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

**Case No. : WP(C)/1023/2021**

DR BIMAL KUMAR DUTTA
RETIRED MEDICAL OFFICER (CONTRACTUAL)
R/O PUBERUN PATH, NA ALI
BONGAL PUKHURI, JORHAT, 785001

VERSUS

THE UNION OF INDIA AND 4 ORS
REPRESENTED BY THE SECRETARY TO THE MINISTRY OF COMMERCE AND INDUSTRIES, GOVT. OF INDIA, NEW DELHI 781037, ASSAM

2:THE CHAIRMAN
TEA BOARD OF INDIA
KOLKATTA

3:THE CHAIRMAN
TEA RESEARCH ASSOCIATION
113
PARK STREET
KOLKATTA
700016
WEST BENGAL

4:THE DIRECTOR

TOCKLAI TEA RESEARCH INSTITUTE TEA RESEARCH ASSOCIATION
CINNAMARA
JORHAT
785008
ASSAM

5:THE ADMINISTRATIVE CONTROLLER

TOCKLAI TEA RESEARCH INSTITUTE
TEA RESEARCH ASSOCIATION
CINNAMORA
JORHAT
785008
ASSA

**Advocate for the Petitioner** : MR M Z AHMED, MR. S K SHARMA

**Advocate for the Respondent** : ASSTT.S.G.I., MR. S BORTHAKUR (R2),MR. S S ROY (R2),MR. S S ROY,MR G N SAHEWALLA (R-4),MR D SENAPATI (R-4),MR. A CHETIA (R-4),MS. S. TODI (R-4),MR H K SARMA (R-4)

Date of Hearing : 11.09.2024

Date of Judgment : 26.11.2024

**BEFORE**
**HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

## Judgment and Order (CAV)

Heard Mr. M.Z. Ahmed, learned counsel for the petitioner assisted by Mr. A.M. Dutta, learned counsel for the petitioner. Also heard Mr. S. Borthakur, learned counsel for the respondent nos. 2 and Mr. G.N. Sahewalla, learned Senior Counsel assisted by Mr. A.M. Dutta, learned counsel for the respondent nos. 3 to 5.

2] The petitioner is a doctor by profession and was appointed as a Medical Officer initially for a period of five years on contractual basis under the Tocklai Tea Research Institute, Tea Research Association, Cinnamara, Jorhat on 27.06.200. He joined the organization on 01.07.2000. His appointment was

subsequently extended for different periods till 30.09.2014. According to the petitioner, his extension was without any break in service and his salary was enhanced up to Rs.25,000/- per month. He continued his service as a doctor on contractual basis and his service was completed on 30.09.2014. It is submitted that the Tocklai Tea Research Institute, formerly known as Tocklai Experimental Station, was established way back in the year 1911 in Cinnamara, Jorhat District. The Tea Research Association was formed in the year 1964 under the Tea Board of India with its Headquarter at Kolkata for the purpose of research on all aspects of tea cultivation and the Tocklai Tea Research Institute was subsequently brought under the management of the Tea Research Association. It is submitted that the Tocklai Tea Research Institute is the oldest and the largest tea research association of its kind in the world and the administrative ministry of the organization is the Ministry of Commerce and Industries, Government of India, New Delhi.

3] It is submitted that the respondent authorities had earlier permitted the petitioner to avail the privileged (earned) leave like other employees of the organization and at the time of completion of his service in the organization, the petitioner had total number of 54 days of earned leave to his credit and accordingly, the petitioner requested for consideration and approval of encashment of the privileged leave for the said period. However, his request was denied by letter no. 4792 dated 01/12/2014 issued by the respondent no. 5 herein. This according to the petitioner is illegal and arbitrary as the petitioner had earlier been granted encashment of earned leave without any question and the instant refusal of the respondent authorities to consider his request without indicating any reasons, therefore, is arbitrary and malafide in nature and as

such, the impugned letter no. 4792 dated 01/12/2014 issued by the respondent no. 5 is required to be quashed by the present proceedings. The further contention on behalf of the petitioner is that he has not been paid the gratuity amount due to the petitioner even after lapse of more than six years from the date of completion of his service. He had represented before the respondent authorities on a number of occasions for release of his gratuity but the respondent authorities have not paid the said amount till date. It is contended on behalf of the learned Senior Counsel for the petitioner that the petitioner is entitled to payment of gratuity under the Payment of Gratuity Act, 1972, but the same has not been considered till date. In this context, the petitioner has referred to a letter no. 3302 dated 17.08.2020 issued by the Administrative Controller of the Tocklai Tea Research Institute, Tea Research Association, Cinnamara, Jorhat to submit that his claim for gratuity was also rejected on the ground that his appointment was purely contractual and the said action of the respondent authorities in not considering his claim for gratuity is also highly arbitrary and contrary to the provisions of law. The same is, therefore, illegal and it calls for interference by this Court. It is not denied that the petitioner has completed more than 14 years of service without any break and therefore, besides his claim for earned leave he is also entitled to payment of gratuity under the provisions of the Payment of Gratuity Act, 1972.

4] Referring to Section 4 of the Payment of Gratuity Act, 1972, it is submitted that the gratuity is payable to an employee on his superannuation or his retirement or resignation or on his death or disablement due to accident or disease after he has rendered continuous service of not less than five years. Learned Senior Counsel for the petitioner, therefore, submits that there is no

specific bar under the provisions of Payment of Gratuity Act 1972 to exclude contractual employees from the benefit of gratuity. In support of his contentions, learned Senior Counsel for the petitioner has referred to and relied upon judgment of the Madras High Court rendered in *Tiruchengode Agricultural Producers Co-operative Marketing Society vs. Joint Commissioner of Labour* reported in *2012. SCC Online MAD 417*.

5] In *Tiruchengode Agricultural* (supra), the issue was raised before the Hon'ble Court whether a contractual worker or a khalasi is entitled to the benefits of Payment of Gratuity Act. He submits that the Hon'ble Madras High Court upon examination of the matter by relying on another order dated 23.06.2000 passed in WP(C) No.15976 of 1993 had held that the same issue was decided by a Coordinate Bench of the said Apex Court and consequently, the learned Single Judge of the Madras High Court concluded that in the absence of any specific exclusion it is presumed that even contract workers or khalasis are entitled to the benefit under the Payment of Gratuity Act, 1972. The Court, therefore, was not inclined to take a different view than the view of the other Coordinate Bench of the Hon'ble Madras High Court rendered in WP(C) No.15976 of 1993.

6] Learned Senior Counsel for the petitioner has also relied upon a judgment of the Hon'ble High Court of Kerala at Ernakulam in WP(C) No.20971 of 2003(V) where the question of whether a doctor is entitled to gratuity who has claimed the benefit of gratuity under the Payment of Gratuity Act, 1972 after having worked in the hospital for about 11 years and subsequently resigned. The respondent no.3 in WP(C) No.20971 of 2003(V) filed an application before the

controlling authority under the Payment of Gratuity Act seeking directions to the petitioner to pay the gratuity. The said proceeding was allowed and the respondent no.3, namely, Dr. Josey Neroth, was directed to pay an amount of Rs.44,423/- with 10% interest as gratuity by the petitioner. This order directing payment of Gratuity to the 3rd respondent came to be challenged before the Hon'ble High Court. The Hon'ble High Court of Kerala held that the doctor working in the hospital would be an employee within the meaning of Payment of Gratuity Act, 1972 and therefore, the distinction sought to be raised by the employer before the Hon'ble High Court that since the respondent no.3 was permitted to have private practice, he cannot be termed as an employee defined under the Payment of Gratuity Act, 1972, such, submission did not find merit before the Court and accordingly, the petition was dismissed and the order of the Controlling Authority directing the employer Hospital to pay gratuity to the respondent no.3 was upheld.

7] The learned Senior Counsel for the petitioner also place reliance on a judgment from the Gujarat High Court rendered in *the Gujarat State Road Transport Corporation vs. Dr. R. D. Rathod* in Special Civil Application No. 12192 of 2009. Learned Senior Counsel for the petitioner submits that in this case the Corporation had challenged the order passed by the Controlling Authority dated 24.05.2007 under the Payment of Gratuity Act towards payment of gratuity of Rs.11,538/- with 10% simple interest. This order was challenged by filing an appeal before the Appellate Authority which also came to be rejected on the ground of limitation. Being aggrieved, the employer approached the Hon'ble Gujarat High Court by filing the writ petition. The orders of the controlling authority as well as the order passed by the Appellate Authority were assailed

before the Hon'ble High Court of Gujarat. It was urged before the Hon'ble Court that the respondent was not covered by the definition of employee given under Section 2 within (e) of the Payment of Gratuity Act, 1972. It was urged that the definition Section 2 (e) of the Act of 1972 excludes persons who holds a post under the Central Government or a State Government and is governed by any other Act or Rules providing for payment of gratuity. The Hon'ble Gujarat High Court while considering the matter also considered an earlier judgment of the Hon'ble High Court rendered in the Gujarat State Road Transport Corporation *(GSRTC) vs Dr. Praveen Chandra C. Nayak* reported in *2004 (3) GLH page 291*. In the said matter before the Gujrat High Court the learned counsel appearing for the petitioner therein, namely, the GSRTC had submitted that a medical doctor would also be a person doing a technical work for the said industry and he would fall within the definition of workmen as defined under Section 2 (s) of the Industrial Disputes Act and would therefore be entitled to bonus as may be declared by the Company. The said submission was taken note of before the Hon'ble Gujarat High Court and it accordingly upheld the findings of the Controlling Authority that the respondent was an employee of the petitioner establishment within the meaning of section 2 (e) of the Payment of Gratuity Act, 1972 and that the wages received by the respondent are covered within the definition given under section 2(s) of the Payment of Gratuity Act, 1972.

8] The petitioner has also referred to a judgment of the Apex Court rendered in *Gestetner Duplicators Private Limited vs. Commissioner of Income Tax, West Bengal,* reported in (*1979) 2 SCC 354* to submit that salary under the recognized Provident Fund Scheme Rules would not only include the fixed monthly salary but also commission and dearness allowance paid by the

employer to its employees. He submits that the Apex Court by referring to various dictionary meanings that conceptually "salary" and "wages" connotes one and the same thing, namely, remuneration or payment for work done or services rendered, but the former expression is generally used in connection with the services of a higher or non manual type, while the latter is used in connection with manual services. The Apex Court held that there is no difference between "salary" and "wages" and the words both being a recompense for work done or services rendered, though ordinarily the former expression is used in connection with the services of the non manual type, while the letter is used in connection with manual services. He, therefore, submits that the claim of the petitioner is justified and ought to have been accepted by the respondents that he entitled to gratuity under the provisions of the Payment of Gratuity Act, 1972 and therefore, the same ought not to have been rejected. The claim of the petitioner is, therefore, required to be accepted by the respondents and a suitable direction to that effect be issued by this Hon'ble Court.

9] The respondents have contested the case of the petitioner by filing an affidavit-in-opposition. The respondent nos. 3 to 5 have referred to the original order of appointment dated 27.06.2000 which is enclosed as Annxure-1 to the said affidavit-in-opposition. By the said communication dated 27.06.2000 the petitioner was appointed to the post of Medical Officer in the Association at a consolidated salary of Rs.12,000/- (Rupees Twelve thousand only) per month and he was to contribute 12% of his salary to the Provident Fund account and the Association would make equivalent contribution. Learned Senior Counsel for the respondent nos. 3 to 5 strenuously submits by referring to the said order of

appointment that there was a clear stipulation that "*apart from consolidated salary, no other charges or allowances will be admissible*". It is further contended on behalf of the respondents that the petitioner's claim that there was continuous service rendered by the petitioner is also not correct, as there were intermittent gaps between his re-engagement on contractual service pursuant to completion of the earlier contract period. The learned Senior Counsel appearing for the respondents further submits that the writ petition ought not to be entertained in view of alternative remedy available. It is submitted that the petitioner ought to have approached the Controlling Authority in the first instance towards his claim for payment of gratuity. Referring to Section 7(4) of the Payment of Gratuity Act, 1972, submits that if there is a dispute as to the admissibility of any claim or in relation to an employee for payment of gratuity, the application lies before the Controlling Authority. Further, under Section 7 (7), any person aggrieved by the order of the Controlling Authority may file an appeal before the appropriate authority. Learned Senior Counsel for the respondent nos. 3 to 5 therefore submits that there is a complete procedure prescribed under the provisions of the Act for determination of the question of admissibility and/or payment of gratuity in respect of such cases which the petitioner has not availed of nor is there any explanation as to why the statutory remedy prescribed has not been availed of. Under such circumstances, this writ petition ought not to be entertained and the petition is required to be dismissed.

10] Learned Senior Counsel for the respondent nos. 3 to 5 further submits that there are factual disputes with regard to the claim of the petitioner that he had rendered continuous service for more than 14 years vis-a-vis the contentions of

the respondents that there were breaks in his service before being renewed by the respondent authority as contractual services and therefore, the petitioner should have approached the Controlling authority prescribed under the Act for any claims towards payment of gratuity. It is, therefore, submitted that the Apex Court has time and again held that where there are effective alternative remedies prescribed, the petitioner should be relegated to avail of such statutory remedies prescribed.

11] Learned Senior Counsel for the respondent nos. 3 to 5 has referred to a judgment of the Apex Court rendered in *M/S Godrej Sara Lee Ltd. vs. the Excise and Taxation Officer-cum-Assessing Authority & Ors.* in Civil Appeal No.5393/2010 on 01.02.2023. Referring to the said judgment, the Senior Counsel for the respondent submits that unless there is procedural impropriety or illegality, the claimant is required to approach the statutory authority for the remedy. The writ petitioner filed his rejoinder affidavit disputing the contentions of the respondents and reiterating the case projected in the writ petition.

12] Learned counsel for the parties have been heard and pleadings on the record have been carefully perused.

13] The facts which are evident from the pleadings are that the petitioner was appointed on contractual basis by order dated 27.06.2000 by the Tocklai Tea Research Association and he joined his service on 01.07.2000 and the same was communicated by his joining report dated 03.07.2000. There is no dispute that the petitioner has rendered more than 14 years of service as a contractual employee as a medical doctor under the Tocklai Tea Research Association.

However, while the petitioner claims that there is continuous service rendered by him without any break, the said claim is disputed by the respondents who claim that there were gaps in his services prior to the same being renewed from time to time pursuant to expiry of the earlier contract periods. A bare perusal of the appointment letter dated 27.06.2000 reveals that there is a condition which provides *that apart from consolidated salary, no other charges or allowances will be admissible*.

14] A perusal of the Payment of Gratuity Act reveals the Definition of "*Employees*" provided under Section 2(e). As per section 2(e) of the Act, employees defined as under:

"2(e) "employee" means any person (other than an apprentice) employed on wages, [3] [***] in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, [4] [and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity]."

15] Wages is defined under Section 2 (s) of the Act, which produced herein below:

(*s) "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which arc paid or arc payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.*

16] Section 2 A of the Payment of Gratuity Act, 1972, defines continuous

service and the same is quoted below:

"For the purposes of this Act, - (1) an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order [***] treating the absence as break in service has been passed in accordance with the standing order, rules or regulations governing the employees of the establishment), lay off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.
(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer –
(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than –
(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and
(ii) two hundred and forty days, in any other case;
(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than –
i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and
(ii) one hundred and twenty days, in any other case;
Explanation: For the purpose of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which –
(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicab1c to the establishment;
(ii) (ii) he has been on leave with full wages, earned in the previous year;
(iii) (iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment and
(iv) (iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.
(v) (3) where an employee employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy five per cent of the number of days on which the establishment was in operation during such period."

17] Payment of gratuity is prescribed under the Section 4 of the Act. Under section 7 of the Act there is a procedure for determination of the amount of gratuity. Section 7(4) of the Act provides that if there is any dispute to the amount of gratuity payable under the Act or as to the admissibility of any claim

or in relation to an employee for payment of gratuity or whether such person is entitled to receive gratuity, the Controlling Authority (as appointed under Section 3 of the Act) will cause an enquiry and thereafter, pass necessary orders on the entitlement or admissibility of such claim of gratuity. Section 7 (7) of the Act provides for an appeal against any order passed by the Controlling Authority under Section 7 (4).

18] Various judgments have been referred to by the learned Senior Counsel for the petitioner in support of his contentions to justify the claim of the petitioner towards gratuity. Seeking to include a Medical Officer within the definition prescribed under the Act of 1972 reveals that there is some cloud as to whether the petitioner's employment as a Medical Officer read with his appointment letter dated 27.06.2000, and his consequential acceptance thereto can be interpreted to extend the benefit of gratuity under the Payment of Gratuity Act, 1972.

19] A plain reading of the provisions of the Act reveals that the Act itself provides for a specific forum to determine such issues including the question of admissibility of any claims of gratuity.

20] There is no averment in the writ petition or in the affidavit-in-reply explaining as to why the claim of the petitioner could not be or cannot be addressed by the Statutory Authority, namely, the Controlling Authority prescribed under the provisions of the Act. There is no limitation prescribed under Section 7(4) within which the parties are required to approach the Controlling Authority.

21] The claim of the petitioner consistently has been that he is included within the definition of the "Employee" rendered in Section 2 (e) of the Act and the respondents have rejected the claim.

22] There is also no explanation on behalf of the respondents as to why a reference to the Controlling Authority was not made to determine on the question of payment of gratuity as claimed for by the petitioner.

23] It is no longer *res integra* that for resolving any disputes, ordinarily parties should approach a forum prescribed under the statute in case of any grievances. In *Titaghur Paper Mills Company Limited. Vs. State of Orissa* reported in 1983 (2) SCC 433, the Hon'ble Apex Court held that where there is a statutory forum, prescribed parties are ordinarily required to approach such a forum prescribed. In *Assistant Commissioner (Ct) LTU. Kakinada and Ors. Vs. M/s Glaxi Smith Kline Consumer Health Care Limited* reported in *2020 (19) SCC 681* on the question of maintainability of a writ petition where alternative remedy is available, the Apex Court held that where a right or a liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. Though an Act cannot bar or curtail remedy under Article 226 or 32 of the Constitution of India, the Constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment.

24] The Apex Court held that to put it differently, the fact remains that since

the High Court has wide jurisdiction under Article 226 of the Constitution of India does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute. Even in the context of the powers under Article 142 of the Constitution of India, the Apex Court held that it is one thing to state that prohibitions or limitations in a statute cannot come in the way of exercise of jurisdiction under Article 142 of the Constitution of India to do complete justice between the parties in the cause or the matter arising out of that statute. But it is quite a different thing to say that while exercising jurisdiction under Article 142 the Constitution of India, the Hon'ble Supreme Court can altogether ignore the substantive provisions of the statute dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. The Apex Court held that indubitably, the powers of the High Court under Article 226 of the Constitution of India are wide but certainly not wider than the plenary powers bestowed on the Hon'ble Supreme Court under Article 142 of the Constitution of India.

25] What the Hon'ble Supreme Court cannot do in exercise of its plenary powers under Article 142 of the Constitution of India, it is unfathomable, as to how the High Court can take a different approach in the matter in reference to Article 226 of the Constitution of India. The principle underlying the rejection of such argument by the Hon'ble Supreme Court would apply on all force to the exercise of power by the High Court under Article 226 of the Constitution and accordingly, in the facts of that case, the Hon'ble Supreme Court, therefore, allowed the appeal preferred by the Revenue against the order passed by the High Court of Judicature at Hyderabad for the State of Telangana interfering

with the order which was passed, entertaining a challenge to the assessment order on the sole ground that the statutory remedy of appeal against that order stood foreclosed by the law of limitation.

26] The Apex Court referred to several earlier precedents on this issue and held that where there is a statutory remedy provided, the same is required to be availed of unless it can be shown that the remedy provided will not be an effective remedy.

27] While it is correct that existence of an alternative remedy cannot be an absolute bar to prevent the Constitutional Court from exercising its jurisdiction under Article 226 of the Constitution of India but there are certain well accepted principles which are to be considered before a Court proceeds for exercise of its jurisdiction under Article 226 of the Constitution of India notwithstanding the existence of such remedies. In the recent judgment of the Apex Court rendered in *Mangt. Of M/S D.T.C. vs. Dharam Pal Singh & Anr.* reported in 2022 (16) SCC 477 it was reiterated that only in cases under the following circumstances, namely,

(i) Breach of fundamental rights;

(ii) violation of principles of natural justice;

(iii) excess of jurisdiction; and

(iv) challenge to the vires of a statute or a delegated legislation, ordinarily, where the statute prescribes an adjudicatory forum, parties are expected to approach such forum.

28] As discussed above, no such exceptional circumstances have been pleaded in the present proceedings. Even during the arguments made before the Court, no such instance was pointed out by the learned Senior Counsel for the petitioner that the authority prescribed under the Payment of Gratuity Act, namely, the Controlling Authority, will not be the appropriate authority to decide the question of payment and/or legal admissibility of the claim of the petitioner towards payment of gratuity.

29] Under such circumstances, this Court is of the view that this writ petition fails and is not maintainable in view of the Statutory Authority prescribed under the Act and the absence of any material before this Court as to why the statutory remedy prescribed will not be an effective remedy to redress the grievances of the writ petitioner.

30] However, in view of the claim made by a Medical Doctor, who was on contractual basis, towards gratuity and the denial of his claim by the respondents, the matter stands disposed of with a direction to both the petitioner and the respondents to appear before the Controlling Authority appointed for the State of Assam as per the rules prescribed under within a period of 30 (thirty) days from the date of receipt of a certified copy of this order. The prescribed Controlling Authority will thereafter proceed to make necessary enquiries, if required, and thereupon, pass appropriate orders as to the claim and/or the admissibility of the claim for payment of gratuity under the Payment of Gratuity Act, 1972. Any party aggrieved may thereafter prefer an appeal before the Appellate Forum as prescribed under Section 6 of the Act. The question of whether a Medical Doctor, who was appointed on contractual basis can be accepted to be an employee for the purposes of the Payment of Gratuity

Act, 1972 is left open to be decided in an appropriate proceeding.

31] Writ petition accordingly is disposed of in terms of the above, no order as to cost.

**JUDGE**

**Comparing Assistant**