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O.A.No. 52 OF 2002

Shri Bidyadhar Sahoo Applicant
Vrs.
Union of India and others..... Respondents

ORDER DATED 27th JUNE MAY 2007

N.D.RAGHAVAN, VICE-CHAIRMAN

The applicant filed this O.A. on 21.1.2002 for the following relief:

“8. Relief(s) Sought for:

- 1) The Respondents may be directed to consider the suspension period since 22.10.1990 to 21.1.2001 as duty period and the arrear salary may be paid to him as he has been exonerated from the charges by the enquiry officer.
- 2) The applicant maybe allowed to appear in the recruitment examination for the post of Postman.
- 3) The applicant maybe considered for recruitment as Postal Assistant for the period of three years.
- 4) The punishment portion in Annexure 7 and 8 may be quashed.

And any other relief(s) may be awarded in favour of the applicant in view of the facts and circumstances mentioned in this application.”

By order dated 4.2.2002 notices on the question of admission were directed to be issued to the Respondents requiring them to file counter within four weeks from the date of receipt of the notice. On 19.6.2003 the Respondents filed a counter denying the claim of the applicant. Though Shri B.N.Udgata, A.S.C., filed a Memo of Appearance on 11.10.2004 received by the Registry without mentioning the Diary Number, yet the same was found defective and despite opportunity being given, Shri Udgata did not remove the said defect.

2. The matter was listed for hearing on 25.4.2007 when the learned counsel for the applicant filed a Memo praying for withdrawal of the O.A. It has been stated in the Memo that the applicant does not want to press the O.A. on merit and therefore, the prayer for withdrawal may be accepted to render justice.

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3. As there appears to be no provision in the A.T.Act, CAT (Procedure)Rules and CAT Rules of Practice, we refer to Order 23, Rule 1, of the Code of Civil Procedure 1908 to consider the Memo filed by the applicant's counsel on 2.5.2007 although the Tribunal shall not be bound by the provisions of the same, but be guided by the principles thereof.

4. Order 23, Rule 1, Code of Civil Procedure 1908 reads as follows:

"ORDER XXIII
WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.-(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants, abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the court is satisfied,-

- (a) that a suit must fail by reason of some formal defect, or
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms, as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff -

- (a) abandons any suit or part of claim under sub-rule (1), or
- (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

5. No ground having been mentioned by the applicant in the Memo filed by his learned counsel for withdrawal of the O.A., his prayer is covered by



sub-rule (1) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908. Therefore, in terms of the above Rule 1(4) of Order 23 and in the light of Rule 24 of the CAT (Procedure)Rules, the applicant shall be liable to pay costs and shall be precluded from instituting any fresh O.A. in respect of the subject-matter involved in the present O.A, especially when withdrawal is prayed after about five and half years since the institution of O.A. on 21.1.2002 troubling so far, thus, the time of not only the Respondents but also the Registry as well as the Bench of this Tribunal. Hence, we direct that the applicant shall pay costs of Rs.1000/- (Rupees one thousand) only to the Respondent No.1 by a Bank Draft, without liberty to institute any fresh O.A. in respect of the same subject-matter.

6. In the result, this O.A. is dismissed as withdrawn, accordingly as above.

(B.B.MISHRA)
ADMINISTRATIVE MEMBER


(N.D.RAGHAVAN)
VICE-CHAIRMAN

MR.B.B.MISHRA, MEMBER(A):

7. I have had the benefit of going through the order prepared by my Learned brother and I am unable to agree with his conclusion that “.....Therefore in terms of the above Rule 1(4) of Order 23 and 'in the light of Rule 24 of the CAT (Procedure) Rules, the applicant 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, especially when withdrawal is prayed after about five and half years since the institution of OA on 21.1.2002 troubling so far, thus, the time of not only the Respondents but also the Registry as well as the Bench of this Tribunal. Hence, we direct that the applicant shall pay costs of Rs.1000/- (Rupees one thousand) to the Respondent No.1 by a Bank Draft, without liberty to institute any fresh O.A. in respect of the same subject matter” on the grounds stated herein below:

8. Short fact of the matter is that Applicant is a GDSBPM under the Department of Posts. In this OA filed on 21.1.2002 he challenges the order of punishment imposed on him as a result of disciplinary proceedings initiated against him.



9. On 04.02.2002 notice was issued to the Respondents , who have filed their counter on 19th June, 2003. Thereafter the matter was listed on 113.03.2007 and on the request of the Learned Counsel for the Applicant the matter was adjourned to 25.04.2007. As there was no Division Bench on 25.04.2007, the matter was adjourned to 30.04.2007 when Learned Counsel for the Applicant by filing Memo has expressed his willingness to withdraw this OA and **Learned Additional Standing Counsel for the Respondents has raised no objection to the prayer of applicant to withdraw this OA.**

10. Therefore, the question for consideration as to whether the Applicant has any substantial right to seek for withdrawal of a petition and if so, as to whether imposing costs in absence of any prayer/objection on the other side is proper.

11. In this connection I would like to observe that in absence of any ex facie provisions in the A.T. Act, 1985 and the Rules made there under, this Tribunal shall have to follow the procedures codified in the CPC on the subject.

O.23 r.1 provides as under:

"(1) 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:

Provided that where the plaintiff is a minor or other person, to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(a) that a suit must fail by reason of some formal defect, or

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(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,

it 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.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of others."

12. While interpreting the provisions quoted above, Their Lordships of the Hon'ble Apex Court in the case of ***Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others, AIR 1987 SC 88 (Para-6)*** held as under:

"6. It may be noted that while in sub rule (1) of the former R.1 of 0.XXIII of the Code the words 'withdraw his suit' had been used in sub rule (1) of the new R.1 of OXXIII of the Code, the words 'abandon his suit' are used. The new sub-rule (1) is applicable to a case where the Court does not accord permission to withdraw from a suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. In the new sub rule (3) which corresponds to the former sub-rule (2) practically no change is made and under that sub-rule the Court is empowered to grant subject to the conditions mentioned therein permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject matter of such suit. Sub-rule (4) of the new R.1 of XXIII of the Code provides that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without

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the permission referred to in sub-rule (3) , he would be liable for such costs as the Court might award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

(emphasis supplied)

13. Similarly Rule 24 of the CAT (Procedure) Rules, 1987

deals and provides as under:

"24. ORDERS AND DIRECTIONS IN CERTAIN CASES-The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

14. From this it is clear that 'cost' can be awarded by applying sub rule (4) of Rule 4 of Order 23 where the parties approach the Court on the self same ground after withdrawing an application without leave to pursue it once again. Likewise, Rule 24 empowers the Tribunal to make any order for giving effect to an order passed by this Tribunal. But none of the principles is applicable to the present case. Therefore, awarding cost on the wishes of the Applicant to withdraw a petition is unwarranted.

15. Next question arises for consideration as to whether any right is available to a litigant to seek for withdrawal of an application filed before this Tribunal if so, as to whether the Court is bound to accede to such request .

16. In this regard, instead of going deep into the matter it would suffice to quote the observations of the Hon'ble Suopreme Court

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made in the case of *Bijayananda Patnaik v. Satrughna Sahu and others*, AIR 1963 SC 1566 (V 50 C 231=AIR 1962 Orissa 177) which run thus:

“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 O. 23, R.1 (1), the Court has to allow that 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 O 23 R.1(1) and (3) also apply in the same manner to withdrawal of appeals. In *Kalyan Singh v. Rahmu*, ILR 23 All 130 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.”

(emphasis added)

17. Besides I may say that doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court (Ref: AIR 1989 SC 1933 at page 1939, **Union of India v. Raghbir Singh**).

Cardozo propounded a similar thought with more emphasis:

“I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and

irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly by some consideration of history or custom or policy or justice. Lacking such a person, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another." (The nature of the judicial Process by Benjamin N. Cardozo p.3) {extracted from the decisions reported in 2007(3) SLR 338, Eastern Coalfields Limited v. Shri Sudama Das and others p.344}.

18. The reason of quoting the above is that the Division Bench consisting of present Hon'ble Vice-Chairman and Member(A) have already allowed prayers for withdrawal of Applicants, in many number of cases, without imposing any costs. Therefore, imposing cost on the prayer for withdrawal of this OA will be contrary to the view already taken and discriminatory. I do not think it necessary to burden this judgment by referring to all of those cases, some of recent cases are quoted herein below:

<u>Sl.No.</u>	<u>Registration No.</u>	<u>Date of dismissal/disposal as withdrawn.</u>
1.	OA No. 96/07	11.04.2007
2.	OA No. 127/07	03.04.2007
3.	OA No.391/06	26.03.2007
4.	OA 795/2005	07.03.2007
6.	OA 883/06	26.02.2006
7.	OA 539/2004	14.02.2007

19. 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 aforesaid OAs as withdrawn' by accepting the Memo of the Applicants.

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20. As regards delay in disposal of this OA, I would observe that in fact there is no delay on the part of the Applicant. However, Sub Section 2 of Section 22 of the A.T. Act, 1985 clearly provides that a **Tribunal shall decide every application made to it as expeditiously as possible.** Rule 16 of the CAT (Procedure) Rules, 1987 also empowers this **Tribunal to decide an application *ex parte* in case any of the parties is not present on the date of hearing.** It is also seen from the record that delay in taking decision, in this case, some times, occurred due to the fault of the Respondents. Therefore, for the delay in disposal of this OA, the Applicant alone cannot be held responsible.

21. In view of the discussions made above; especially on the face of the no objection raised by the Learned Additional Standing Counsel for the Respondents, on the basis of the Memo dated 25.4.2007, this OA is dismissed as withdrawn. There shall be no order as to costs.


(B.B. MISHRA)
Member (A)

ORDER DATED:

In view of the above difference in opinion, we refer the matter to the Hon'ble Chairman under Section 26 of the Administrative Tribunals Act, 1985 for deciding on the following points:

- (a) As to whether the Applicant has any right to seek for withdrawal of an application at any stage of proceeding;
- (b) As to whether in the event of allowing the prayer for withdrawal of OA imposition of costs is necessary;

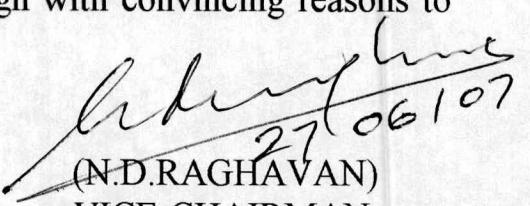
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(N.D.Raghavan)
Vice-Chairman

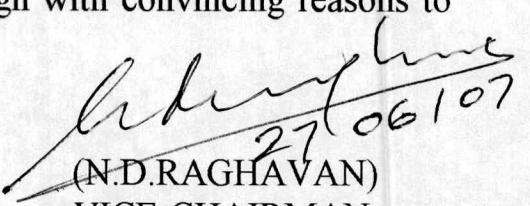
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(B.B.Mishra)
Member(A)

While referring this case to the Hon'ble Chairman under Section 26 of the A.T.Act, 1985, since the difference of opinion pointed out by my erudite Brother, with great respect to him, does not bring out the precise nature of difference, I am constrained to humbly differ even on such points in issue, as below:

- c) Whether, or not, on the facts and under the circumstances of the case, the applicant has any right to seek withdrawal of the O.A. at any stage of its proceedings without assigning any reason therefor and without leave of this Court ?
- d) Whether, or not, on the facts and under the circumstances of the case, costs can be awarded on the applicant for his withdrawal of the O.A., when the case is fit enough with convincing reasons to award so ?


(N.D.RAGHAVAN)

VICE-CHAIRMAN


27/06/07

O.A.No. 52/02

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 and after the counter is filed, by filing Memo dated 25.04.2007 the Applicant has stated that as he does not want to pursue this OA , he may be permitted to withdraw the same. While deciding the matter, Hon'ble Vice-Chairman has held as under:

“5. No ground having been mentioned by the Applicant in the Memo filed by his learned counsel for withdrawal of the OA, his prayer is covered by Sub-rule (1) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908. Therefore, in terms of the above Rule 1(4) of Order 23 and in the light of Rule 24 of the CAT (Procedure) Rules, the applicant 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, especially when withdrawal is prayed after about four years since the institution of OA on 21.1.2002 troubling so far, thus, the time of not only the

Respondents but also the Registry as well as the Bench of this Tribunal. Hence, we direct that the applicant shall pay costs of Rs.1000/- (Rupees one thousand) only to the Respondent No.1 by a Bank Draft, without liberty to institute any fresh OA in respect of the same subject-matter.”

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

“22. As regards delay in disposal of this OA, I would observe that in fact there is no delay on the part of the Applicant. However, Sub-section 2 of Section 22 of the A.T. Act, 1985 clearly provides that **a Tribunal shall decide every application made to it as expeditiously as possible**. Rule 16 of the CAT (Procedure) Rules, 1987 also empowers this **Tribunal to decide an application *ex parte* in case any of the parties is not present on the date of hearing**. It is also seen from the record that delay in taking decision, on this case, some times, occurred due to the fault of the Respondent. Therefore, for the delay in disposal of this OA, the Applicant alone cannot be held responsible.”

4. Parties have been heard. The A.T. Act is a self-contained Act and saves 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 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 elect ion 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 tho se 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 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,

“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.”

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 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

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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 thereunder'. 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.

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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 January, 2002 and for admission hearing the case was listed on 04-02-2002 when the respondents were directed to file counter and the same was filed by October, 2002. Thereafter, no transaction has taken place. Nor the case was listed before the Court. It cannot therefore be stated that court's time is wasted.

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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.

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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