

1928

GANGA-  
DHAR  
v.  
KANHAL.

Gangadhar was therefore released from the debt due to the plaintiff.

I set aside the decree of the lower court and dismiss the plaintiff's suit with costs of all the courts.

*Decree set aside.*

### MISCELLANEOUS CIVIL.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

1928

January,  
13.

DEOKI AND OTHERS (PETITIONERS) v. JWALA PRASAD  
(OPPOSITE PARTY.)\*

*Civil Procedure Code, order XXIII, rule 1—Order permitting withdrawal of appeal—Application for amendment of decree.*

When an appellate court does not judicially deal with the matter of a suit but merely permits an appeal to be withdrawn, so that the decree of the court below is left intact, it cannot be said that it has confirmed the decision appealed from. It is not, therefore, possible for such court to entertain an application for amendment of the decree. *Abdul Majid v. Jawahir Lal* (1), *Nand Lal Saran v. Dharam Kirti Saran* (2) and *Pitam Lal v. Balwant Singh* (3), followed.

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

*Munshi Panna Lal*, for the applicants.

*Dr. Kailas Nath Katju*, for the opposite party.

SULAIMAN and KENDALL, JJ.:—This is an application for an amendment of our decree. It appears that in a partition suit the claim was decreed and in its judgement the court below directed that mesne profits should be ascertained in the execution department. This direction was not incorporated in the decree which was prepared by the court below. The defendants appealed

\*Miscellaneous Case No. 1028 of 1927.

(1) (1904) I.L.R., 36 All., 350. (2) (1926) I.L.R., 48 All., 377.  
(3) (1925) 23 A.L.J., 518.

1928

DEOKI  
S.  
JWALA  
PRASAD.

to the High Court but the plaintiffs did not file any cross-objection. On the date when the appeal came up for hearing the defendants withdrew their appeal without liberty to institute a fresh appeal. They were made to pay the costs of the opposite party. An oral request was made at that time for the amendment of the decree of the court below, which we declined to entertain at that stage.

In our opinion when the appeal was withdrawn the order which we passed on that occasion granting permission to withdraw the appeal under order XXIII, rule 1, was not a decree so as to supersede the decree of the court below. When an appellate court does not judicially deal with the matter of a suit but merely permits an appeal to be withdrawn, so that the decree of the court below is left intact, it cannot be said that it has confirmed the decision appealed from. It merely recognizes authoritatively that the appellant does not wish to go on with his appeal. We may refer to the case of *Abdul Majid v. Jawahir Lal* (1), where their Lordships of the Privy Council laid down this proposition with regard to an appeal which had been dismissed for want of prosecution. This case was followed in *Nand Lal Saran v. Dharam Kirti Saran* (2) where the appellate court had held that no appeal in fact lay to that court. There is another case of this Court, viz. *Pitam Lal v. Balwant Singh* (3), to the same effect. We are of opinion that that principle applies to an equal extent to the case where the appeal is withdrawn. We cannot therefore amend the decree of the court below.

The result therefore is that this application must be dismissed with costs.

*Application dismissed.*

(1) (190) I.L.R., 36 All., 350.

(2) (1926) I.L.R., 48 All., 377.

(3) (1925) 23 A.L.J., 518.