

**Khimchand Narotamdas Bhavsar Vs. Sobhagchand Bhogilal**

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**Court :** Mumbai

**Decided On :** Dec-18-1922

**Reported in :** AIR1923Bom206; (1923)25BOMLR242

**Judge :** Norman Macleod, Kt., C.J. and ;Crump, J.

**Appeal No. :** Civil Extraordinary Application No. 318 of 1920

**Appellant :** Khimchand Narotamdas Bhavsar

**Respondent :** Sobhagchand Bhogilal

**Judgement :**

Norman Macleod, Kt., C.J.

1. 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the First Class Subordinate Judge of November 17, 1920, by which he allowed the plaintiffs suit No. 572 of 1919 to be withdrawn, but refused to allow the defendants their costs.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 which he has been put to 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 I.L.R. (1919) Mad. 61, 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 decided. No doubt it may be in a particular case a sound exercise of discretion to refuse costs where the suit is based on a state of law, which has been afterwards altered either by statute or 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* 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 presentation by the party and upon circumstances and authorities which were preexisting 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.

2. 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 v. Bhogilal* : (1922)24BOMLR361 , 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, before exercising his 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.

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