

the order of adjudication had been made against the debtor, the court shall, on the application, direct the property, if in the possession of the court, to be delivered to the receiver." This section and the preceding section 34 only apply when there has been an adjudication of insolvency or the appointment of a receiver. In the present case there has been neither an adjudication in insolvency nor the appointment of a receiver. We must allow the appeal, set aside the order of the court below and dismiss the application with costs in both courts to be paid by the opposite party.

1917  
ANUP KUMAR  
v.  
KESHO DAS.

*Appeal decreed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Piggott.*

EMPEROR v. BHOLA AND OTHERS.\*

*Criminal Procedure Code, section 439—Appealable and non-appealable sentences given on a joint trial—Appeal by some accused—Reference made by appellate court as to the others*

1917  
May, 18.

Of several persons tried jointly by a Magistrate, some received appealable sentences, others non-appealable. The former appealed to the Sessions Judge, who acquitted them, but on grounds that were applicable to all.

*Held* that it was the duty of the judge to bring the cases of the remaining accused to the notice of the High Court under section 439 of the Code of Criminal Procedure.

THIS was a reference under section 439 of the Code of Criminal Procedure made by the Sessions Judge of Meerut under the following circumstances. Eleven persons were jointly tried before a Magistrate of the first class in respect of offences charged under section 409 and section 424 of the Indian Penal Code. Three men were convicted under the former of these sections and received appealable sentences. The remaining eight, Bhola and others, being convicted on a charge under section 424 of the Indian Penal Code, were sentenced to fine only. The first three appealed. The Sessions Judge acquitted these three upon grounds which were applicable also to the non-appealing accused. But he submitted the whole record to the High Court with the recommendation that they likewise should be acquitted.

\* Criminal Reference. No. 367 of 1917.

1917

EMPEROR  
v.  
BHOLA

PIGGOTT, J.—This was a case in which eleven persons were jointly tried before a Magistrate of the first class in respect of offences charged under section 409 and section 424 of the Indian Penal Code. Three men were convicted under the former of these sections and received appealable sentences. The remaining eight, Bhola and others, being convicted on a charge under section 424 of the Indian Penal Code, were sentenced to fine only. The three first mentioned appealed to the Sessions Court, and the learned Sessions Judge, in a carefully reasoned judgement, has accepted their appeal on the facts. He has accordingly set aside the conviction and sentence against these three men and has acquitted them and ordered their release. The case of the eight men against whom unappealable sentences were passed has been referred to this Court. As the Code of Criminal Procedure at present stands, there is room for controversy as to whether, in a case like the present, an appeal from those accused persons in respect of whom the sentence passed was individually unappealable is barred by the provisions of section 413 of that Code. I take this opportunity of stating that, although I have myself expressed and acted upon the view that the provisions of section 413 aforesaid do not operate so as to take away the right of appeal which would otherwise be conferred, in any case tried by a Magistrate of the first class, to the court of Session by section 408, I find that this view has not been generally accepted in this Court and has been expressly dissented from by the present acting Chief Justice. I do not propose, therefore, further to insist on my own individual view in this matter. So far as I am concerned, the law may be taken as settled in accordance with what I admit to have been the prevailing practice in this Court. If, therefore, at one and the same trial, an appealable sentence is passed against one or more accused and unappealable sentences against others, and the learned Sessions Judge, hearing the case on the merits on the appeals of those convicts who had a right of appeal, comes to the conclusion that the convictions were bad as against all the persons accused, he should consider it his duty to refer to this Court the case of those persons against whom unappealable sentences were passed. The matter can then be dealt with by this Court under its general revisional jurisdiction as provided by section 439 of the Code

of Criminal Procedure. The procedure is clumsy, and I hope to see it amended by a reasonable modification of the law. At present this must be taken as the settled procedure of this Court under the Code as it stands. I have no doubt that the learned Sessions Judge was right in this case. I accept his reference, and, for the reasons given by him, I set aside the convictions and sentences against Bhola and each of the other seven men named in the referring order. I acquit them of the offence charged and direct that the fines imposed upon them, if paid, be refunded.

*Reference accepted. Convictions set aside.*

## REVISIONAL CIVIL.

*Before Mr Justice Tudball and Mr. Justice Muhammad Rafiq.*

MOTI LAL (PLAINTIFF) v. RAM NARAIN (DEFENDANT)\*

*Civil Procedure Code (1908), order XXII, rule 4—Partnership—Suit for dissolution—Death of defendant after preliminary decree—Application for substitution—Limitation.*

In a suit for dissolution of partnership, after the preliminary decree was passed, one of the defendants died. Some two years after his death the plaintiff applied for substitution of the name of the heir of the deceased defendant, and asked the court to proceed with the suit. *Held* that in the circumstances order XXII, rule 4, of the Code of Civil Procedure applied and the application was too late. *Jamnadas Chhabildas v. Sorabji Kharsedji* (1) followed.

ONE Moti Lal obtained a preliminary decree in a partnership case against Pirbhu Dayal and others. After this decree had been passed Pirbhu Dayal died. Some two years after his death, the plaintiff Moti Lal applied to have the name of his heir brought upon the record and asked the court to proceed with the suit. The court of first instance held that order XXII, rule 10, of the Code of Civil Procedure applied to the case and that the application was within time, and it was granted. The defendants appealed and the lower appellate court allowed the appeal and rejected the application on the finding that order XXII, rule 4, applied and that the application was beyond time. The plaintiff applied in revision to the High Court.

1917  
EMPEROR  
v.  
BHOLA.

1917  
May, 28.

\* Civil Revision No. 201 of 1916.

(1) (1891) I. L. R., 16 Bom., 27.