evidence to show that while they participated in the profits they were not liable for any share of the loss. It is so peculiar a contract and so much out of the ordinary partnerships that, if no such contract is proved, the general presumption that profits and losses are to be shared in equal or similar shares would apply and the plaintiff would get a decree. Therefore the burden of proof is on the defendants and, they not having offered to adduce evidence, the learned Judge's judgment is right. The appeal must therefore fail and is dismissed with costs.

MADHAVAN NAIR J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

NETI VENKATA SOMAYAJULU GARU (PLAINTIFF), APPELLANT,

1934, February 16.

v.

ADUSUMILLI VENKANNA (DEFENDANT), RESPONDENT.*

Appeal—Right of—Proceedings extra cursum curiae *and not so —Distinction—Abridgement of trial by seeking decision on incomplete evidence—Proceeding not* extra cursum curiae *in case of—Right of appeal when nevertheless lost in such a case.*

If a proceeding is *extra cursum curiae,* the decision is in the nature of a consent order and generally the right of appeal against it is barred. If, on the other hand, the proceeding is not *extra cursum curiae,* unless there is a clear waiver of the right, the right of appeal will not be lost; in that case, the person who contends that no appeal will lie must clearly show that

* Second Appeal No. 107 of 1930.

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the right has, either expressly or by necessary implication, been given up.

Where the parties to a suit abridged the trial by seeking a decision on incomplete evidence,

held that that being no more than some deviation from the ordinary procedure, the judgment was not *extra cursum curiae*.

Where the joint statement filed by the parties for the purpose of abridging the trial ran as follows:—

"At the request of the defendant herein, this Court personally inspected the suit plot . . . Both the parties by consent pray that the Court may be pleased to consider the evidence already on the record and the documents filed so far and give a final, decisive adjudication between the parties, without there being any necessity for examining further witnesses and so on. Both the parties further agree to be bound by the decision and to act according to it by giving full effect thereto. We therefore pray that the Court may make an order accordingly.",

held that the intention of the parties was to give up their right of appeal.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 23 of 1929 (Appeal Suit No. 109 of 1928 on the file of the District Court of East Gōdāvari) preferred against the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 612 of 1926.

G. Lakshmanna for appellant.

A. Lakshmayya for respondent.

JUDGMENT.

This appeal raises an important question and has been fully argued by the Counsel on both sides. The facts may be briefly stated. In the suit the plaintiff claimed an easement of necessity in respect of certain lands. At the defendant's request, the District Munsif made a local inspection of the site. Then, after the plaintiff was

examined-in-chief and some documents were filed, the parties requested the Court to give a decision on the evidence already on the record and intimated that they proposed to adduce no further evidence. A joint statement to that effect was filed and the decision in the case really turns upon the proper construction of that document. To resume the story, the Munsif gave his decision partly in favour of the plaintiff and partly against him. The plaintiff, dissatisfied with that judgment, appealed to the Subordinate Judge. He held that, by reason of the joint statement to which I have referred, the plaintiff was debarred from filing the appeal. The plaintiff, whose appeal has thus been dismissed, questions the correctness of that view.

The proper test to apply is whether the judgment in regard to which the question arises has been pronounced *extra cursum curiae* ; if so, it is in the nature of an arbiter's award and, as a general rule at least, no appeal from it will lie. This position is well illustrated by *Burgess* v. *Morton*(1). The rules which govern the procedure on the Common Law side of the High Court of Justice do not contemplate or permit the use of a special case, except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted. But what happened there was, that the parties agreed to withdraw the case from trial and to state a special case for the purpose of trying a question of fact. It was held that the proceedings were not in the ordinary course of law but *extra cursum curiae* and that

(1) [1896] A.C. 136, 137.

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the decision should therefore be regarded as a consent order, from which no appeal will lie.

A mere deviation from the ordinary procedure does not necessarily, however, render a proceeding *extra cursum curiae*. As observed by the Judicial Committee in *Pisani* v. *Attorney-General for Gibraltar*(1):

> "Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, such departures have never been held to deprive either of the parties of the right of appeal."

Of the Indian cases cited at the Bar, the two most useful are *Sankaranarayana* v. *Ramaswamiah*(2) and *Ballabh Das* v. *Sri Kishen*(3); the other cases, *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*(4), *Shahzadi Begam* v. *Muhammad Ibrahim*(5), *Sita Ram* v. *Pirai Lal*(6) and *Sri Sri Sri Ramachandra Deo Garu* v. *Chaitana Sahu*(7), do not throw much light on the question.

The result, however, of the cases, is, that, if the proceeding is *extra cursum curiae*, the decision is in the nature of a consent order and generally the right of appeal is barred. If, on the other hand, it is not *extra cursum curiae*, unless there is a clear waiver of the right, the right of appeal will not be lost; in that case, the person who contends that no appeal will lie must clearly show that the right has, either expressly or by necessary implication, been given up. In the present instance, the parties abridged the trial by

(1) (1874) L.R. 5 P. C. 516.
(2) (1922) I L.R. 47 Mad. 39.
(3) (1925) 89 I.C. 586.
(4) (1919) I L.R. 42 Mad. 625.
(5) (1920) I.L.R. 43 All. 266.
(6) (1925) I.L.R. 47 All. 921.
(7) (1920) 39 M.L.J. 68 (P.C.).

seeking a decision on incomplete evidence, and this being no more than some deviation from the ordinary procedure, the judgment was not *extra cursum curiae*. Then the question really is, whether, on a true construction of the document, the right of appeal has clearly and unequivocally been waived. With these observations, let me now turn to the document:

"At the request of the defendant herein, this Court personally inspected the suit plot on 5th February 1928. Both the parties by consent pray that the Court may be pleased to consider the evidence already on the record and the documents filed so far and give a final, decisive adjudication between the parties, without there being any necessity for examining further witnesses and so on. Both the parties further agree to be bound by the decision and to act according to it by giving full effect thereto. We therefore pray that the Court may make an order accordingly."

There are of course no express words that the parties waive their right of appeal; but the conclusion is irresistible that their intention was to give up that right. There are two expressions in the Telugu original, which in my opinion clinch the matter. The first is "parishkaram", used in connection with the final decision to be given and the second, "amool zarupu", an expression often used in the sense of executing an order. I am therefore satisfied that, although the proceeding was not *extra cursum curiae*, the right of appeal is nevertheless barred by reason of the special agreement.

The second appeal therefore fails and is dismissed with costs.

A.S.V.
