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coming to a different conclusion. In this case the appellant's pleader has not been able to put before us any reasons why we should differ from the decision of the Madras High Court except that it would be against the interest of his client.

There is further reason why we should follow it, as this case is cited in the 8th edition of Mayne's Hindu law, para. 540, at page 755, and no exception whatever has been taken to the law as laid down therein. We, therefore, follow that decision and dismiss the appeal. As the respondent has not appeared, there will be no costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

1922.

December 18.

KHIMCHAND NAROTAMDAS BHAVASAR (ORIGINAL DEFENDANT No. 1), APPLICANT *v.* BHOGILAL HIRACHAND SHAH AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT No. 2), OPPONENTS*.

Costs—Discretion to deprive successful defendant—Grounds.

Question considered as to the discretion of the Court to refuse costs to a successful defendant, where the plaintiff's suit was based on a state of law which was subsequently altered.

Ramasami Naiken v. *Venkatasami Naiken* (1), discussed.

APPLICATION under extraordinary jurisdiction against the order passed by M. N. Choksi, First Class Subordinate Judge at Ahmedabad.

The facts were as follows :—

The applicant (defendant No. 1) and opponents (plaintiffs and defendant No. 2) and others carried on business in partnership in Bombay and Ahmedabad.

*Civil Extraordinary Application No. 318 of 1920.

(1) (1919) 43 Mad. 61.

1922.

KHIMCHAND NAROTAMDAS v. BHOGILAL HARICHAND.

In 1918 plaintiff Bhogilal filed Suit No. 85 of 1918 praying for dissolution of partnership and partnership accounts. The parties referred their disputes to arbitration of two arbitrators and the arbitrators filed their award on 18th April 1919. The award was challenged by the applicant.

The plaintiff Bhogilal and the defendants Nos. 3 and 4 in the Suit No. 85 of 1918 filed the award in Court and applied for a decree in terms of the award. The application was registered as a suit between the parties being Suit No. 572 of 1919. On the 18th March 1920, the said suit came on for hearing and final disposal, but on the same day the parties again agreed to refer the matter in dispute in the original Suit No. 85 of 1918 to the arbitration of one of the arbitrators originally appointed.

The arbitrator could not give his award within time and returned the reference to the Court for want of time. On the 21st July 1920 the suit came on for hearing and an issue was framed "Whether the suit was maintainable having regard to the order of Reference to arbitration made on the 18th March 1920 in Suit No. 85 of 1918". This issue was decided against the applicant and the suit was proceeded with.

On the 5th November 1920, the opponents applied to withdraw the Suit No. 572 of 1919 on the ground that when the award was filed the law was uncertain as to what procedure should be adopted, as it was decided in *Shavakshaw* v. *Tyab Haji Ayub*[1] that to get such awards filed, a separate suit ought to be instituted but the said decision was overruled by the decision in *Manilal Motilal* v. *Gokaldas Rowji*[2], which decided that in such cases an award could be recorded under Order XXIII, Rule 3 of the Civil Procedure Code and a separate suit was not maintainable.

[1] (1916) 40 Bom. 386. [2] (1920) 45 Bom. 245.

The Subordinate Judge allowed the suit to be withdrawn and as to costs he ordered that parties should bear their own costs. *Ramasami Naiken* v. *Venkatasami Naiken* (1919) 43 Mad. 61.

The defendant No. 1 applied to the High Court.

H. V. Divatia, instructed by *Hiralal D. Nanavati*, for the applicant.

R. J. Thakore, for the opponents.

MACLEOD, C. J.:—This is an application in revision to set aside the order of the First Class Subordinate Judge of November 17, 1920, by which he allowed the plaintiff's Suit No. 572 of 1919 to be withdrawn, but refused to allow the defendants their costs. The ordinary rule is that costs follow the event, and that if the plaintiff finds himself unable to proceed with his suit, and asks for leave to withdraw it, then the opposite party is entitled to the costs to which he has been put in defending the suit. The granting of leave to withdraw from a suit is a concession because the defendant is ordinarily entitled to ask the Court to decide the suit on the merits, and if he wins, he would be entitled to his costs. The Judge declined to follow the ordinary rule, as he thought he ought to follow the decision in *Ramasami Naiken* v. *Venkatasami Naiken*[1], where it was held that it was a good cause for depriving a successful respondent of the costs of an appeal if the law had been altered since the filing of the appeal. But it seems to me that he has read one portion of the judgment in that case, and not the other, with the result that he has failed to realise the *ratio decidendi*. No doubt it may in a particular case be a sound exercise of discretion to refuse costs where the suit is based on a state of law, which has afterwards been altered either by Statute or

[1] (1919) 43 Mad. 61.

1922.

KHIMCHAND NAROTAMDAS v. BHOGILAL HIRACHAND.

by the decision of a superior tribunal, and that might be a good ground for the decision in this case, provided the learned Judge had also considered the facts, for the judgment in *Ramasami Naiken* v. *Venkatasami Naiken*[1] proceeds at p. 64 :

"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 representation 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 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 appellants should not be made to pay the costs of defendants."

There the costs had followed the event. The first defendant who was responsible for the whole of the litigation was made to pay the costs of the other defendants. In this case it is just the opposite way. From the decision in Civil Suit No. 85 of 1918, the basic suit in these disputes, which came up to this Court, and is reported (see *Khimchand Narotamdas* v. *Bhogilal Hirachand*[2]) it will be seen that it is the present respondents-plaintiffs who had been in the wrong throughout, and, if the learned Judge had considered all the facts and surrounding circumstances of the case, he would have seen that it was not the present applicant who was responsible for the litigation, but the respondents-plaintiffs. That makes a great deal of difference in considering who should pay the costs of the suit which was allowed to be withdrawn. In this case the Judge has not considered all the facts, which he was bound to consider,e befor exercising his

[1] (1919) 43 Mad. 61. [2] (1922) 46 Bom. 854.

discretion with regard to the award of costs; and when there is an omission to consider the necessary circumstances then there cannot be a sound exercise of discretion, and this Court is entitled to interfere. We think the application must be allowed, and the applicant must get his costs of the suit and of this application.

Application allowed.

J. G. R.

PRIVY COUNCIL.

KESHAVLAL BROTHERS AND COMPANY (PLAINTIFFS) *v.* DIWANCHAND AND COMPANY (DEFENDANTS).

J. C.*
1923.
February 27.

[On Appeal from the High Court at Bombay.]

Sale of Goods—Damages—Failure to deliver—Government control of coal—Restriction on use of waggons—Indent in favour of consumers—Alleged absence of market.

By a contract made in Bombay on October 11, 1917, the appellants bought from the respondents 1,200 tons of steam coal, to be delivered by instalments of 200 tons monthly to a depot in Bombay which the appellants used, it being provided that an indent was to be furnished by the buyers, and that the coal was to be delivered from stock. The supply of coal in India was subject to Government regulations which provided that railway waggons were to be supplied only on indents signed by the actual consumers and certified. The buyers furnished a certified indent for the coal signed by an ice factory, and providing for the coal being unloaded at Byculla (Bombay) railway station. The sellers having failed to deliver part of the coal contracted for, the buyers sued them for damages. The appellate Court dismissed the suit on the ground that the buyers had not proved that they had suffered any loss by reason of the undelivered coal not reaching the indentors. There was a market for coal at Bombay at the time of the breach:—

Held, that the contract could not be treated as one for the delivery of coal for the purpose only of supplying the indentor, and that the buyers were

* *Present*: LORD DUNEDIN, LORD ATKINSON, AND LORD WRENBURY.