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property. The proceedings taken against him by way of arrest had dropped. We cannot believe that it was the intention of the Legislature that any judgment-debtor, who had once been arrested, or against whose property an order of attachment had once been made, could some years afterwards come into Court, and apply to it to declare him insolvent on the strength of a long-dropped proceeding by arrest or attachment. We think it is only a person against whom proceedings under section 344 are actually pending who is entitled to make the application permitted by that section. We must therefore allow the appeal. We set aside the order of the District Judge declaring the respondent to be insolvent. The appellant is entitled to his costs of this appeal. We may add that the respondent was not represented at the hearing of the appeal. The above order therefore is *ex parte*.

Appeal decreed.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

MEHDI HUSAIN (PLAINTIFF) v. SUGHRA BEGAM AND OTHERS
(DEFENDANTS).*

Civil Procedure Code, sections 368, 588(18) — Death of one of several defendants—Order declaring suit to have abated—Appeal.

Held that an order made under the penultimate clause of section 368 of the Code of Civil Procedure declaring a suit to have abated is appealable, not as a decree, but as an order under section 588(18) of the Code.

Where a defendant to a suit for the recovery of a mortgage debt, who was on the record as a surety personally for the payment of the mortgage money, died, and the plaintiff declined to place on the record such defendant's legal representative, it was *held* that this only amounted to a waiver of the plaintiff's rights as against the surety, and did not preclude him from continuing the suit against the mortgagor. The suit did not abate.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Satya Chandra Mukerji, for the appellant.

Mr. Abdul Raoof, Babu Jogindro Nath Chaudhri, Pandit Moti Lal Nehru and Babu Sital Prasad Ghosh, for the respondents.

AIKMAN, J. (BURKITT, J., concurring).—This is an appeal under clause (18) of section 588 of the Code of Civil Procedure

* First Appeal No. 96 of 1902, from an order of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 14th July, 1902.

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from an order passed by the Subordinate Judge of Benares declaring that the suit brought by the plaintiff appellant had abated. The order is one under the penultimate clause of section 368 of the Code of Civil Procedure. On behalf of the respondents a preliminary objection is taken to the effect that no appeal lies. This objection is based upon the contention that an order declaring that a suit shall abate has the force of a decree. We are unable to sustain this objection. The clause under which the appeal is laid gives a right of appeal from orders under section 368 without any restriction whatever as to the nature of the order. The provision in the same clause as regards appeals from orders under section 366 is significant. Under the first clause of section 366 the order to be passed is that the suit shall abate. But clause (18) of section 588 gives no appeal against such an order. It restricts the right of appeal to the case of orders passed under paragraph 2 of section 366. We attach no weight to the argument that the penultimate clause of section 368 does not in so many words authorize the Court to do anything, but simply says that the suit shall abate, as it were, automatically. We consider that an order is necessary declaring that the suit has abated. We therefore repel the preliminary objection.

The plaintiff Mehdi Husain is a mortgagee under a deed, dated the 29th of March, 1890. It has been found that the property mortgaged belongs exclusively to Sughra Begam. The second executant of the deed is one Agha Jan Nimazi, who was the second husband of Sughra Begam. He, as executant, renders himself personally liable to the mortgagee for the payment of the debt incurred by Sughra Begam. It is also recited that as between Sughra Begam and Agha Jan Nimazi he is merely a surety for the said Sughra Begam. It appears that Agha Jan died on the 11th or 12th of January, 1901. The plaintiff intimated to the Court the death of Agha Jan, on the 2nd of June, 1902. In his petition the plaintiff says:—"As Agha Jan Nimazi, who was made a party to suit simply as a *pro forma* defendant, made no defence in the suit, it seems unnecessary to the plaintiff to take proceedings against the heirs of the said defendant, even if there be any besides the

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defendant No. 1, as beyond expense and delay, no purpose can be served. It is therefore prayed that the case be proceeded with as against the existing defendants." This petition the Court ordered to be filed. On the 11th of July, 1902, an application on behalf of one of the defendants, namely, Kashi Nath, a subsequent transferee from Sughra Begam of a part of the mortgaged property, was presented, alleging that Agha Jan had died on the 11th of January, 1902, and asking that, as the plaintiff had omitted within the period allowed by law to make any application to bring on the record the legal representatives of the deceased, the suit should be struck off. On the 14th of July, 1902, the Subordinate Judge passed the order against which the present appeal has been brought, declaring the suit to have abated. The learned counsel for the respondent ingeniously argued that as Agha Jan was surety for the payment of the mortgage debt, he had a right under section 91 of the Transfer of Property Act to redeem the mortgaged property, and that he was therefore a necessary party to the suit upon the mortgage; that this right to redeem would survive to his heirs, and that they not having been brought on the record within the time allowed by law, the order of the Court below was right. As we read the mortgage deed, Agha Jan was personally liable for the mortgage money, both as surety for Sughra Begam and on his own behalf. As such surety, he would doubtless have a right of redemption, and it was therefore incumbent upon the plaintiff, if he wished to enforce his right against Agha Jan, to make him a party to his suit. But it was open to the plaintiff to waive his right to proceed against Agha Jan and to restrict himself to his rights against his mortgagors; that is, the plaintiff might, had he so chosen, have waived all rights to enforce against Agha Jan his personal covenant of suretyship. We look upon the petition of the plaintiff, dated the 2nd of June, 1902, as such waiver. We take that to be an abandonment by the plaintiff of all right to proceed against Agha Jan or his heirs under the deed in suit. With that waiver any right of redemption which Agha Jan or his heirs might otherwise have had comes, in our opinion, to an end. The conclusion at which we arrive is, that *quod* the suit

to enforce the mortgage the right to sue does survive against the surviving defendants on the record. That being so, we think the order of the Court below was wrong. We allow the appeal, and setting aside the order of the lower Court declaring the suit to have abated, we remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure, with directions to the Court to readmit the suit under its original number in the register and proceed to determine it on the merits. The plaintiff will have the costs of this appeal in any event.

Appeal decreed and cause remanded.

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REVISIONAL CRIMINAL.

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Before Sir John Stanley, Knight, Chief Justice.

EMPEROR v. ALLI AND ANOTHER.*

Criminal Procedure Code, section 198—Act No. XLV of 1860 (Indian Penal Code), sections 494 and 498—Jurisdiction—Complaint.

The husband of a woman who had left him laid a complaint before a Magistrate alleging facts which seemed to constitute the offence provided for by section 498 of the Indian Penal Code. In the course of the inquiry consequent upon this complaint, it appeared that an offence falling under section 494 of the Code had been committed, and the Magistrate accordingly made an order of commitment under section 494 of the Code.

Held, that such commitment was not illegal. It was not necessary that the complainant should specify precisely the section under which the person complained against should be charged, and he had laid before the Magistrate matter which, if proved, would be sufficient to warrant a commitment under section 494. *In the matter of Ujjala Bewa* (1) approved.

In this case the complainant laid a complaint against one Alli, charging him with the commission of the offence specified in section 498 of the Indian Penal Code. In the course of the inquiry into this complaint it appeared to the Magistrate conducting the inquiry that the offence which had been committed was really the offence dealt with by section 494 of the Code, namely, bigamy. The Magistrate accordingly committed Alli to the Court of Session on a charge under section 494, and he also committed to the same Court one Musammat Banno, the mother

* Criminal Reference No. 740 of 1902.

(1) (1878) 1 C. L. R., 523.