We are therefore of opinion that the disposition in favour of the plaintiff under Exhibit A is void under section 100 of the Succession Act of 1865 and this invalidity is not prevented or cured by Act VIII of 1921. The appeal must therefore be allowed and the suit dismissed even as against the appellant. The appellant will have the costs of this appeal but we do not propose to interfere with the order as to costs of the trial Court.

G.R.

APPELLATE CIVIL.

Before Mr Justice Ramesam and Mr. Justice Madhavan Nair.

K. PITCHIAH CHETTIAR (SECOND DEFENDANT), APPELLANT,

v.

G. SUBRAMANIAM CHETTIAR AND TWO OTHERS (PLAINTIFF, FIRST DEFENDANT AND THIRD DEFENDANT), RESPONDENTS.*

1934, February 9.

Indian Contract Act (IX of 1872), sec. 253—Indian Evidence Act (I of 1872), sec. 114—Partnership—Unequal shares in respect of profits—Absence of special agreement to the contrary regarding losses—Same inequality applicable to losses also.

The fair inference that could be drawn from sections 253 of the Indian Contract Act and 114 of the Indian Evidence Act is that, in the absence of a special agreement to the contrary, if unequal shares between partners are admitted in a partnership in respect of the sharing of profits the same inequality of shares apply to losses also.

APPEAL from the judgment of STONE J., dated the 27th day of November 1933, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 571 of 1931.

* Original Side Appeal No. 2 of 1934.

PITCHIAH CHETTIAR v. SUBRAMANIAM CHETTIAR.

V. Radhakrishnayya and *K. P. Mahadeva Ayyar* for appellant.

T. G. Raghavachari for first respondent.

R. Thirumalaithathachari for second respondent.

R. V. V. Tatachariar for third respondent.

RAMESAM J.

The JUDGMENT of the Court was delivered by RAMESAM J.—This appeal arises out of a partnership action. The plaintiff and the three defendants carried on the partnership. Towards the end it was working at a loss and the plaintiff filed the suit on 16th November 1931 for winding up the partnership. In the plaint the plaintiff alleged that the shares were as follows :—

Plaintiff	...	...	Four annas,
First defendant	...	...	Four annas,
Second defendant	...	...	Four annas,
Third defendant	...	...	Two and a half annas,

out of a total of fourteen and a half annas, in other words, the shares were eight twenty-ninth, eight twenty-ninth, eight twenty-ninth and five twenty-ninth. It is unnecessary to notice the written statement of the first defendant.

Defendants 2 and 3 filed a joint written statement in which they admitted that there was a partnership of which they were members but denied that they were liable to bear any proportion of the losses. At the first hearing two issues were framed :

(1) What are the terms of the partnership agreement between the plaintiff and the defendants?

(2) Are the defendants 2 and 3 partners and if so are they not liable for the losses of the partnership?

On 19th April 1932 the matter was referred to the Official Referee for taking accounts. The

order expressly reserved the question of whether some partners are or are not liable for losses. A preliminary decree was passed on 28th April in which it was stated that all the partners were interested in the assets and profits in equal proportions. This seems to be a mistake because neither the pleadings nor the issues nor the order of the learned Judge referring the matter to the Official Referee stated that the parties were to be interested in the assets and liabilities in equal proportions. But, however, as nobody is affected by it and as everybody knew that the partnership ended in loss, nobody cared to question the correctness of this statement in the preliminary decree by an appeal. Clause 7 of the preliminary decree provided that the question whether some partners are or are not liable for losses of the said partnership be and is hereby reserved. The Official Referee submitted his report on 24th November 1932. Objections were filed by both parties and when the case came on for disposal before our brother, STONE J., on 27th November 1933, the objections were not pressed by the learned Advocate who appeared for the second and third defendants, Mr. V. V. Srinivasa Ayyangar, and nothing more was said by him. Thereupon the learned Judge passed a decree directing that the losses also should be borne in the proportions alleged in the plaint. The second defendant has filed this appeal. The third defendant says that he is too poor to file an appeal and that he supports the second defendant.

On this appeal it is argued that the second defendant had witnesses ready and they ought to have been examined by the learned Judge. Upon

PITCHIAH CHETTIAR v. SUBRAMANIAM CHETTIAR.

RAMESAM J.

this argument being put forward we wanted to ascertain what exactly happened at the time of the final hearing. We accordingly requested Mr. Srinivasa Ayyangar to state what happened before the learned Judge. He told us that he said that he would not press the objections and nothing else. He admitted that he never offered to examine his witnesses. Mr. Radhakrishnayya, who now appears for the appellant, argues that even if this were so the burden of proof is on the plaintiff to prove the case set up by him in his plaint and if he does not prove his case he ought to fail even if the defendant does not examine his witnesses. The question thus reduces itself to one of burden of proof, in other words, who should fail if no evidence is offered on either side. Section 253 (2) of the Indian Contract Act lays down that all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership. As I read the section, it lays down two presumptions with which the Court should start. The two presumptions are clubbed in one sub-section. The first is, if no specific contract is proved, the shares of the partners must be presumed to be equal. In the present case the plaintiff alleged unequal shares which were not denied by the defendants. So the parties being agreed on their pleadings as to the shares possessed by them in the profits, there is no scope for the application of this first presumption. The second presumption is that where the partners are to participate in the profits in certain shares they should also participate in the losses in similar shares. Now the section says that both

should be in equal shares but implies that if unequal shares are admitted by the partners as to profits that applies equally to losses. In the absence of a special agreement, that this should be the presumption with which one should start is merely a matter of common sense and in India one has only to rely on section 114 of the Evidence Act for such a principle. This principle is in consonance with the decision in *Nowell* v. *Nowell*(1) where there was an agreement to share the profits and losses in certain shares but the question arose whether that agreement as to losses covered the case of a partner advancing a larger capital and the capital being lost. JAMES V.C. observed :

"Whether moneys are brought in originally as capital, or advanced subsequently, or paid by one partner at the winding up, is, in my judgment, wholly immaterial. In the absence of stipulation to the contrary, the community of profit involves like community of loss."

Though the agreement in that case covered only the actual loss in the carrying out of the partnership and did not cover excess advance of capital followed by loss of capital, still the principle that the community of profit involves like community of loss was applied by the learned Judge. The learned Judge then gives an arithmetical example where one partner advances £1,000 for speculation in cotton, and winds up like this :

"If it only produces £900 could it be contended that the capitalist partner is to put up with the entire loss ; and that the game of partnership between the man without money, and the man with, was to be on the principle of 'heads, I win ; tails, you lose'?"

(1) (1869) L.R. 7 Eq. Cas. 538.

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RAMESAM J.

We entirely agree with those remarks of the learned Judge. The same principle is also inferable from the remarks of JESSEL M.R. in *In re Albion Life Assurance Society*(1). This case related to an insurance company which is of course a more complicated matter than a partnership. In an insurance company it is the shareholders that advance the capital, and, though the shareholders and the policyholders participate in the profits, the shareholders are to participate first in certain percentage in the profits and then only all are to share in the profits equally. On this ground it was held that their position is not similar in an insurance company where, if there was a loss, the shareholders must share the losses and the policyholders cannot be asked to bear them. But in discussing the matter JESSEL M.R. states the principle thus :

> "It is said, as a general proposition of law, that in ordinary mercantile partnerships where there is a community of profits in a definite proportion, the fair inference is that the losses are to be shared in the same proportion."

This principle, though it could not be applied in that particular case, states a general principle applicable to all cases of ordinary partnerships. The learned Judge then proceeds to say that it must be logically carried out to its legitimate extent and where the capital is lost the partners should bear the loss. In some respects it resembles the case before JAMES V.C. The principle above stated by us is exactly the same as in these two cases and we think that it is embodied in section 253 of the Contract Act. That being so, it is for the second and third defendants to adduce

(1) (1880) 16 Ch. D. 83, 87.

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.