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learned Sessions Judge's judgment has made it necessary for us to go through the evidence in the case and to hear the appeal just as he ought to have done.

[His Lordship then examined the evidence and convicted the accused.]

WALSH, J. :—I agree. In my opinion it was impossible for the Government to permit the judgment of the Sessions Judge to stand. Whatever the merits might have been, a decision that members of the public are entitled to interfere with members of the police force while in the *bonâ fide* execution of their supposed duty, and to rescue their friends, is so entirely without legal foundation and so dangerous in principle that no Government could in the public interest permit it to stand. The learned Judge has muddled himself over cases relating to arrest when the question which he had to decide was one of rescue, an entirely different matter. He has also muddled himself over a question of warrants when the question which he had to decide arose out of an arrest without a warrant under section 56 of the Code. He had the courage to hold that there was no evidence on the record and that the prosecution had failed to prove the order, when a proper order, dated the 11th of December, was on the record before him.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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November, 15

RAM PRASAD AND ANOTHER (DEFENDANTS) v. ASA RAM AND OTHERS (PLAINTIFFS). *

Civil Procedure Code (1908), order XLVII, rule 1(a)—Appeal and application for review filed by same party—Appeal withdrawn—Jurisdiction of court to entertain application for review not ousted.

An appeal which has been withdrawn must be treated as if it had never been "presented" within the meaning of order XLVII, rule 1, of the Code of Civil Procedure. *Ramappa* v. *Bharma* (1) referred to.

A party to a suit filed an appeal against the decree and thereafter an application for review of judgment. After the review had been filed, the applicant withdrew his appeal. *Held* that the fact of an appeal having been filed and

* Civil Revision No. 162 of 1919.

(1) (1906) I. L. R., 30 Bom., 625.

withdrawn was no bar to the hearing of the application for review. *Partab Singh* v. *Jaswant Singh* (1), *In the matter of the petition of Nand Kishore* (2) and *Pandu* v. *Devji* (3) referred to

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

Munshi *Panna Lal*, for the applicants.

Babu *Piari Lal Banerji*, for the opposite parties.

PIGGOTT and WALSH, JJ. :—The applicants to this Court were defendants in a suit in the court of the Munsif of Koil. The suit was decreed on the 7th of March, 1919, and the defendants filed an appeal in the court of the District Judge on the 4th of April, 1919. On the 21st of June, 1919, they applied for a review of judgment to the trial court, alleging grounds sufficient to bring the case within the purview of order XLVII, rule 1, of the Code of Civil Procedure. Having filed this application they withdrew their appeal on the 8th of July, 1919, and their application for review came up for disposal on the 20th of September, 1919. The trial court refused to consider it on the merits, holding that it had no jurisdiction to entertain any such application, because on the date on which the application for review was made an appeal had been preferred to the court of the District Judge and was pending. The application before us is against this refusal to exercise jurisdiction. The case of *Partab Singh* v. *Jaswant Singh* (1), which rests upon reported cases of the Madras and of the Bombay High Courts, is authority for the proposition that if an application for review is presented to a competent court, the subsequent filing of an appeal against the decision sought to be reviewed will not bar the jurisdiction of the trial court to entertain the application for review. On the other hand, there have been a number of cases, of which *Nand Kishore's* case (2) and *Pandu* v. *Devji* (3) may be quoted as instances, in which the courts have evidently felt that some remedy in law must be open to a litigant who has in good faith filed an appeal against the decree of a subordinate court and then discovers that materials have come to his knowledge sufficient to afford good ground for an application for review of the adverse decision. It is conceivable that the appeal on the materials on the record might be

(1) (1919) I. L. R., 42 All., 79 (2) (1909) I. L. R., 32 All., 71.

(3) (1883) I. L. R., 7 Bom., 287.

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hopeless, or nearly so, and that nevertheless the litigant concerned might be able to make out a strong case for review of judgment. Both this High Court and the Bombay High Court have accordingly expressed the opinion that a litigant under such circumstances might be permitted to withdraw his appeal and then to apply for a review of judgment. The merely technical objection that in the present case an application for review of judgment was made on the 21st of June and the appeal was not withdrawn until the 8th of July does not much impress us. The application for review was obviously pressed in argument when it was heard and disposed of by the trial court on the 20th of September, and for practical purposes the applicants for review were in the same position as if they had withdrawn their appeal before presenting the application for review. The correct position seems to be that adopted by the Bombay High Court in *Ramappa* v. *Bharma* (1), in which the learned Judges practically held that an appeal once withdrawn must be treated as if it had never been "presented" within the meaning of order XLVII, rule 1, of the Code of Civil Procedure. This seems to be the only logical method of reconciling such a decision as that in 32 Allahabad, page 71, with the strict wording of the rule and with requirements of justice, in the case of a litigant who has discovered adequate materials for an application for review after his appeal has been filed. Applying that principle to the present case, we think that the court below was wrong in refusing to entertain this application on the merits and that, as it has virtually refused to exercise jurisdiction, its order is open to interference by this Court in revision. The application for review of judgment ought to be heard and considered on the merits. We set aside the order complained of and send the case back to the trial court for this purpose. It seems reasonable that costs here and hitherto should abide the result of the application.

Order set aside and the case sent back.

(1) (1906) I. L. R., 30 Bom., 625.