can be imputed to him. But nevertheless, the procedure adopted by him is illegal and his acts amount to legal misconduct and his award is therefore bad. I agree with the order proposed by my learned brother.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Wallace.

SANKARANARAYANA PILLAI (PLAINTIFF), APPELLANT,

1922 December 14

v.

RAMASWAMIAH PILLAI AND THREE OTHERS (DEFENDANTS), RESPONDENTS. *

Appeal—Right of appeal, when parties agree to Court deciding a case like an arbitrator.

If parties agree to a Court proceeding without jurisdiction *extra cursum curiae*, i.e. (beyond the ordinary powers of a Court) the parties cannot thereafter appeal from the decision of the Court. But where the Court has jurisdiction over a cause, mere agreement between the parties that the Court may decide the cause disregarding rules of procedure and evidence without giving up a right of appeal either expressly or by necessary implication, does not deprive the parties of their right of appeal. *Pisani* v. *Attorney-General for Gibraltar* (1874) L.R., 5 P.C., 516, *Burgess* v. *Morton*, (1896) A.C., 136, *Sayad Zain* v. *Kalabhai*, (1899) I.L.R., 23 Bom., 752, followed.

The reasoning in *Nidamarthi Mukkanti* v. *Thammana Ramayya* (1903) I.L.R., 26 Mad., 76 and *Chengalroya Chetty* v. *Raghava Ramanuja Doss*, (1919) 37 M.L.J., 100, not followed.

SECOND APPEAL against the decree of C. V. KRISHNASWAMI AYYAR, acting Subordinate Judge of Tuticorin, in Appeal Suit No. 58 of 1919, preferred against the decree of N. SUBRAHMANYA AYYAR, District Munsif of Srivaikuntam, in Original Suit No. 181 of 1917.

* Second Appeal No. 2046 of 1920.

SANKARA-NARAYANA v. RAMA-SWAMIAH.

The facts appear from the judgment of his Lordship the Chief Justice.

K. S. Sankara Ayyar for *T. R. Venkatarama Sastri* for appellant.—The agreement in this case is merely that the Court may decide questions of fact for itself by a personal inspection of the locality without taking any evidence. There is no agreement either express or necessarily implied giving up the right of appeal which is an important right and which cannot be lightly presumed to have been given up. Where a Court has no jurisdiction over a cause but is asked by parties to decide it, the Court acts *extra cursum curiæ* [(i.e.,) outside its ordinary powers] as an arbitrator and in such cases there is no right of appeal; but where there is jurisdiction mere agreement that the Court may decide the cause disregarding formalities of procedure and evidence, as the parties are entitled to agree, without an abandonment of the right of appeal, the right of appeal is not taken away; *Pisani* v. *Attorney-General for Gibraltar*(1), *Burgess* v. *Morton*(2). Unless there is an agreement actually constituting the Court as an arbitrator, the decision of the Court is no award within the second Schedule of the Civil Procedure Code and the right of appeal exists. The reasoning to the contrary in *Nidamarthi Mukkanti* v. *Thammana Ramayya*(3) and *Chengalroya Chetty* v. *Raghava Ramanuja Doss*(4) is wrong. Whether an agreement really gives up a right of appeal is a question of its construction; *Jamnadas* v. *Gordhandas*(5), *Rao Bahadur Raoji* v. *Govind*(6). An estoppel not to appeal cannot be founded from the wording of the agreement in this case which is the only agreement between the parties.

(1) (1874) L.R., 5 P. C., 516.
(2) (1896) A.C., 136.
(3) (1903) I.L.R., 26 Mad, 76.
(4) (1918) 37 M.L.J., 100.
(5) (1896) 8 P. J. Bom. H. C., 615.
(6) (1897) 9 P. J. Bom. H.C., 271.

K. R. Rangaswami Ayyangar for respondent:—When parties to a suit agree as in this case that the presiding Judge may adopt a special procedure in the trial of the case and that they will be bound by his decision they thereby constitute the Judge a quasi-arbitrator and the effect of such an agreement is to make the decision unappealable. This has always been the law in England from *Harrison* v. *Wright*(1) to *Burgess* v. *Morton*(2) which is the leading case; see Halsbury, volume 1, page 442; Russel on Arbitration, pages 35 and 36, Redman, page 47. This has been followed uniformly by all the Courts in India. See *Chengalroya Chetti* v. *Raghava Ramanuja Doss*(3), *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*(4), *Sayad Zain* v. *Kalabhai*(5), *Baikanta Nath Goswami* v. *Sita Nath Goswami*(6), *In re Nimmagadda Peda Naganna*(7), *Nidamarthi Mukkanti* v. *Thammana Ramayya*(8), and *Shahzadi Begam* v. *Muhammad Ibrahim*(9). Such a case is not strictly an actual reference to arbitration as provided for by the second schedule of Civil Procedure Code and the finality rests on the general principles of estoppel. Parties ought not to be allowed to invite the Court to go out of its way and adopt a special procedure for their benefit, and after agreeing to abide by its decision resile subsequently if they are dissatisfied with it. The agreement "to abide by the decision" is virtually an agreement not to appeal. Otherwise there is no meaning in it; *Shahzadi Begam* v. *Muhammad Ibrahim*(9). The addition or omission of the words "final" or "conclusive" cannot make any difference. Nor does it make any

(1) (1845) 13 M. and W., 816.
(2) [1896] A.C., 136.
(3) (1919) 37 M.L.J., 100.
(4) (1919) I.L.R., 42 Mad., 625.
(5) (1899) I.L.R., 23 Bom, 752.
(6) (1911) I.L.R., 38 Calc., 421.
(7) (1915) 26 I.C., 355.
(8) (1903) I.L.R, 26 Mad., 76.
(9) (1921) 19 A.L.J., 14).

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difference that the suit involved not only questions of fact but also questions of law.

SCHWABE, C.J.

JUDGMENT.

SCHWABE, C.J.—This case is of considerable importance because circumstances of a similar nature have been before the Courts on several occasions and they have given rise to some considerable divergence of opinion.

The facts are that a suit came before the District Munsif as to whether the defendants had unlawfully diverted some water from the land of the plaintiff and so injured his land. When the case came before the District Munsif certain plans and documents were put before him and then the plaintiff and some of the defendants agreed in writing and the pleader acting for the other defendants, I have no doubt, agreed to what appeared in writing that the learned Munsif should himself go and inspect the land. The terms of the agreement signed by the plaintiff and two of the defendants are contained in an affidavit which ran as follows:—

"We agree to the matter being decided according to the opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence."

The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at after making a local inspection of the land and perusing certain plans and other records. The learned Munsif agreed to act on that agreement and went to the place some seven miles off two days later. The case was again before the Court when some documents were put in according to the plaintiff's statement and the judgment was given and a decree passed in the ordinary form of a decree.

The issues in the suit were issues of fact and issues of law. The learned Munsif found the facts in a certain way and in view of those facts gave a finding. In due course there was an appeal to the Subordinate Judge and he expressed his view that the learned Munsif was wrong in law. He held that no appeal lay to him by reason of the agreement referred to above. He purported to follow *Chengalroya Chetti* v. *Raghava Ramanuja Doss*(1) where a very similar agreement was held to result in the decree being not appealable on the grounds, as I understand it, that the decree was not a decree of a Judge as such but as an arbitrator. The law, as I understand it, is this. Where parties agree to a Court proceeding without jurisdiction *extra cursum curiæ*, as it has been put, the parties cannot appeal from the decision of the Court. The parties in fact may agree not to appeal from the decision of the Court and such agreement will be inferred from the fact that they agreed to the Court taking a course which is altogether outside the ordinary powers of the Court. But this does not apply to mere deviations from procedure if the Court has jurisdiction over the subject unless there is an attempt to give the Court a jurisdiction it does not possess, so that a Court of appeal cannot properly review the decision. Such deviations do not deprive either of the parties of the right of appeal; *Pisani* v. *Attorney-General for Gibraltar*(2); see also the decision of the House of Lords in *Burgess* v. *Morton*(3). So in these cases the question to be decided is whether an agreement between the parties does result in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so outside its ordinary course of procedure that

(1) (1918) 37 M.L.J., 100. (2) (1874) L.R., 5 P. C., 516.
(3) [1896] A.C., 136.

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it is impossible for the Appellate Court properly to review its decision.

Further, the giving up of a right of appeal is giving up a very important right possessed by all litigants and in my judgment, such right of appeal can only be given up by a clear agreement. It may be that an agreement is in such terms that the Court will be driven to imply a term that the right of appeal was given up but a Court would not imply such a term unless it was driven to do so.

Turning to the agreement in this case, I can find nothing in it to show an intention to give up a right of appeal. I think it merely means that the parties agree to the evidence being taken in an irregular way or in an unusual way, viz., by the Munsif going to the place and seeing for himself what had happened and what was happening and not relying on what witnesses in Court told him had happened or was happening and the parties agreed to the case being decided in that way and to abide by the decision. If an appeal had been attempted on the ground that the learned Munsif took a wrong view of the facts, that his eyes have deceived him or that the procedure of dispensing with the evidence was irregular, I can well understand the argument that the parties had agreed not to take any such point, and indeed I think that would be right. But, I can find nothing in the words used to indicate that the parties intended to give up all rights of appeal on questions of law which might arise or did arise in the case. I do not think it is right to say that, even though there was an agreement of the kind indicated, the Court becomes an arbitrator, and in my judgment in order to make a Court arbitrator, there must be a clear agreement to that effect as indeed there was in *Sayad Zain* v. *Kalabhai* (1). A Court

(1) (1899) I.L.R., 23 Bom., 752.

acting *extra cursum curiæ* has been said to act as quasi-arbitrator which may be a convenient expression but it does not involve an application of the second schedule to the Code of Civil Procedure which is applicable to arbitrators. Such agreement merely involves that the parties who agree expressly or impliedly not to appeal will not be allowed by the Court to appeal. I do not think it is necessary to go in detail into the cases that have been cited but would observe that it would follow from what I have said that I do not agree with the reasoning in *Nilamarthi Mukkanti* v. *Thammana Ramayya*(1) and *Chengalroya Chetti* v. *Raghava Ramanuja Doss* (2). It may be that the result of those decisions is correct. *Rao Bahadur Raoji* v. *Govind*(3) is a case where the agreement stated that the decision was to be final and conclusive. I do not think it is necessary to consider whether the mere inclusion of those words is sufficient, for in this case there are no words to that effect. In *Jamnadas* v. *Gordhandas*(4) where the words were,

> " we are not going to produce evidence, and agree to the decision which the Court shall pass after inspection,"

it was held, and I think rightly, that the Munsif did not thereby become an arbitrator and that an appeal lay from his decision. In *Chengalroya Chetty* v. *Raghava Ramanuja Doss*(2), where the terms of the agreement were,

> " we shall abide by any kind of decree passed by the Courts after a personal inspection of the place in dispute,"

it was held that the District Munsif acted thereafter as arbitrator and that he acted illegally and with material irregularity in accepting the position of an arbitrator as all the parties had not consented.

It follows from what I have said above that I do not agree with the finding that he acted as arbitrator, nor do

(1) (1903) I.L.R., 26 Mad., 76. (2) (1919) 37 M.L.J., 100.
(3) (1897) 9 P.J. Bom. H.C., 271. (4) (1896) 8 P.J. Bom. H.C., 615.

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I agree that the agreement before the Court in this case amounted to an agreement that the Court should act *extra cursum curiæ*.

SCHWABE, C.J.

This appeal must be allowed with costs and the matter must go back to be disposed of on the merits.

WALLACE, J.

WALLACE, J.—I agree. The respondent rests his case not on the footing that the District Munsif's decree was really an arbitration award but on the principle of estoppel. In order that there may be an estoppel prohibiting an appeal by either party, there must be an agreement implicit or explicit not to appeal. I think the words of the plaintiff's and respondents' own undertakings, read together as a contract, are enough to dispel any such idea, and to show that what the parties agreed to was nothing more than that the finality of the District Munsif's decision by which they agreed to abide was limited to the point which the District Munsif, in the absence of other evidence, was required to settle by personal inspection, that is, the point of fact necessary for the decision of the first issue, and the agreement went no further, Now it is open to the parties in an ordinary suit tried by the ordinary procedure to dispense with evidence, and it is open to the Judge on application by the parties to inspect the place, and what he sees on his inspection is evidence within the meaning of the Indian Evidence Act, on which he may decide issues in the suit and this and no more is what I conceive the original Court has in this case done. Hence I can see nothing in the agreement between the parties which puts the suit *extra cursum curiæ*.

I agree therefore that no estoppel exists except on the point of fact decided by the Munsif by his inspection of the ground. As to whether on the facts he found he came to a wrong decision on the law, I cannot see how there can be any estoppel of the right of appeal. If

there was no agreement not to appeal, there cannot possibly be any question of the appellant intentionally permitting the respondents to believe that he had waived that right, and to act according to that belief. I therefore agree in the order proposed by the learned Chief Justice.

N.R.

APPELLATE CIVIL

Before Mr. Justice Devadoss.

FRASER AND ROSS (PETITIONERS), PETITIONERS,

1922 May, 5.

v.

KRISHNASWAMI AIYER AND OTHERS (PLAINTIFFS AND DEFENDANTS,) RESPONDENTS.*

Suit for sale—Final decree—Order for sale—Execution of decree by sale ordered—Partition suit in another Court between the mortgagors—Receiver appointed in such suit after final decree in mortgage suit—Application by Receiver after order for sale to the executing Court to be made a party—Leave of the latter Court for execution, necessity for—Duty of decree-holder to apply for leave—Duty of Court to make Receiver a party.

A mortgagee-decree holder is bound to apply to the Court appointing a Receiver of the mortgaged properties in another suit, for leave to execute his decree, and cannot proceed to sell the mortgaged property in execution of his decree without such leave.

Where, after final decree had been passed and order for sale made by a Court in a suit for sale on a mortgage, a Receiver, appointed by another Court, subsequent to such decree, in a suit between the mortgagors for partition of their family properties including the mortgaged properties, applied to the former Court to be made a party to the execution proceedings, prior to sale ;

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* Civil Revision Petition No. 323 of 1922.