(1919) 07 MAD CK 0007

In the Madras High Court

Ramaswami Naicken and Others — APPELLANT

Vs

Venkataswami Naicken and Others — RESPONDENT

Date of Decision : 21-07-1919

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 35

Citation : (1919) 10 LW 326 : (1919) 37 MLJ 271

Judgement

1. Following the Full Bench decision in Arumugam Chetty v. Muthu Koundan (1918) 37 M.L.J. 166, we hold that this second appeal fails and

dismiss it. The learned Advocate-General who appeared for the appellant did not argue the second appeal, but contended that as it was filed after

the Privy Council decision Sahu Ram Chandra v. Bhup Singh ILR (1917) All. 437 : 33 M.L.J. 14 and on the strength of Badagala Jogi Naidu Vs.

Bendalam Papiah Naidu and Others, , in which Spencer and Krishnan, JJ., interpreted the Privy Council ruling to mean that a deed of mortgage

cannot be relied on as an antecedent debt, this Court should not direct the appellant to pay the respondents'' costs. Mr. K. Srinivasa Aiyangar on

the other hand contended that unless there was misconduct on the part of the successful party or unless it would be manifestly unjust on the merits

of the case to visit the defeated party with costs, costs should follow the event. There can be no doubt that the rule enunciated in Section 35 of the

CPC as to costs is wider than the English rule (Order 65 Rule 1) as to actions tried by a jury which enjoins on the Judge to withold the costs for

the successful party only for good cause shown. Even under the English rule, Bowen L.J. pointed out that in order to deprive the successful party

of his costs it is not necessary to prove that the opposite party has been guilty of misconduct. See Forsler v. Farquhar (1893) 1 Q.B. 564. Mr.

Justice North in Waller v. Steinkoof (1892) 3 Ch. 489 said that the discretion of the presiding Judge is not taken away because he has to decide a bare legal question. The strict rule which was enunciated by Jessel M.R. in Cooper v. Whiltin gharn (1880) 15 Ch. D. 501, has been practically abandoned in these two cases. Mr. Justice Subrahmania Aiyar in Kuppuswami Chetty v. Rajah of Kalahasti ILR (1903) Mad. 341 has based his judgment on the dictum of the Master of the Rolls which is no longer law in England. Further, for the present case, there is the direct authority of Robinson v. Rosher (1841) 1 Y. & C.C.C. 7 : 62 E.R. 767 and Suttan Harbour Improvement Company v. Hitchens (1852) 15 Beaven 161 : 51 E.R. 498 wherein it has been pointed out that it would be a sound exercise of discretion to refuse costs where a suit was based on a state of law, which has since been overruled either by an act of Parliament or by a superior tribunal. In our opinion, the above principles are deducible a fortiori from the language of Section 35 of the Civil Procedure Code.

2. Under the Indian Law it can safely be stated that the discretion of the Court as to the award of costs so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case and upon its presentation by the party and upon circumstances and authorities which were pre-existing before the suit was launched. In the present case, the 1st defendant has been responsible for the whole of the litigation, neither the plaintiffs nor the other defendants have been guilty of any act of commission which can be charged against them. If the judgment of the Divisional Bench had stood, the appellants might have succeeded. That is a consideration which cannot altogether be ignored in apportioning costs. Taking all these circumstances into consideration, we think the appellant should not be made to pay the costs of the defendants. We further think that the 1st defendant who is the fous et origo of all the trouble should be directed to pay the costs of the other defendants in this court.