

**Kopram Dhanalakshamma and anr. Vs. Gadam Chetty Namberumal Chetty**

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**Court :** Chennai

**Decided On :** Jul-06-1948

**Reported in :** (1948)2MLJ385

**Appellant :** Kopram Dhanalakshamma and anr.

**Respondent :** Gadam Chetty Namberumal Chetty

**Judgement :**

Mack, J.

1. This appeal raises a technical point of a very limited scope and arises out of an order passed by Kunhi Raman, J., on the Original Side. He granted leave to the plaintiff in C.S. No. 32 of 1946 to withdraw his suit with liberty to file a fresh suit and in his order directed the plaintiff to pay the defendant Rs. 500 towards advocate's fee plus other expenses of the defendant in taking out subpoenas to witnesses. That order was passed on 20th January, 1947. On 14th August, 1947, the plaintiff filed a second suit impleading his two children as co-plaintiffs and was met with an objection in the defendant's written statement that her costs had not been paid as a condition precedent required by the High Court's decretal order which gave effect to the judicial order of Kunhi Raman, J. After this objection was taken, the costs amounting to Rs. 618-4-0 were paid into Court on 19th November, 1947, and withdrawn by the learned Counsel for the defendant in the suit without prejudice.

2. The contest centres round Order 17, Rule 13 of the Original Side Rules of this Court in accordance with which the decretal order was drafted. This rule reads as follows:

When a suit is allowed to be withdrawn with liberty to bring a fresh suit for the same matter, unless the Court shall otherwise direct, the order shall be drawn up so as to make the payment of the costs of the first suit a condition precedent to the plaintiff's bringing a fresh suit.

To overcome this hurdle the plaintiff filed the application under appeal before Kunhi Raman, J., to amend the decretal order and to bring it into conformity with the judicial order he passed on 20th January, 1947. Kunhi Raman, J., allowed the application accepting the contention that Order 17, Rule 13 applied to cases where no order for costs had been passed and that as he had passed an executable decree awarding costs, this order was one which came within the scope of the words ' unless the Court shall otherwise direct.'

3. We are unable to accept his interpretation of Order 17, Rule 13. This rule is based on a salutary principle that defendants in a suit should not be brought to Court

unnecessarily a second time by a plaintiff who has been given leave to withdraw his first suit, unless the plaintiff has paid them the costs of the first litigation. We are unable to see anything inconsistent between an executable order and an order making the costs payable as a condition precedent to the filing of the second suit. If a decree imposing such a condition precedent was taken to be unexecutable it would mean that a defendant who was dragged to Court in a suit by a plaintiff who got leave to withdraw it would not be able to recover his costs at all in the event of the plaintiff not filing his second suit. We are therefore of the opinion that the decretal order giving effect to the judicial order of Kunhi Raman, J., was in conformity with his order and also in strict accord with the mandatory provisions of Order 17, Rule 13. We do not think that he was correct in directing the amendment which he did and deleting the portion of the order making the payment of the costs of the first suit a condition precedent to the plaintiff's bringing a fresh suit.

4. In the result the appeal is allowed. We direct the respondent to pay the appellants their costs in this appeal only--advocate's fee Rs. 100.

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