7. In those circumstances, we do not find any infirmity in the order of suspension passed by the authorities concerned in the interest of administration. The learned single Judge has correctly apprised of these aspects of the case and we do not find any ground made out to interfere with the said order.

8. For all these reasons, this Letters Patent Appeal is dismissed.

9. In all fitness of things, we feel on the facts and circumstances of the case that the enquiry has to be completed as expeditiously as possible, taking into consideration the fact that the offence alleged is of the year 1984.

(KMV) *Appeal dismissed.*

* * *

SPECIAL CIVIL APPLICATION

Before the Hon'ble Mr. Justice A. M. Ahmadi and the Hon'ble Mr. Justice P. M. Chauhan.

GUJARAT STATE FERTILIZER CO. LTD. v. STATE OF GUJARAT & ORS.*

Industrial Disputes Act, 1947 (XIV of 1947) - Secs. 10, 31(1), 33(2)(b) & 33 A - An employer has a right to withdraw at any stage an approval application - The employee has a right to pursue his own remedies in such a situation - This right is analogous to the right of the plaintiff under Civil Procedure Code Order 23.

This Court is of the view that if the employer withdraws the approval application and thereby terminates the proceedings, he will be contravening the provisions of Sec. 33 of the Act. For such contravention, action may be taken against him under Sec. 31(1) and/or proceedings may be initiated under Sec. 10 or 33A of the Act. (Para 10)

Belated withdrawal of the approval application is likely to cause some prejudice to employee. But the question for consideration is whether in law the employer has a right to withdraw the approval application at any time he likes. (Para 17)

On a conjoint reading of Secs. 10, 31(1), 33 and 33A it is evident that where an approval application is filed under the proviso to clause (b) of sub-sec. (2) of Sec. 33, there is nothing in law which precludes the employer from withdrawing the approval application at any stage of the proceeding. True it is that if the workman is discharged from service during the pendency of an Industrial dispute, the proviso to clause (b) of sub-sec. (2) of Sec. 33 requires that such an order of discharge must be accompanied by the payment of wages for one month and an application must be made by the employer to the competent authority before which the industrial dispute is pending for approval of the action taken by the employer. If these two conditions are satisfied the effect of the discharge order would depend on the result of the approval application. If the approval application is granted, the employer's order of discharge will stand affirmed. But if the approval application is rejected, the employer's order of discharge will be rendered in-effective. However, the legislature also envisaged the situation where the

*Decided on 5th, 7th and 8th September, 1988. Special Civil Application No. 668 of 1987, for a writ for quashing the order passed by the Conciliation Officer, Vadodara on 8-1-1987 in Case No. 60 of 1974.

(Only a part of the Judgment approved for reporting is published.)

employer did not apply for approval of his action as required by the said provision. Sanction for the same is to be found in Sec. 31 which states that if an employer contravenes the provisions of Sec. 33, he shall be liable to punishment of imprisonment for a term which may extend to six months or of fine which may extend to one thousand rupees or both. Section 33A next provides that where an employer contravenes the provisions of Sec. 33, the employee aggrieved by the contravention may lodge a complaint in writing in the prescribed manner to the authority before which the proceedings were pending. (Para 17)

The Court observed "if the employee seeks a reference under Sec. 10 of the Act within a reasonable time from today, the fact that more than a decade has passed should not be a ground for refusing a reference as he was throughout diligently contesting the approval application which the petitioner Company sought to withdraw belatedly". (Para 21)

M/s. Punjab Beverages Pvt. Ltd. v. Suresh Chand (1), followed.

Straw Board Mfg Co v. Govind (2), M/s. Filmistan (Pvt) Ltd. v. Balkrishna (3) and Boel Quay Wharfingers v. King's Lynn Conservancy Board (4), referred to.

Orissa Road Transport v. Krushna Chandra (5) and Shakuntala Dasi v. Kusum Kumari (6), relied on.

Fox v. Star Newspaper Co (7), Hanson v. London Rent Assessment Committee (8) and Spl. C. A. 961 of 1976 (9), distinguished.

K. S. Nanavati, for the Petitioner.

G. D. Bhatt, Assistant Government Pleader for *Anil R. Dave* for the Respondents 1 and 2.

N. J. Mehta, for the Respondent No. 3.

AHMADI, J. Whether an employer, who applies for approval under clause (b) of sub-section (2) of Ssc. 33 of the Industrial Disputes Act, 1947 (hereinafter called 'the Act') has a right *(dominis litis)* to withdraw the proceeding at any stage before a final decision is recorded by the concerned authority 7 That is the question which is raised in this petition brought under Article 227 of the Constitution of India by the employer- The Gujarat State Fertilizers Company Ltd. against the decision of the Conciliation Officer, Baroda refusing permission to withdraw the application filed under the said provisions. The factual background in which the question arises for consideration may be stated in brief as under.

2. The third respondent, Vinayak S. Desai, was employed as a Research Assistant (Trainee) sometime in October 1972 by the petitioner Company. He was served with a charge-sheet dated January 28, 1974 for certain alleged acts of misconduct and was placed under suspension pending the departmental inquiry. On receipt of the report of the Inquiry Officer who held the departmental inquiry, he was served with a second show cause notice on August 1, 1974 and was ultimately discharged from service by an order dated October 15, 1974.

3. At the time when the order of discharge was made, an industrial dispute in regard to the payment of dearness allowance was pending before the Conciliation Officer, Baroda. The petitioner Company

(1) AIR 1978 SC 995 (2) AIR 1962 SC 1500 (3) AIR 1972 SC 171
(4) 1971 (1) WLR 1558. (5) 1974 (1) LLJ 56 (6) AIR 1971 Orissa 103
(7) (18981 I Q8D 636 (8) 1976 (1) QBD 394
(9) Spl. C. A. 961 of 1976 (Guj. High Court).

therefore, filed an application under clause (b) of sub-Sec. (2) of Sec. 33 of the Act for approval of the action taken against the employee. This application was made on the same day, *i.e.* October 15, 1974, and was registered as Application No. 60 of 1974. The said approval application was granted by the Conciliation Officer by the order dated January 30, 1976. The employee, feeling aggrieved by the said order of the Conciliation Officer, approached this Court by way of a writ petition, Special Civil Application No. 961 of 1976, challenging the said order. This Court, by its judgment and order dated April 6, 1977 quashed and set aside the order passed by the Conciliation Officer. It appears from the copy of the judgment of this Court in the said writ petition, Annexure 'F' that the Conciliation Officer had disposed of the approval application by dealing with only one out of the nine objections raised by the employee without considering the other eight objections. This Court, while quashing the said impugned order, stated as under :

> "We are, therefore, constrained to quash the Impugned order Annexure 'X' and direct the Conciliation Officer to dispose of the application afresh according to law on merits after giving an opportunity to both sides of being heard. Petition allowed accordingly. No order as to costs."

We have reproduced this part of the Court's order because one of the submissions made before us on behalf of the employee was based on the langauge of this order. We will deal with the same later.

4. After the matter went back to the Conciliation Officer, the hearing commenced afresh and after evidence was closed, the matter, was adjourned from time to time. In the meantime the petitioner Company addressed a letter dated September 24, 1984 to the Conciliation Officer informing him as under :

> This has reference to Approval Application No. 60 of 1974. We now hereby withdraw the said Application, which please note."

On receipt of this letter, the Assistant Commissioner of Labour, Buroda informed the Company that the withdrawal of the application has the effect of non-filing on approval application and that since the approval is neither granted nor refused by the Conciliation Officer, the withdrawal of the application would tantamount to contravention of Sec. 33 of the Act. The Company was requested to communicate the reasons for withdrawal as the withdrawal application did not disclose the same. On receipt of this letter, the petitioner Company replied on December 14, 1984 to the effect that in view of the decision of the Supreme Court in the *case of M/s. Punjab Beverages Pvt. Ltd*, the management was entitled to withdraw the approval application. After the employee was informed about the aforesaid correspondence, he filed a detailed reply objecting to the withdrawal of the approval application. After taking his objections into consideration, the Conciliation Officer rejected the application for withdrawal on the ground that the decision of the Supreme Court in M/s. Punjab Beverages Pvt. Ltd., had no application since in that case the approval application was withdrawn before it was heard on merits

and also because the contention that the workman was not concerned with the pending industrial dispute was not sustainable. Feeling aggrieved by this order passed by the Conciliation Officer, the Company has preferred the present writ petition.

5. Mr. K. S. Nanavati, learned Advocate for the petitioner Company, submitted that a party, which prefers an application claiming a certain relief e. g., approval of its action, has no inherent right to withdraw the application at any stage of the proceeding before it is finally decided unless the statute otherwise provides. According to him, the petitioner Company was under no statutory obligation to prefer the application in question or to pursue the same to the logical end of it being either allowed or refused and hence in the absence of any statutory bar the petitioner Company was entitled to withdraw the application and face the legal consequences of such withdrawal. He submitted that neither the provisions of the Act nor the Rules framed thereunder curtail the right of the petitioner to withdraw the proceeding and hence on first principles the petitioner ought to have been allowed to withdraw the application. Such withdrawal of the application would mean that no application for approval was ever preferred and the employee would be entitled to invoke Sec. 31(1) or 33A of the Act. Even in cases where the withdrawal is belated, the authority cannot refuse withdrawal; it may at best grant costs to compensate the employee for the expenditure incurred during the pendency of the said application. Lastly it was stated that unless the withdrawal is likely to affect third party's rights, ordinarily in biparty cases the withdrawal must be allowed as a matter of course. He, therefore, contended that the Conciliation Officer had failed to exercise jurisdiction vested in him by refusing to permit withdrawal of the approval application.

6. On the other hand, Mr. Mehta for the employee contended that the proviso to Sec. 33(2)(b) casts an obligation on the employer to obtain approval of the concerned authority, failure to abide by this statutory obligation may result in the prosecution of the employer under Sec. 31(1) of the Act. The scheme of the related provisions of the Act is that when the services of an employee are terminated, such termination is subject to the employer securing approval of the concerned authority which is seized of the industrial dispute. If the authority grants the approval, the termination would stand affirmed from the date it was made; if on the other hand the approval is refused, the termination becomes inoperative and the workman becomes entitled to all the benefits as if he continues in service. He, therefore, argued that the law casts an obligation on the employer to seek approval and does not leave it to the sweet will of the employer. The sanction of prosecution under Sec. 31(1) or the remedy available under Sec. 10 or 33A of the Act cannot absolve the employer from seeking approval and the Court should not countenance the argument that if the employer does not apply he will be prosecuted. He then submitted that in any case withdrawal at such a belated stage after almost a decade should

not be permitted as it would result in serious prejudice to the workman and the Court should refuse to exercise its extraordinary jurisdiction under Art. 227 of the Constitution of India.

7. Sub-secs. (1) and (2) of Sec. 33, in so far as they are relevant for our purposes, read as under :

> "33. Conditions of service etc., to remain unchanged under certain circumstances during pendency of proceedings :
>
> (1) During the pendency of the conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall -
>
> (a) xxx xxx xxx
>
> (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending."

This provision, therefore, obliges an employer to obtain a written permission of the concerned authority before discharging an employee from service whether by dismissal or otherwise during the pendency of any conciliation proceeding before a conciliation officer or a Board or any proceeding before an arbitrator or Labour Court or Tribunal or National Tribunal in respect of an industrial dispute pending before them. Sub-sec. (2) of Sec. 33 next provides as under :

> "(2) During the pendency of any such proceedings in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or where there are no such standing orders in accordance with the provisions of the contract whether express or implied between him and the workman -
>
> (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
>
> (b) for any misconduct not connected with the dispute, discharge or punish whether by dismissal or otherwise, the workman :
>
> Provided that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

Under this sub-section the employer is entitled to pass an order of dismissal or discharge for any misconduct not connected with the dispute provided the action taken by the employer is approved by the said authority. On a conjoint reading of the extracted sub-sections it is obvious that Sec. 33 makes inroads in the management's rights to take action against an erring workman when an industrial dispute is pending before any of the named forum. It restrains an employer from effecting any change in the conditions of service to the prejudice of the workmen or from taking punitive action of discharge or dismissal for misconduct connected with a pending industrial dispute without the express permission of the authority before whom the industrial dispute is pending. However, if the alteration in the service conditions

or punishment for misconduct is with reference to a matter not connected with the pending industrial dispute, the employer is required to obtain the approval of the authority before which the industrial dispute is pending. The underlying idea is to guard the workman against possible harassment or victimisation for raising and prosecuting an industrial dispute and to maintain industrial peace by restraining the employer from disturbing the *status quo* as far as possible. At the same time, in order to ensure that the workmen remain disciplined and do not take undue advantage of the protection of law a balance is struck by permitting the employer to take punitive action against his employee, in cases falling under sub-secs. (1) and (3) of Sec. 33 on previous permission and in cases falling under sub-sec. (2) on obtaining subsequent approval of the concerned authority. Since the case on hand admittedly falls within the purview of Sec. 33(2)(b) of the Act, it is obvious that the employer was entitled to terminate the workman's services and seek approval of the concerned authority thereafter.

8. Now in cases falling within sub-sec. (1) and (3) of Sec. 33 prior permission of the concerned authority is a must to make the employer's action legally effective. However, in cases falling under sub-sec. (2) of Sec. 33, the employer may take action without prior permission and then seek *ex post facto* approval from the concerned authority. In granting the approval the authority must satisfy itself that the action is consistent with the standing orders, that a proper inquiry was held and the other conditions were satisfied. If these requirements are satisfied and a *prima facie* case is shown, the approval must follow. If the approval is granted, the employer's action stands affirmed but if it is refused, the action is rendered invalid and *non-est.* But if the employer does not apply for approval or after applying for approval withdraws the application and the withdrawal is permitted, the employers action is not rendered invalid or *non-est* although the employer may become liable to punishment under Sec. 31(1) or may be required to face a complaint under Sec. 33A of the Act.

9. In *M/s. Punjab Beverages Pvt. Ltd., Chandigarh v. Suresh Chand & Anr.,* AIR 1978 SC 995, the Supreme Court categorically ruled. that if an employer contravenes the provisions of Sec. 33 by not making an application for approval of its action under sub-sec. (2)(b) thereof, such contravention does not *ipso facto* render the order of discharge or dismissal void and inoperative. In such a case the remedy available to the workman is two-fold, namely, (i) to move for punishment under sub-sec. (1) of sec. 31 and/ or to challenge the order of discharge or dismissal under Sec. 33A of the Act. It is also open to the workman to seek a reference under Sec. 10 of the Act. Similarly if an employer, after filing an application for approval of his action withdraws the application, such withdrawal stands on the same footing as if no application under Sec. 33(2)(b) was made at all. It is, therefore, clear on a conjoint reading of Secs. 31(1), 33 and 33A of the Act that the legislative intent was not to invalidate an order of discharge

or dismissal on the employer having contravened Sec. 33 by not applying or prosecuting an application for approval of the action taken against the workman. Sec. 33A gives to a workman, who is visited with an order of discharge or dismissal in contravention of Sec. 33, the right to move the appropriate forum for redress of his grievance without having to take recourse to Sec. 10 of the Act. It follows that a mere contravention of Sec. 33 by the employer will not entitle the workman to treat the order of discharge or dismissal as *non-est*, he will have to lodge a complaint under Sec. 33A or seek a reference under Sec. 10 and have the matter adjudicated by the competent authority. This is obvious for the simple reason that if the intention of the legislature was to render the employer's action invalid on the mere proof of contravention of Sec. 33, there was no need to enact Sec. 33A. Thus, when an employer fails to make an application for approval under the proviso to Sec. 33(2)(b), or after having made an application withdraws the same unconditionally, he can be said to have contravened the provisions of Sec. 33 thereby running the risk of punishment under Sec. 31(1) of the Act. However, failure to comply with the requirement of the said provision will not render the employer's action *qua* the workman illegal or *non-est* but the remedy of the workman would be to either seek a reference under Sec. 10 or lodge a complaint under Sec. 33A of the Act. The withdrawal of the application for approval stands on the same footing as if no application under Sec. 33(2) (b) was made at all and, therefore, the contravention takes effect as soon as the application is withdrawn and ceases to exist on the file of the concerned authority. This much is clear on a plain reading of the decision of the Supreme Court in the case of *M/s. Punjab Beverages Pvt. Ltd.* (supra)

10. The scope of the proviso to Sec. 33(2)(b) fell for consideration by the Supreme Court in *Straw Board Manufacturing Co. v. Govind*, AIR 1962 SC 1500. It was pointed out that the said sub-section contemplates : (i) dismissal or discharge, (ii) payment of wages and (iii) making of an application for approval, to be simultaneous and to be a part of the same transaction. Therefore, when an employer takes action under Sec. 33(2) by dismissing or discharging a workman, he is expected to immediately pay the workman wages for one month and also make an application for approval to the competent authority. It is essential that the action of the employer must show that the order of dismissal or discharge was accompanied by the payment of wages and an application for approval. It is not the requirement of law that the application must be made on the same day but it must constitute a part of the same transaction (See : *M/s. Filmistan (Private) Ltd. v. Balkrishna Bhiwa & Anr.*, AIR 1972 SC 171). This takes care of the apprehension that an employer may, after withdrawing his application for approval, lodge another application for approval to escape from the rigour of Sec. 31(1) of the Act. This apprehension is clearly misplaced because in order to comply with the requirement of Sec. 33(2) of the

Act it is necessary that the application for approval is simultaneously made so as to constitute a part of the same transaction. If an application is withdrawn and a fresh application is made, assuming it is permissible, after a lapse of time, it will not constitute a part of the same transaction and will not cure the contravention of Sec. 33. In such circumstances the employer will be held to have contravened the provisions of Sec. 33 attracting punishment under Sec. 31(1) of the Act. We are, therefore, of the view that if the employer withdraws the approval application and thereby terminates the proceedings, he will be contravening the provisions of Sec. 33 of the Act. For such contravention, action may be taken against him under Sec. 31(1) and/or proceedings may be initiated under Sec. 10 or 33A of the Act.

11. The question then is whether it is permissible to the employer to withdraw an approval application at any stage of the proceeding without assigning any reason whatsoever ? The provisions of the Act do not expressly or by implication prohibit withdrawal of the approval application. There is no statutory bar since the Act and the Rules made thereunder are silent. Besides this being a biparty dispute ordinarily the party which initiates the action has the right to withdraw therefrom at any time it likes before a final order is made by the competent authority. No right or interest of any absentee party is likely to be affected by the withdrawal of the application. In *Boel Quay Wharfingers Ltd. v. King's Lynn Consorvancy Board* (1971) I WLR 1558, the claimants, Wharfingers, handled goods in varying quantities for a large fertilizer group at their quay in the port of King's Lynn, employing dock workers on a casual basis. After Docks and Harbours Act, 1966 came into force the claimants applied for a licence to employ five men permanently for general stevedoring work as required by the provisions of the said statute. Before the licensing authority decided the application the fertiliser factory in the vicinity had closed down and the claimants were negotiating to sell their lease of the quary to large-scale grain operators. In the meantime the licensing authority granted the claimants' application but subject to condition that they should employ 13 men. The claimants filed an appeal under Sec. 4(2) to the Minister against the condition imposed by the licensing authority. By the same letter the claimants informed the Minister that owing to the change in their circumstances they do not require the licence. Notwithstanding the same, the Minister decided that the claimants' application should be "refused". The decision also drew the attention of the claimants to the rights of those who had been refused licences to claim compensation under Sec. 13 of the enactment. However, when the claimants applied to the licensing authority for compensation, the claim was rejected on the ground that the claimants, having been granted a licence by the licensing authority, had withdrawn their application before the Minister's decision and hence were not entitled to compensation. The claimants appealed against the said decision. Under the Act if the licensing authority grants a licence subject to conditions, then no

matter how onerous the conditions, the employer gets no compensation. However under Sec. 13 the employer was entitled to compensation on refusal of the licence. Now before the licence was refused, the employee-claimants had written to the Minister that owing to the change in their circumstances they would no longer require a licence. The question then was whether the claimants' application was refused in which case they would be entitled to compensation or whether it stood withdrawn beforehand in which case they would have no right to compensation. This raised a question whether the claimants had a right to withdraw the application for licence while the appeal before the Minister was pending. Dealing with this contention Solmon Lord J., while agreeing with the opinion of Lord Denning M. R. observed as under :

> "If you apply for,a licence, I cannot for may part see why you are not entitled to withdraw your application, unless, of course, there is any section in this Act which would prevent you from doing so. Whenever an application is made to a Tribunal or to the Courts for that matter, as a rule, there is nothing to compel you to go on with it. You are entitled to withdraw your application at any stage. I cannot see any reason for holding that an employer who makes an application under this Act has no power to withdraw it. It is quite true that the legislature sometimes, for policy reasons, lay down that an application made under a statute cannot be withdrawn in specified circumstances. The Rent Act, 1968 contains an example of such a statutory provision. The Landlord and Tenant (Rent Control) Act of 1949, however, contained no such provision; and in *Rex v. Hampstead and St. Pancras Rent Tribunal, Ex parte Goodman* (1951) I K.B 451 the Court held that since there was nothing in that Act to prevent an application being withdrawn it could be withdrawn at any time. That I think is an authority for the view I have expressed. But quite independently of authority it seems to me to follow on principle that in the absence of a statutory prohibition, once you have made an application you can always withdraw it; and once you have withdrawn the application it ceases to exist. I think that this application having been withdrawn, it was no longer before the Minister, and when the letter was written - not, of course, by the Minister personally - that part of the letter which stated that the application was refused was a nullity. You cannot refuse an application which is not before you, and this application was not before the Minister."

In that view the appeal was dismissed.

12. It follows from the above observations that unless a statute prohibits the withdrawal of any proceeding unless third party rights are affected, the party which initiated the proceeding always has the right to withdraw it at any stage of the proceeding. As pointed out above, the provisions of the Act do not prohibit withdrawal of an approval application once it is made in pursuance of the contents of the proviso to Sec. 33(2)(b) of the Act. It is, thefore, open to the employer making the approval application to withdraw from the same at any stage he chooses. This is the view expressed by the Orissa High Court in *Orissa Road Transport Company Ltd. v. Krushna Chandra Sahu and Anr.*, (1974) I LLJ 56. In that case a bus conductor was discharged from service pursuant to the finding of guilt recorded by the Inquiry Officer. Thereafter the management filed an application under Sec. 33(2) for approval of the action taken against the workman. As the manage-

ment had failed to pay one month's wages, it made an application for withdrawal of the approval application which was allowed. Soon thereafter the management passed a fresh order of discharge and preferred another approval application under Sec. 33(2) for approval of its action. The Tribunal dismissed the application as not maintainable in law. That was because the Tribunal was of the view that the order of its predecessor permitting withdrawal of the earlier application was without jurisdiction. The High Court held that this view was contrary to law. It then proceeded to add as under :

> "It is open to a party when it is aware of the legal position to withdraw the application filed for approval. Law does not prohibit such a step and it need not be positively so prescribed. It was, therefore, open to the petitioner to withdraw the application under Sec 33(2) of the Act when it was satisfied that the application for approval cannot be allowed as one month's wages had not been paid."

The Division Bench, therefore, held that it was quite within the jurisdicition of the Tribunal to pass order of withdrawal. This decision also supports the contention of the petitioner that in law the employer has a right to withdraw the approval application at any stage before it is finally decided as the Act does not bar the same.

13. In *Shakuntala Dasi v. Kusum Kumari Sarkar,* AIR 1971 Orissa 103, the petitioner had applied for probate and after the litigation had continued for about three years and as many as 19 witnesses were examined and the evidence of the hand-writing expert was also tendered, the petitioner applied for unconditional withdrawal of her application, She also made an application to withdraw her contest from the cross-application filed against her. The learned District Judge rejected both the applications. The petitioner questioned the legality of the order of the learned District Judge in rejecting her two applications in both the suits by preferring Civil Revision Applications in the High Court. It will appear from the above facts that substantial time was devoted by the Court in recording oral evidence of as many as 19 witnesses as well as the hand-writing expert. Notwithstanding the same the High Court came to the conclusion that the District Judge was not right in refusing permission to withdraw the suit as well as the contest filed in the other matter. Taking note of the fact that in cases where the applicant is an executor or executrix, a duty is cast on such person to have the will probated. It pointed out that there was no method prescribed under the law to compel such person to take steps for probating the will. Dealing with the argument that once an application is filed in pursuance of the duty cast on the executor or executrix, the proceeding cannot stop and must be continued, Mishra, J. observed as under :

> "I hardly find any support for such a proposition. If whether to apply for probate or not was within the option of the petitioner, whether to, continue or not the application would be equally within her option. On the principle that the plaintiff is *dominus litis* in a litigation the matter must be left to his charge, otherwise the Court would be assuming a burden which it would in many cases find difficult to discharge."

In taking this view, the learned Judge also referred to the provisions of the Civil Procedure Code which permitted withdrawal of the proceedings. He was, therefore, of the opinion that unless there was anything contrary in the law itself which expressly or impliedly prohibited the withdrawal of the proceedings, the party at whose instance the proceedings were initiated was entitled to withdraw the same. It is, therefore, obvious that the Court cannot compel a party to continue the proceedings initiated by it unless the law confers that power.

14. From the above discussion it clearly emerges that a party which has initiated proceedings is entitled to withdraw the same at any stage it likes unless it is precluded by law from doing so, for example Rule 100 of the Companies (Court) Rules, 1959 expressly provides that the petition for winding up shall not be withdrawn after presentation without the leave of the Court. Once a petition for winding up is advertised, it cannot be allowed to be withdrawn before the date fixed in the advertisement for the hearing of the petition. In view of this specific provision the party presenting a winding up petition is precluded from withdrawing the same after presentation without the leave of the Court. The Civil Procedure Code, Order XXIII, entitles the plaintiff at any time after institution of a suit to abandon the same or a part of his claim but if 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 can be abandoned without the leave of the Court. In the latter case before abandonment is permitted the rule requires that the application for leave to withdraw shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a lawyer, by a certificate of the lawyer to the effect that the abandonment is, in his view, for the benefit of the minor or such other person. Similarly under Sec. 321 of the Code of Criminal Procedure, the Public Prosecutor or the Assistant Public Prosecutor in charge of a case is permitted to withdraw the prosecution against any person with the consent of the Court. If the Court does not consent then the withdrawal is not permissible. It will be manifest from the above illustrative cases that whenever the legislature thought that third party rights were likely to be affected, as in the case of withdrawal of winding up petitions, or in the case where the interest of minors or persons of unsound mind is involved or where the complainant's or society's interest is at stake in the withdrawal of prosecutions, it specifically provided that the party initiating the proceeding will not be entitled to withdraw the same except with the permission or consent of the Court.

15. In *Fox v. Star Newspaper Company* (1898) I QBD 636 the plaintiff desired to be nonsuited but it was held that under the existing rules of procedure he cannot elect to do so and the only way in which the action could be discontinued was by "discontinuance" under Order XXVI, Rule 1. Counsel for the employee, however, invited our attention to the following observations to buttress the argument that a party can

withdraw from the proceeding initiated by him only with the leave of the Court or the authority before whom the proceedings are pending :

> "The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the Judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is, that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the Judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."

It must be realised that Rule 6 of Order XLI of 1875 Rules placed fetter upon the power of the plaintiff to demand as of right to be nonsuited in a common law action. That rule was repealed as the matter with which the rule dealt was provided for by the rule as to discontinuance which laid down that after a certain stage the plaintiff could not, without the leave of the Court discontinue the action. It is, therefore, obvious that the observations extracted earlier must be read in the context of the relevant provision which specifically debarred the plaintiff from discontinuing the action without the leave of the Court.

16. Another decision to which our attention was drawn by the learned Counsel for the empolyee is reported in *Hanson v. London Rent Assessment Committee* (1976) I.Q.B.D. 384. The observations on which reliance was placed read as under :

> "I approach this problem on the footing that in general where you have a statutory procedure of this kind which involves the making of objections or applications, in general a person who makes an objection or an application should have the right to withdraw if he can do so without prejudicing other interested parties."

In taking this view strong reliance was placed on the decision in *Boel Quay Wharfingers Ltd.,* (supra). In that case the landlords applied to a Rent Officer to fix the fair rent in respect of the demised premises, The tenant objected to the fair rent being assessed at £ 800 as ordered whereupon the matter was referred to the London Rent Assessment Committee. While the Committee was seized of the matter the tenant addressed a letter withdrawing his objections but the Committee finding the letter ambiguous, considered the matter on merits and determined the fair rent at £ 800 a year. The question which arose for consideration was whether the tenant was entitled to withdraw the objection and thereby preclude the Committee from determining the fair rent of the premises in question. This question had to be answered in the context of the relevant provisions of the Rent Act, 1968. After discussing the provisions of the statute, the Court came to the conclusion that once the matter has been referred to the Rent Assessment Committee, it is obligatory on the Committee to determine the fair rent of the premises after weighing the material placed before it. That is because the issue which arises before it for the fixation of fair rent is no longer a matter concerning the landlord and the tenant only but it affects the interest

of third parties as the effect of the fixation of a fair rent is that the rent is fixed *in rem* and not merely inter-parties. That is why the Court felt that it would not be permissible to allow a party to withdraw his objection because interest of third parties was involved and was likely to be affected. In our view, therefore, this decision is of no assistance to the employee since the present case is essentially a biparty matter.

17. Invoking the doctrine of prejudice, the learned Counsel for the employee pointed out that the order of discharge was passed way back on October 15, 1974; approval application was filed on the same day; the approval application was allowed by the Conciliation Officer but the order was quashed by this Court on April 6, 1977 and the matter was remanded back to the Conciliation Officer for disposal on merits in accordance with law; on remand, evidence was led and the petitioner Company closed its evidence on December 4, 1979; the matter dragged on thereafter till the petitioner Company sent a letter dated September 24, 1984 for withdrawal of the approval application; intimation regarding the application for withdrawal was given to the employee as late as January 13, 1986 and finally the application for withdrawal was rejected on January 8, 1987. He, therefore, said that after the expiry of a decade the petitioner Company decided to withdraw the approval application without assigning any reason whatsoever and the reasons assigned subsequently were not found to be germane by the Conciliation Officer and, therefore, the Conciliation Officer was justified in refusing permission to withdraw the approval application. He submitted that from the above facts it will become apparent that the employee was contesting the application for almost a decade and more and, therefore, serious prejudice would be caused to him if the application is allowed to be withdrawn since he would not be entitled to the benefit of Sec. 33A as the matter was pending before the Conciliation Officer and he would have to seek a reference under Sec. 10 which may or may not be granted because of long lapse of time. There is no doubt that the belated withdrawal of the approval application is likely to cause some prejudice to the employee. But the question for consideration is whether in law the employer has a right to withdraw the approval application at any time he likes. Mr. Nanavati, learned Advocate for the petitioner Company, therefore, submitted that if the employer has a right to withdraw the approval application, the same cannot be rejected merely on the ground that such withdrawal would cause prejudice to the employee. The proper course would be to saddle the employer with the liability to pay costs. Now as pointed out earlier on a conjoint reading of Secs. 10, 31(1), 33 and 33A it is evident that where an approval application is filed under the proviso to clause (b) of sub-sec. (2) of Sec. 33, there is nothing in law which precludes the employer from withdrawing the approval application at any stage of the proceeding. True it is that if the workman is discharged from service during the pendency of an industrial dispute, the proviso to clause (b) of sub-sec. (2) of Sec. 33 requires that such an order of discharge must be

accompanied by the payment of wages for one month and an application must be made by the employer to the competent authority before which the industrial dispute is pending for approval of the action taken by the employer. If these two conditions are satisfied the effect of the discharge order would depend on the result of the approval application. If the approval application is granted, the employer's order of discharge will stand affirmed. But if the approval application is rejected, the employer's order of discharge will be rendered ineffective. However, the legislature also envisaged the situation where the employer did not apply for approval of his action as required by the said provision. Sanction for the same is to be found in Sec. 31 which states that if an employer contravenes the provisions of Sec. 33, he shall be liable to punishment of imprisonment for a term which may extend to six months or of fine which may extend to one thousand rupees or both. Sec. 33A next provides that where an employer contravenes the provisions of Sec. 33, the employee aggrieved by the contravention may lodge a complaint in writing in the prescribed manner to the authority before which the proceedings were pending. It is true that in the present case since the original dispute was pending before the Conciliation Officer, clause (a) of Sec. 33A would come into play. However, it must be, remembered that even if the benefit of Sec. 33A cannot be availed of by the employee since the proceedings were pending before the Conciliation Officer and not before any of the bodies named in clause (b) of Sec. 33A, the employee was not without a remedy because he was free to seek a reference under Sec. 10 of the Act. It was not obligatory on him, merely because an approval application was pending, not to invoke the remedy of seeking a reference under Sec. 10 of the Act. It was, therefore, open to him throughout the pendency of the approval application to move the appropriate Government for a reference under Sec. 10 of the Act. Nonetheless it is clear that the employee was contesting the approval application which dragged on for over ten years. He must have incurred considerable expenditure during the said period in contesting the same. It is equally true that substantial time was devoted by the Conciliation Officer as well as the parties before the petitioner Company applied for withdrawal of the approval application. Mr. Nanavati fairly conceded that these would be relevant facts which the Court may take into consideration in awarding costs but the employer's right to withdraw the approval application cannot be affected or taken away on that count. In *Shakuntala Dasi's case* (supra), it becomes clear from paragraphs 5 and 6 of the judgment that the factual situation in this behalf was more or less similar. Even so the Court came to the conclusion that the right of the party to apply for withdrawal remained unaffected. We are, therefore, of the opinion that the submission of the learned Counsel for the employee based on the doctrine of prejudice cannot rob the employer of the right to withdraw the application. We may also reiterate that the employee was not precluded from seeking a reference under Sec. 10

of the Act after the order of discharge and during the pendency of the approval application.

18. Counsel for the employee then turned to the language of this Court's order in *Special Civil Application No. 961 of 1976* whereby the order of the Conciliation Officer granting approval was set aside and the matter was remanded to the said officer 'to dispose of the application afresh according to law on merits' after giving an opportunity to both sides of being heard. Placing emphasis on the words 'on merits', Counsel submitted that the writ of this Court was imperative in that it expected the Conciliation Officer to dispose of the application on merits and, therefore, it was not open to the Conciliation Officer to permit withdrawal of the approval application. We do not see any merit in this contention. That this Court allowed the employee's writ petition and remanded the matter for disposal according to law and on merits, it did not intend to take away the right of the employer to withdraw the application at any stage of the proceeding. That was never a matter in the contemplation of the Court and, therefore, the usual phraseology which is employed while remanding the matter back to the concerned authority was used while disposing of the writ petition. It is not possible to conclude from the language used by this Court while disposing of the writ petition that this Court intended that even if the employer has a right to withdraw and seeks withdrawal of the approval application, his right should be overlooked and the approval application should be disposed of on merits, that is to say either in the grant or refusal of the application.

19. It was next argued that in view of the language of sub-sec. (5) of Sec. 33 the authority was bound to hear and dispose of the application on merits. Emphasis was laid on the words 'hear such application and pass... such order in relation thereto as it deems fit'. Counsel laid stress on the requirement to 'hear such application' and argued that these words implied that the application must be heard on merits. We are afraid such a meaning cannot be assigned to the said provision. The sub-section merely lays down the procedure for the disposal of an approval application. It does not negate the withdrawal of such an application. The legislature did not think it necessary to make a specific provision in regard to the inherent right of withdrawal but, it provides for the disposal of an application in ordinary course. It merely lays down the procedure to be followed for the disposal of an approval application, but does not rule out the disposal of the application by withdrawal. We, therefore, do not see any merit in this contention also.

20. In desparation Counsel for the employee relied on Sec. 291 of the Companies Act, 1956 which *inter alia* provides that the Board of Directors of a Company shall be entitled to exercise all such powers and shall be entitled to do all such acts and things, as the Company is authorised to exercise and do. Reliance was placed on the second

proviso which states that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf in this or any other Act or in the memorandum or articles of the company, or in any regulation not inconsistent therewith, including regulations made by the company in general meeting. Article 180 of the Memorandum and Articles of Association of the petitioner Company is couched in substantially the same language. It was, therefore, submitted by Mr. Mehta, the learned Advocate for the employee, that the Board of Directors having approved the action taken against the employee on being informed that the company had filed an approval application under Sec. 33(2)(b) of the Act, it was not open to the petitioner Company now to withdraw the application and to do so would tantamount to the Board committing an offence under Sec. 31(1) of the Act. This is in our view begging the question. Once it is held that in law the employer has a right to withdraw the approval application at any stage and take the consequences thereof, the mere fact that the Board's consent to discharge the employee was obtained earlier will not take away the Company's right to apply for withdrawal. Whether or not to withdraw the application is also the decision of the Company and if the law permits the withdrawal, Sec. 291 or Art. 180 of the Memorandum and Articles of Association does not create an embargo against the exercise of such right merely because earlier the Board had approved of the action on being informed that an approval application was filed.

21. Before we part, we may observe that if the employee seeks a reference under Sec. 10 of the Act within a reasonable time from today. the fact that more than a decade has passed should not be a ground for refusing a reference as he was throughout diligently contesting the approval application which the petitioner Company sought to withdraw belatedly. It is in fact surprising that the approval application was not disposed of till 1984 after its remand in 1977 when the law expects disposal of such applications within three months. Such delay renders the very purpose of the provisions nugatory.

22. For the above reasons we allow this writ petition, set aside the impugned order of the Conciliation Officer, Annexure 'E' to the petition and permit the withdrawal of the approval application with a direction that the petitioner Company will pay costs which we quantify at Rs. 10,000/- within three weeks from today. Rule is made absolute accordingly.

(Rest of the judgment is not material for the Reports).

(KMV) *Rule made absolute.*

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