acknowledged and this saves limitation. If the argument of the learned Advocate for the respondent was sound, no evidence other than the writing was admissible to prove the nature of the payment. But that is not the meaning of the proviso as added by the legislature. I, therefore, agree that the appeal should be allowed with costs.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Manohar Lall and Chatterji, JJ.

CENTRAL INDIA SPINNING, WEAVING AND MANUFACTURING COMPANY, LIMITED

1939.

January, 5, 23.

v.

KHEMRAJ MARWARI.*

Appeal—Compromise—parties agreeing to be bound by the decision of the court—appeal, whether lies from the decision—test—intention of the parties.

Where the parties agree to be bound by the decision of the Court with regard to a dispute which they specifically ask it to decide, no appeal lies from the decision.

Where the party invites the Court to adopt a procedure which is not contemplated by the Code of Civil Procedure, 1908, and in fact the procedure is extra cursum curiae, he cannot turn round and say that the Court is to blame for the very procedure which he invited the Court to follow. In each case the appellate Court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the Court.

Jaggu Mal v. *Brij Lal*(1), *Robert Murray Burgess* v. *Andrew Morton*(2), *Ballabh Das* v. *Sri Kishen*(3) and *Pisani* v. *Attorney General for Gibraltar*(4), reviewed.

*Appeal from Original Decree no. 204 of 1936, from a decision of Maulavi Saiyid Muhammad Ibrahim, Subordinate Judge of Ranchi, dated the 27th June, 1936.

(1) (1930) A. I. R. (All.) 127.
(2) (1896) A. C. 136.
(3) (1926) A. I. R. (All.) 90.
(4) (1874) 5 P. C. 516.

1939.

CENTRAL INDIA SPINNING, WEAVING AND MANUFACTURING COMPANY, LIMITED, v. KHEMRAJ MARWARI.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Manohar Lall, J.

B. C. De and *K. K. Banerjee*, for the appellant.

U. N. Banerjee and *L. K. Chowdhury*, for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge, dated the 27th June, 1936, by which he decreed the suit of the plaintiff in terms of the compromise arrived at between the parties on the 8th June, 1936.

The suit was instituted on the 1st of December, 1934, to recover a sum of Rs. 9,000 and interest to be enforced against the properties mentioned in a security bond, dated the 5th July, 1927. In paragraph 5(*v*) of the plaint the property subject to the mortgage was specified. The action was contested challenging that the amount due was not as stated in the plaint; the liability was also denied. On the 8th June, 1936, it appears that the parties came to terms and actually filed a petition to that effect which is printed at page 12 of the paper-book. The petition states that the parties have compromised the above suit on the terms stated therein, namely, that the claim of the plaintiff against defendant nos. 1 to 3 is settled at Rs. 7,000 and the defendants 1 to 3 shall execute a conveyance by way of absolute sale of the properties mortgaged by the bond in suit in favour of plaintiff for the aforesaid amount of Rs. 7,000. It was also agreed that on execution of this sale deed the plaintiff shall file a petition for full satisfaction in court and that the defendants 4 to 7 will be discharged from the suit. The parties on filing this petition prayed as stated therein that the suit be postponed for a week to enable the parties to execute the necessary sale deed. On the 15th June, 1936,

the parties informed the court that there was a hitch to the execution of the kebala, that they could not agree as to whether certain survey plots were or were not actually covered by the security bond and they requested the court to decide this matter. The court by its order no. 61, stated the points in dispute between the parties in these terms :

" The hitch to the execution of the kebala is about the survey numbers of the first three properties. According to the plaintiff the first property mortgaged is entered as survey plots 1523, 1537 to 1542 and Holding no. 459 of Ward no. 1 and the second mortgaged property is entered as survey plot 1426 of Holding no. 411 of Ward no. II. Whereas defendants 1 to 3 state that portions of plots 1523, 1537 to 1542 and portion of plot 1426 are the properties 1 and 2 mortgaged. This dispute they require now to be decided by the court."

Order no. 62 records that the pleader for the plaintiff urged that plot 1425 was a part of the second property mortgaged and was left out in the plaint through mistake of the scribe. Defendants took one day's time to give their definite version. On the 16th June, 1936, the parties put in their documents which were taken into consideration, formal proof of exhibits A and 4 being waived. Argument was then heard and the parties put in a joint petition that the court should make a local enquiry regarding the mortgaged property and then decide the matter. The Judge accordingly held a local enquiry on the 17th June, 1936, but no record was kept thereof. He then by his order, dated the 27th June, 1936, decided on the documents which were filed before him and as a result of what he saw and heard at the local enquiry that " the mortgaged property no. 1 consists of plot nos. 1537 to 1542 only and that plot no. 1523 is outside the mortgaged property ". There was no dispute regarding property no. 2. As a result of this decision the court made the following decree :

" It is ordered that the suit is decreed in part according to the terms incorporated in the petition filed by the parties on 8th June 1936. The mortgaged property no. 1 consists of plots nos. 1537 to 1542 and the mortgaged property nos. 2 and 3 are as stated in the plaint."

Against this decision the present appeal has been preferred by the plaintiff.

1939.

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MANOHAR LALL, J.

It was stated before us that the only dispute between the parties now is about plot 1523.

A preliminary objection has been raised on behalf of the respondents that the suit having been decided as a result of a compromise the present appeal is not maintainable and that the parties must be taken in law to have agreed to be bound by the decision of the court with regard to the dispute which they specifically asked it to decide.

In my opinion the contention of the respondents is correct. As soon as the compromise petition was filed on the 8th June, 1936, the suit stood disposed of in terms of the compromise petition, that is to say, the claim of the plaintiff was settled at Rs. 7,000 and that "the defendants shall execute a conveyance by way of absolute sale of the properties mortgaged by the bond in suit". The further condition in the compromise petition that "on execution of the sale deed the plaintiff shall file a petition for full satisfaction in court" relates to the discharge of the decree or the claim which had already been accepted at Rs. 7,000 and for which the defendants had undertaken to execute a conveyance.

A large number of cases were cited on behalf of both the parties in support of their respective contentions. I have examined each and every one of these cases. The true rule, in my opinion, is that the intention of the parties must be gathered in each case and if the intention is clear that the parties are binding themselves by the decision that might be given by the court no appeal would lie; but if such an intention cannot be gathered then the right to appeal is not shut out. In some cases it has been held that all that the parties did was that they refrained from adducing any oral evidence but asked the court to decide upon the documentary evidence and upon local inspection. No hard and fast rule can be laid down.

In *Jaggu Mal* v. *Brij Lal*(1) an application was jointly made by the parties to the Munsif asking him to make an inspection of the locality to decide the matters in question and in place of evidence the Munsif might ask questions on the spot. In these circumstances it was held that it was not open to the defeated party to bring in an appeal after he had agreed to the Munsif deciding the case in the manner stated above and the learned Judges observed that " it is not open to a party to ask for a departure from the ordinary course of procedure and require the court to decide questions of fact in this manner by local inspection and oral statements on the spot and then come forward and ask the appellate court to decide the same question. For one thing there is no evidence in the record which would enable the court to come to a decision ".

In *Robert Murray Burgess* v. *Andrew Morton*(2) it was held by the House of Lords that " where in pursuance of an agreement between the parties the court proceeds outside its ordinary jurisdiction, the proper inference would be that there was to be no appeal from the decision as would be in the case if the trial were in the ordinary way ". But it does not follow, as pointed out by Sulaiman, J. in *Ballabh Das* v. *Sri Kishen*(3), that this is a test of universal application because unless the court has proceeded outside its ordinary jurisdiction, a right to appeal always exists ". On the other hand, in the case of *Pisani* v. *Attorney-General for Gibraltar*(4) where the parties agreed " that the rights, if any, of the several defendants may be ascertained and declared by decree of the court and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that the court will give such further directions as shall be necessary ", it was held that the

(1) (1930) A. I. R. (All.) 127.
(2) (1896) A. C. 136.
(3) (1926) A. I. R. (All.) 90.
(4) (1874) 5 P. C. 516.

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" above words clearly meant that the parties were to keep themselves in curia and that it was plain also that the parties and the Judge thought that an appeal was open ".

It is unnecessary to refer to further cases. The true rule, which I conclude, is that where the party invites the court to adopt a procedure which is not contemplated by the Code of Civil Procedure, and in fact the procedure is extra cursum curiae, he cannot turn round and say that the court is to blame for the very procedure which he invited the court to follow. In each case the appellate court will try to find as to what the true intention of the party was and the question whether an appeal lies or not will depend upon the conclusion arrived at by the court.

In the present case it is clear to my mind that the suit was disposed of in terms of paragraphs 1, 2, 3 and 5 of the compromise petition; accordingly the court should have ordered that the suit is decreed in part according to the terms incorporated in the petition of compromise filed by the parties on the 8th June, 1936. The court had no jurisdiction to enter in the decree the words " The mortgaged property no. 1 consists of plots nos. 1537 to 1542 and the mortgaged property nos. 2 and 3 are as stated in the plaint ". Whatever the court did on the 15th, 16th and 17th June, 1936, was merely to decide the dispute which the parties asked him to decide but the result of that decision could not be incorporated in the decree.

Accordingly, I hold that no appeal lies against the decree passed by the learned Subordinate Judge dated the 3rd July, 1936, following his decision dated the 27th June, 1936, but in the exercise of our powers of revision I would delete the portion indicated above, namely, " The mortgaged property no. 1 consists of plots nos. 1537 to 1542 and the mortgaged property nos. 2 and 3 are as stated in the plaint " from the decree.

Parties will bear their own costs of this appeal.

CHATTERJI, J.—I agree.

Appeal dismissed in limine.

S. A. K.

1939.

CENTRAL INDIA SPINNING, WEAVING AND MANUFACTURING COMPANY, LIMITED, *v.* KHEMRAJ MARWARI.

MANOHAR LALL, J.

REVISIONAL CIVIL.

Before James and Rowland, JJ.

SITAL PRASAD SAH

v.

RAMDAS SAH.*

1939.

January, 26.

Court-Fees Act, 1870 (*Act VII of* 1870), *section* 7, *sub-sections* (*iii*), (*iv*)(*c*) and (*v*)—*partition suit partaking of the nature of title suit—plaintiff out of possession of a portion of the subject-matter—ad valorem court-fee payable on the amount by which plaintiff's share in possession is of less value than the share claimed.*

So far as a partition suit may actually be in the nature of a title suit, ad valorem court-fee is payable by the plaintiff whether the suit is regarded as governed by section 7 (*iv*)(*c*) or by sub-section (*iii*) or (*v*) of section 7 of the Court-Fees Act, 1870.

Rachhya Raut v. *Musst. Chando*(1), followed.

Where the plaintiff is out of possession of a portion of the property of which he seeks partition, he has to pay ad valorem court-fee on the amount by which his share in possession is stated to be of less value than the share which he claims.

Dip Chand Rai v. *Chhetru Lal*(2) and *Sundara Ganapathi Mudali* v. *Daivasikamani Mundali*(3), followed.

Hara Gowri Saha v. *Dukhi Saha*(4), distinguished.

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*Civil Revision no. 652 of 1938, from an order of Babu Anugrah Narain, Subordinate Judge of Muzaffarpur, dated the 21st September, 1938.

(1) (1921) 6 P. L. J. 662.
(2) (1917) 1 Pat. L. T. 529.
(3) (1930) 129 Ind. Cas. 824.
(4) (1910) 5 Ind. Cas. 582.