02.2022 that there was any benchmark for the candidates pre-fixed and there is also no consideration as to whether the petitioner had achieved the said benchmark. The consideration on the part of the Selection Board while considering the matter of promotion on the principle of seniority-cum-merit should have been that given the minimum pre-fixed benchmark fixed for suitability for the higher post, the senior, even though less meritorious on that count, shall have priority over a junior who might have scored higher marks at the interview/viva-voce segment. But the Selection Board in the case in hand has proceeded to consider the matter by making a comparative assessment of merits of the candidates including the petitioner and the respondent no. 6, and has thereafter, taken the decision to promote the respondent no. 6 to

the post of Supervisory Assistant [SA], which is a principle in deviation to the principle of assessment settled to be followed for the seniority-cum-merit criteria for promotion.

23. In such view of the matter, the decision to that part of the impugned Order no. 31 dated 03.03.2022 by which the respondent no. 5 has promoted the respondent no. 6 to the post of Supervisory Assistant [SA] and has fixed the inter-se seniority position of the petitioner below the respondent no. 6 are liable to be interfered with. It is accordingly interfered with. Accordingly, that part of the impugned Order no. 31 dated 03.03.2022 is set aside and quashed. With the setting aside and quashing of the impugned part of the Order no. 31 dated 03.03.2022 in the aforesaid manner, it is incumbent on the part of the employer to revisit the matter of promotion to the post of Supervisory Assistant [SA]. It is observed that in the event the employer prior to undertaking the exercise of promotion to the post of Supervisory Assistant [SA] had fixed the minimum benchmark for assessing the suitability of the candidate to discharge the duties in the post of Supervisory Assistant [SA] then the employer shall revisit the matter of promotion on the basis of the proceedings of the Selection Board already available. If there was no pre-fixed minimum benchmark for assessment of suitability of the candidate then in such a situation the employer has to proceed with the matter of promotion to the post of Supervisory Assistant [SA] afresh by considering the cases of the candidates within the zone of consideration, after deciding on the minimum benchmark, as expeditiously as possible in order to fill up the vacant post of Supervisory Assistant [SA].

24. With the observations made and directions given above, the writ petition is allowed to the extent indicated above. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant