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O.A.No. 908/2006

Order dated: 17.09.2007.

This matter has been referred to the third Member under section 26 of the Administrative Tribunals Act, 1985.

2. Briefly, the facts of this case are that the Applicant has filed this Original Application praying for a direction to the Respondents to consider his case for regularization strictly as per the seniority and accordingly appoint him in a Group D post lying vacant in the office of Respondent No.4 at Bhubaneswar. On 25.01.2007 notice was issued to the Respondents but no counter was filed. By filing Memo dated 03.05.2007 Applicant has sought for permission to withdraw this Original Application as he does not want to pursue this OA on health grounds. While deciding the prayer for withdrawal, the Hon'ble Vice-Chairman has held as under;

- “5. The ground taken by the applicant in the Memo filed by his learned counsel seeking permission of the Tribunal to withdraw the OA is not covered by sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908.
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Therefore, his prayer for withdrawal of the OA is in terms of sub-rule (1) of Rule 1 and as the applicant intends to withdraw the OA without any lawful ground, he shall be liable to pay costs and shall be precluded from instituting any fresh OA in respect of the subject-matter involved in the present OA, as per sub-rule (4) of Rule 1 of Order XXIII and in the light of Rule 24 of the CAT (Procedure) Rules. However, the reason for withdrawal has been stated as health ground though no evidence has been furnished. The Respondents also seem to have not removed the defects pointed out by the Registry. Therefore, we restrict the costs proposed to be awarded on the part of the applicant to pay the Respondents to Rs.500/- (Rupees five hundred only) herein by Bank Draft, without liberty to institute any fresh OA in respect of the same subject-matter, as withdrawal is prayed after about one and half year since the institution of this OA on 29.12.2006 troubling so far, thus, the time of not only the Respondents but also the Registry as well as the Bench of this Tribunal."

3. Differing with the views of the Hon'ble Vice-Chairman, the Hon'ble Administrative Member has held as under:

"18. I do not find any substantial ground in this case, so as to take a different view from the view already taken while 'dismissing/disposing of the



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aforesaid OAs as withdrawn' by accepting the Memo of the Applicants especially when no counter has been filed by the Respondents."

4. Parties have been heard. The A.T. Act is a self contained Act and save as provided for in the said Act and attendant Rules provisions of other Act do not apply. However, in matters of procedure, the spirit behind the CPC is followed in respect of review, withdrawal etc., This is evident from the decision of the Apex Court in the case of *Raj Kishore Prasad Narayan Singh v. Ram Pratap Pandey*, (1967) 2 SCR 56 wherein it has been held:

42. No doubt, technically, the provisions of Order 23, CPC may not apply; but we do not see any bar to a tribunal permitting the withdrawal of any proceeding, if it is satisfied that the said request can be granted otherwise. No doubt, before permission is granted to withdraw a proceeding, the tribunal can consider as to whether the withdrawal, if granted, will prejudice the opposite party. In this case, as we have already pointed out, the learned Judge has not found any positive prejudice, that will result to the respondents, by the appellant being permitted to withdraw his claim application. If the doctrine of election

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applies, as held by the Patna High Court, which decision has been followed by the learned Judge in this case, quite naturally, permitting the appellant to withdraw his claim, may result in prejudice to the respondent, in whose favour certain findings have also been recorded by the Claims Officer. But we have already pointed out that there is no question of the appellant being put to election in circumstances like this; and if, that is so, there cannot also be any question of prejudice being caused to the respondent by the appellant's request for withdrawing the claim being granted, more especially, in view of the limited request made by him, to which we will advert presently.

43. As we have already indicated, the appellant's request was for permitting him to withdraw his claim application on the ground that he proposed to seek the remedy that might be available to him in law, as against the mortgaged properties, which have not vested in the State. If the appellant's request for withdrawing his claim petition had been made with liberty to enable him again to seek his remedies, as against the properties which have vested in the State, the position may be different, because, in those circumstances, the respondents can forcibly urge that they have obtained a decision on certain aspects in their favour at the hands of the Claims Officer and that, if permission to withdraw is granted to the appellant, it would be prejudicial to

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them. When the appellant was making a very simple request for withdrawing his claim petition, only to enable him to seek any remedy available to him in law, as against the non-vested properties, we do not see any reason as to why that request should not be granted.

Again, in the case of *Thammanna v. K. Veera Reddy*, (1980) 4 SCC 62, the Apex Court has held as under:-

Under Order 23, Rule 1(1) of the Code of Civil Procedure, an appellant has the right to withdraw his appeal unconditionally; and if he is to make such application, the High Court has to grant it.

In *Kush Saigal v. M.C. Mitter*, (2000) 4 SCC 526, The Apex Court has upheld the decision of the Learned Additional District Judge when he had held,

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“The plaintiff has prayed for simple withdrawal of the suit and is not seeking permission to file a fresh suit on this cause of action. Order 23 Rule 1 sub-rule (1) enables the plaintiff to withdraw his suit at any time after the institution of the same. It is only in sub-rule 2 of Rule 1 of Order 23 CPC that the permission of the court is needed for filing a fresh suit on the cause of action.”

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In **Bijayananda Patnaik v. Satrughna Sahu**, (1964) 2

SCR 538 which had been referred to by the Hon'ble Administrative Member, the Apex Court has held as under:-

7. Let us therefore see what powers the High Court has in the matter of withdrawal of an appeal from an original decree before it and what procedure it has to follow in that behalf. The provisions in the Code relating to withdrawal of suits are to be found in Order 23 Rule 1. Sub-rule (1) thereof lays down that at any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim. Sub-rule (2) provides that 'where the court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, to may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim'. We have already said that sub-rule (1) gives absolute power to the plaintiff to withdraw his suit or abandon part of his claim against all or any of the defendants, and where an application for withdrawal of a suit is made under Order 23 Rule 1(1), the court has to allow that

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application and the suit stands withdrawn. It is only under sub-rule (2) where a suit is not being withdrawn absolutely but is being withdrawn on condition that the plaintiff may be permitted to institute a fresh suit for the same subject-matter that the permission of the court for such withdrawal is necessary. The provisions of Order 23 Rule 1(1) and (3) also apply in the same manner to withdrawal of appeals. In *Kalyan Singh v. Rahmu*, it was held that where no objection had been filed by the respondent, the appellant had an absolute right to withdraw his appeal at any time before judgment. This view was followed by the Allahabad High Court in *Kanhaya Lal v. Partap Chand* where it was held that having regard to Order 23 Rule (1) and Section 107(2) of the Code of Civil Procedure, where no cross-objection has been filed by the respondent, an appellant has the right to withdraw his appeal unconditionally, his only liability being to pay costs. In *Dhondo Narayan Shiralkar v. Annaji Pandurang Kokanur* it was held that 'an appellant is entitled as of right to withdraw his appeal, provided the respondent has not acquired any interest there under'. There was however difference between the Allahabad and Bombay High Courts as to whether Section 107(2) of the Code of Civil Procedure would help an appellant in such a case. It is unnecessary for our present purpose to decide whether the absolute right of the appellant to


withdraw an appeal unconditionally flows from Section 107(2) or is an inherent right of the appellant on the analogy of Order 23 Rule 1(1). But there can be no doubt that an appellant has the right, to withdraw his appeal unconditionally and if he makes such an application to the court, it has to grant it.

5. In all the above decisions, the law that is discernable is that withdrawal of a suit at any time is the absolute right but if such withdrawal is sought after a finding that certain rights have accrued to the defendant, the withdrawal cannot affect that right. Withdrawal unconditionally has to be permitted and permission to refuse the same could be possible only when prayer for withdrawal is accompanied with a further prayer to institute a fresh suit on the same subject matter. When no objection is made by the other side for withdrawal, the absoluteness of such a right to withdraw is manifest,

6. In the instant case, the original application was filed in December, 2006 and for admission hearing the case was listed on 25-01-2007 when the respondents were directed to file counter. On 08-02-2007 the case was again listed for consideration of interim


relief as prayed for by the applicant but the case was listed for 01-03-2007 along with certain other cases. On 01-03-2007, counsel for the respondents had prayed for time to file objection to the interim prayer and thus the case was listed for 04-04-2007. However, on 4-4-2007 the counsel for applicant had requested for a short adjournment, which having not been objected was granted and the case listed for 11-04-2007, when at the request on behalf of counsel for respondents, time to file counter was granted. Applicant was not represented. On 03-05-2007, counsel for the applicant had submitted a memo seeking permission to withdraw the OA without any condition. It was while considering the same that the Learned Vice Chairman had, while according permission, levied cost of Rs 500/- while the learned Administrative Member allowed the OA to be withdrawn, but without cost. Thus the issue to be resolved is whether cost is justified or not.

7. Normally levy of cost is a measure of deterrence. It also serves to enable the other side to receive some amount as reimbursement of the expenses it would have incurred. If frivolous O.As are filed and permission sought to be withdrawn after a




number of hearings, the same would unnecessarily occupy the valuable time of the Court. It is under that contingency, the Tribunal would be justified in levying cost. Again, if the respondents insist upon cost and satisfy the court that they have incurred expenses, then also cost could be levied. In the instant case there has been absolutely no insistence upon cost from the side of the respondent. Thus, levying cost would tantamount to providing some relief not claimed or asked for at all.

8. Again, though cost is levied, normally, they are not to meet exactly the amount incurred by the other side. If that be the rule, then in all the cases where the applicants come out victoriously, cost should be levied but save in rare cases (especially when the applicant is driven to the court more than once) cost is made only easy. As such, when the application is unconditionally withdrawn and when the other side has no objection, not only that the OA should be permitted to be withdrawn but also that the applicant should not be saddled with cost.



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9. Thus, I respectfully concur with the decision of the Hon'ble Administrative Member. Consequently, the OA is dismissed as withdrawn. No cost.


(DR.K.B.S.RAJAN)
MEMBER (JUDL.)

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