case does not amount to a judgment within the meaning of s. 369 or 367 of the Code of Criminal Procedure. There was no judicial investigation by the Magistrate of the merits of the complaint, [734] and therefore, as explained in my judgment in the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (1), the order of discharge would be no bar to the revival of the same complaint.

HILL J. I agree in the answer to this reference proposed by my Lord, and for the reasons generally which he has mentioned. But I wish to add that I feel some difficulty as to the materiality of the question whether an order of discharge is or is not a judgment in the sense of s. 369 of the Code, for even assuming it to be a judgment in that sense, it could not, I think, be set up as a bar to a rehearing under the provisions of s. 403.

HENDERSON J. In the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (1), a Full Bench of this Court has held that a Presidency Magistrate is competent to rehear a warrant case, in which the accused has been discharged. In the case now before us the question is wider. It is whether any Magistrate, whether Presidency or Provincial, in a warrant case, having passed an order of discharge, is competent to take fresh proceedings and issue process against the accused in respect of the same offence, unless an order for further inquiry shall have been passed under s. 437 of the Code of Criminal Procedure.

Upon principle I am unable to distinguish between the case of a Provincial Magistrate and that of a Presidency Magistrate. There is no provision in the Code which specifically makes any difference between the position of these two classes of Magistrates in this connection. If, therefore, we must take it on the strength of the Full Bench case to which I have referred, that a Presidency Magistrate is competent to rehear a warrant case in which an order discharging the accused still subsists, it seems to me to follow that a Provincial Magistrate must have the same power. The only possible difference in the law relating to matters of discharge in the Code of Criminal Procedure is that made by s. 437. That section, which has no application to Presidency Magistrates, enables the High Court to direct the District Magistrate by himself or by any Magistrate subordinate to him to make [735] a further inquiry into the case of any accused person, who has been discharged by a Provincial Magistrate, and in effect to set aside the order of discharge. I am unable, however, to see how the insertion of this section, 437, in the Code should take away any powers which a Provincial Magistrate might have had if that section had not been inserted. In this view I would answer the question in the affirmative.

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29 C. 735.

CIVIL RULE.

Before Mr. Justice Pratt and Mr. Justice Mitra.

RAM SARUP LAL *v.* SHAH LATAFAT HOSSEIN.* [12th, 18th June, 1902.]

***Minor—Suit on behalf of minor by next friend—Gross negligence of next friend—Review—Right of minor to have suit restored—Minor consenting party to petition for withdrawal—Civil Procedure Code (Act XIV of* 1882) *s.* 462.**

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* Civil Rule No. 475 of 1902.

(1) (1901) I. L. R. 28 Cal. 652.

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CIVIL RULE.

29 C. 735.

When the next friend of a minor plaintiff withdraws from the suit, it is open to the minor through another next friend to have the suit re-opened on review, on the ground that the former next friend, though guilty of no fraudulent conduct, was grossly negligent of the minor's interest in withdrawing from the suit.

RAM SARUP LAL, minor, by his next friend and mother, Badamo Koer, moved the High Court and obtained this Rule.

One Monji Lal, acting as the next friend of his minor nephew Ram Sarup as well as on his own behalf, had brought a suit in the Court of the Additional Subordinate Judge of Patna for value of articles sold, &c., against the opposite party. On the 6th August 1901, he applied on behalf of himself and Ram Sarup to withdraw from the suit, and accordingly they were permitted to withdraw from the suit unconditionally and the case was disposed of.

Subsequently Ram Sarup, the minor, represented now by his mother and next friend, made an application under ss. 103 and 623 of the Civil Procedure Code to have the order of withdrawal set aside, on the allegation that Monji Lal had filed the application of withdrawal without his consent and permission and [736] in collusion with the defendant. The lower Court found that the applicant had completely failed to bring home fraud to the defendant or to his then next friend, Monji Lal; that Ram Sarup was present in Court when the application of withdrawal was filed, and that both he and Monji Lal instructed their pleader to put in the application; and upon these grounds it rejected the application.

Babu *Kritanta Kumar Bose* for the petitioner.

Babu *Saligram Singh* and *M. M. Ishfak* for the opposite party.

PRATT AND MITRA JJ. This Rule was issued under the following circumstances: One Monji Lal on his own behalf and also as next friend of his minor nephew, Ram Sarup Lal, brought a suit for the value of goods sold and delivered. Subsequently, on the 6th August 1901, he presented a petition to the Court in these terms:—"In this suit Shah Latafat Hossein and Shahed Hossein have personally told your petitioner to withdraw the suit, and that they would pay the amount found on adjustment of accounts after the suit has been withdrawn. Your petitioner has full faith in them. It is therefore prayed that the suit be allowed to be withdrawn and be struck off. As the opposite party does not claim costs, no costs be allowed." On the face of that petition, the pleaders for the defendants wrote: "Without admitting the contents we give up the costs." The order of the Court was that the plaintiffs do withdraw from the suit.

On the 6th September 1901, the minor plaintiff through his mother presented an application to the Subordinate Judge for review of judgment, on the ground that the application for withdrawal had been collusively made to the prejudice of the minor. Evidence was gone into. Monji Lal deposed that he had no fraudulent motive in applying to withdraw, and the Court was satisfied that the minor was present in Court and personally joined in filing the application for withdrawal of the suit. On these materials the Court held that the minor plaintiff was not entitled to have the suit restored. On application to this Court by the minor through his mother, a Rule was issued calling on the opposite party to show cause, why the order of the Subordinate Judge allowing the withdrawal of the [737] suit and dismissing the application for review should not be set aside, and the case instituted by the guardian on behalf of the minor should not be allowed to proceed.. The learned Subordinate Judge was

clearly in error in allowing his mind to be influenced by the fact that the minor was a consenting party to the petition for withdrawal of the suit. That circumstance was wholly irrelevant. It is because of a minor's immaturity of judgment that the Court interferes to safeguard his interests and protect him, even against his own acts and admissions. Then as to Monji Lal's conduct, it may be true that no fraudulent motive was present to his mind, but that would not necessarily suffice to conclude the minor and to debar him of all remedy. Whether the guardian had or had not received verbal assurances that the defendants would pay what was justly due, he was grossly negligent of the minor's interests in withdrawing the suit unconditionally and without any writing by which the defendants would be bound. Caution was all the more needed after the defendants had through their pleaders recorded on the petition that they did not admit its contents. The best that can be said for Monji Lal is that he was a credulous simpleton, and grossly neglected the most ordinary precaution for the protection of the minor. Against such conduct as his, a minor is entitled to invoke the assistance of a Court of equity either by an application for review of judgment or by separate suit. As remarked by Lord Hardwick in *Gregory* v. *Molesworth* (1), the infant has such a remedy when either gross *laches* or fraud and collusion appear in the next friend.

This case may not strictly come within the terms of s. 462 of the Code of Civil Procedure, because it is not proved that the defendants entered into any agreement or compromise with the next friend of the infant, but it is within the scope of the general principle enunciated in Story's Equity Jurisprudence, s. 1353 : "In all cases where an infant is a ward of Court, no act can be done affecting the person or property or state of the minor, unless under the express or implied direction of the Court itself." And, as was observed by Scott, J., in the case of *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2), "a suit relating to the **[738]** estate or person of an infant and for his benefit has the effect of making him a ward of Court." In the result we direct that the Rule be made absolute, and that the case of the minor plaintiff be restored to the file and be tried on the merits, the mother of the minor being substituted as his next friend.

We do not interfere with the order discharging the Court of Wards from the case with costs.

Rule made absolute.

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29 C. 738.

APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Brett.

ABDUL SERANG *v.* PUTEE BIBI.* [July, 1902.]

Mahomedan Law—Distant kindred—Relation, who is neither a sharer nor a residuary—Great-grandson of the brother of the grandfather of the deceased—Probate and Administration (Act V of 1881)—Letters of Administration.

According to Mahomedan law, the term 'distant kindred' includes all relations, who are neither sharers nor residuaries ; therefore a great-grandson of

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* Appeal from Original Decree No. 46 of 1902, against the decree of F. E. Pargiter, Esq., District Judge of 24-Parganas, dated the 21st December 1901.

(1) (1747) 3 Atk. 626. (2) (1888) I. L. R. 13 Bom. 137.