notice of any further application can at the worst amount only to an irregularity. It seems to us therefore that the sale in this case cannot be said to be null and void.

Then the learned pleader for the judgment-debtor further argued that this is a case of fraud and therefore the suit would be in time as the plaintiff came within three years of the date, when the fraud came to his knowledge. No such case was really sought to be made in the Court of trial. Issue does not raise any question of fraud and the plaint, so far as we can judge from the summary of it, does not contain any specific allegations of fraud. The Subordinate Judge no doubt in one or two places in his judgment says that the judgment-creditor acted fraudulently in not serving the judgment-debtor with notice. But in this he seems to have gone further than the issues properly raised in the case. As the sale was not void and as there was no case of fraud, the suit is clearly barred as it was instituted 15 years after the date of the sale which, as already mentioned, took place in the lifetime of the plaintiffs' father.

The result is that the appeal must be allowed, the judgment of the Subordinate Judge reversed, and that of the District Munsif restored with costs here and in the lower Appellate Court.

BAKEWELL, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

RAMASAMI NAIKEN AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATASAMI NAIKEN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1919, July, 21.

Civil Procedure Code (V of 1908), sec. 35—Costs—Change in law, effect of, on award of costs.

It is a good cause for depriving the successful respondent of his costs of the appeal that the law has been altered since the filing of the appeal.

* Second Appeal No. 1147 of 1918.

RAMASAMI NAIKEN v. VENKATASAMI NAIKEN.

SECOND APPEAL against the decree of D. G. WALLER, the District Judge of Coimbatore, in Appeal No. 232 of 1917, preferred against the decree of S. VARADA ACHARYA, the First Additional District Munsif of Coimbatore, in Original Suit No. 14 of 1915.

This was a suit (1) for a declaration that certain sales of family lands made by the plaintiff's father (the first defendant) in favour of defendants two to four were void and not binding on the plaintiffs, in that the sales were for fictitious debts and for illegal and immoral purposes, and (2) for recovery of possession of the properties sold. The first defendant remained *ex parte*. The other defendants contended, *inter alia*, that the debts (most of which were mortgage-debts) were real, that they were not incurred for any illegal or immoral purpose, and that the sales having been for antecedent debts were binding on the sons (the plaintiffs). Both the lower Courts found the pleas of the defendants established and dismissed the suit. The plaintiffs preferred this appeal.

The Hon. *the Advocate-General*, with *R. Ganapati Ayyar*, for the appellants.—At the time this appeal was filed there was a decision of a Bench of this Court in my favour, viz., *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu*(1), that a previous mortgage debt was not an antecedent debt in respect of a subsequent alienation so as to bind the sons' shares also in the property subsequently alienated. This ruling was afterwards set aside by a Full Bench of this Court in *Armugam Chetty* v. *Muthu Koundan*(2). Hence I do not press this appeal, but for the above reason I am not liable for the costs of the respondent.

K. Srinivasa Ayyangar with *T. M. Krishnaswami Ayyar* for respondents.—The appellants are liable to pay the costs of the appeal. Costs generally follow the event and must be allowed unless there has been misconduct on the part of the successful party or unless his case has been found to be manifestly unjust; see Order 65, rule 1, of the rules of the Supreme Court—*Cooper* v. *Whittingham*(3), *Kuppuswamy Chetty* v. *Zamindar of Kalahasti*(4). Section 35 of the Civil Procedure Code is also to the same effect. The fact that there was a change in the law does not matter.

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(1) (1918) 35 M.L.J., 382, F.B.
(2) (1919) 37 M.L.J., 166, F.B.
(3) (1880) 15 Ch. D., 501.
(4) (1904) I.L.R., 27 Mad., 341.

The Hon. *the Advocate-General* in reply. Award of costs is entirely in the discretion of the Court. That is the English as well as the Indian rule. Section 35, Civil Procedure Code, is much wider than the English rule. The cases quoted by the other side are no longer law. It is not necessary to show misconduct to deprive the successful party of his costs—*Forster* v. *Farquhar*(1). The case of *Walter* v. *Steinkoof*(2) shows that the fact that a Judge has to decide a bare question of law does not deprive the Court of its discretion as to costs. A change of law whether effected by Parliament or by decisions of superior tribunals has been held to be good cause for depriving the successful party of his costs—*Robinson* v. *Rosher*(3), *Sutton Harbour Improvement Company* v. *Hitchens*(4). The language of section 35 is wide enough to cover such cases.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—Following the Full Bench decision in *Armugham Chetty* v. *Muthu Koundan*(5), 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—*Sakhu Ram Chandra* v. *Bhup Singh*(6) and on the strength of *Badagala Jogi Nayudu* v. *Bandalam Papiah Nayudu*(7)—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 Ayyangar, 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 Code of Civil Precedure as to costs is wider than the English rule (Order LXV, rule 1) as to actions tried by a jury which enables the Judge to withhold 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

(1) (1893) 1 Q.B., 564. (2) (1892) 3 Ch., 489.
(3) (1841) 1 Y. & C. Ch. Cas., 7 ; s.c., 62 E.R., 767.
(4) (1882) 15 Beav., 161. (5) (1919) 37 M.L.J., 166.
(6) (1917) I.L.R., 39 All., 437 (P.C.). (7) (1918) 35 M.L.J., 382.

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party of his costs it is not necessary to prove that the opposite party has been guilty of misconduct—see *Forster* v. *Farquhar*(1). Mr. Justice NORTH in *Walter* v. *Steinkoof*(2) 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. *Whittingham*(3), has been practically abandoned in these two cases. Mr. Justice SUBRAHMANYA AYYAR in *Kuppusami Chetty* v. *Raja of Kalahasti*(4) 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*(5) and *Sutton Harbour Improvement Company* v. *Hitchens*(6), 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.

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 first 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 or omission 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 defendants. We further think the first defendant who is the *fons et origo* of all the trouble should be directed to pay the costs of the other defendants in this Court.

N.R.

(1) (1893) 1 Q.B., 564.
(2) (1892) 3 Ch., 489.
(3) (1880) 15 Ch. D., 501.
(4) (1904) I L.R., 27 Mad., 341.
(5) (1841) 1 Y. & C. Ch. Cas., 7.
(6) (1852) 15 Beav., 161.