

1928

EMPEROR  
v.  
KISHAN  
NARAIN.

Court and that they both agreed with the view which he took. We think that the Sessions Judge in this case went too far, that he really had no right to entertain the point in appeal and that the revision must be accepted and the order of the Magistrate restored.

*Revision accepted.*

*Magistrate's order restored.*

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## REVISIONAL CIVIL.

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*Before Mr. Justice Dalal.*

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GANGADHAR (DEFENDANT) v. KANHAI (PLAINTIFF).\*

January,  
10

Act No. V of 1920 (*Provincial Insolvency Act*), sections 41, 44 and 34—*Insolvency—Surety—Effect of order of discharge on the claim of a person who had gone surety for the insolvent and had been compelled to pay.*

K was surety for the payment of a debt due by G to D. G applied to be declared insolvent and in due course G was discharged. D then sued K and got a decree against him. Thereafter K sued G for recovery of the amount which he had been compelled to pay.

*Held* that the order of discharge was a bar to the suit. *In re Blackpool Motor Car Company, Ltd.* (1), followed.

THIS was an application in revision against a decree of the Court of Small Causes at Jhansi. The facts of the case sufficiently appear from the judgement of the Court.

Pandit K. N. Laghate, for the applicant.

Dr. N. C. Vaish, for the opposite party.

DALAL, J.—In my opinion the Court of Small Causes has gone wrong on a point of law and this Court

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\*Civil Revision No. 195 of 1927.  
(1) (1901) 1 Ch., 77.

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GANGA  
DEAR  
2.  
KANHAI.

must interfere. The plaintiff was surety of the defendant Gangadhar with respect to a particular debt. Gangadhar applied for an order of adjudication, subsequent to the debt being contracted and the plaintiff becoming a surety for the payment of that debt. Such an order was passed and subsequently he was discharged under section 41 of the Provincial Insolvency Act. Subsequent to the discharge, the creditor Daru sued the surety Kanhai and recovered his debt from him. Kanhai was bound to make payment, because under section 44 (3) an order of discharge does not release any person who was surety for the person discharged. On making payment to Daru, Kanhai brought a suit against Gangadhar for recovery of the amount paid by him to Daru. The question then arises whether Kanhai's debt was provable under the Provincial Insolvency Act or not. It is laid down in clause (2) of section 44 that an order of discharge shall release the insolvent from all debts provable under this Act. Section 34 lays down what debts are provable and what not. The only debts which may be excluded from the schedule are those which have been declared by the court to be incapable of being fairly estimated, and demands in the nature of unliquidated damages. The debt of a surety does not come under either head; it is not alleged here that Kanhai's debt was declared by the court to be incapable of being fairly estimated. There is a very wide scope given to debts and liabilities provable under the Act in clause (2) of section 34. They include debts and liabilities, present or future, certain or contingent. On behalf of the applicant Mr. *Laghate* referred to English rulings which leave no doubt that a surety has a right of proof in respect of contingent liability as surety: *In re Blackpool Motor Car Company, Ltd.* (1). The defendant

(1) (1901) 1 Ch., 77.

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v.  
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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,  
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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.