a tarwad. In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with Marumakkatayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*(1) and *Mahomed Shumsool* v. *Shewakram*(2). The decision in *Narayanan* v. *Kannan*(3) was not followed in *Moidin* v. *Ambu*(4), and it appears to us to be in conflict with the rule of construction indicated by the Privy Council.

We answer the question in the affirmative.

This appeal came on for final disposal before the Division Bench, and the Court delivered the following judgment:—

JUDGMENT.—Following the decision of the Full Bench we set aside the orders of the District Court and of the learned Judge of this Court and restore that of the Court of First Instance.

There having been conflicting rulings on the subject, we make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMACHANDRA JOISHI (RESPONDENT IN APPEAL AGAINST ORDER NO. 99 OF 1890), APPELLANT,

v.

HAZI KASSIM (APPELLANT IN APPEAL AGAINST ORDER NO. 99 OF 1890), RESPONDENT.*

1892. February 29. April 15.

Civil Procedure Code—Act XIV of 1882, *s.* 562—*Act VII of* 1888, *s.* 49—*Power of Appellate Court to remand suit—Preliminary point—Report of Select Committee referred to.*

It is competent for an Appellate Court to remand a case when the Court of First Instance records evidence on all the issues, and at the final hearing decides the suit

(1) 6 M.I.A., 526.
(2) L.R., 2 I.A., 7.
(3) I.L.R., 7 Mad., 315.
(4) See *ante*, p. 203.
* Letters Patent Appeal No. 16 of 1891.

RAMA-CHANDRA JOISHI v. HAZI KASSIM.

erroneously on some particular point without expressing any opinion on the other issues.

A statement in a sale-certificate, granted by a Court, that the purchase is subject to a charge, is not conclusive evidence against the purchaser, when it is sought to enforce the charge by suit.

APPEAL under Letters Patent, s. 15, against the judgment of PARKER, J., in civil miscellaneous appeal No. 99 of 1890. That judgment reversed an order made by S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 260 of 1889, whereby the decree of S. Raghunatha Ayyar, District Munsif of Karakal, in original suit No. 13 of 1889 was set aside and that suit remanded for disposal.

Suit to recover Rs. 36-8-4 being the value of rice due to the plaintiff on account of puja performed by him on behalf of his brother Lakshmana Joishi. The plaint alleged that the sum sued for constituted a charge on certain land which was formerly the property of Lakshmana Joishi, but had been sold in execution of a decree obtained against him and purchased by defendant No. 1. It appeared from the sale-certificate that the land was sold subject to the plaintiff's "right to recover rice muras 4 annually on the "responsibility of the lands."

The District Munsif held that there was no charge on the land in favour of the plaintiff and dismissed the suit without trying any other issues.

The Subordinate Judge on appeal made an order setting aside the finding of the District Munsif on the abovementioned issue, and remanding the suit for disposal. PARKER, J., reversed this order on the two grounds that the Subordinate Judge should not have remanded the suit under Civil Procedure Code, s. 562, but should have called for finding on the other points which arose, and that the finding of the Subordinate Judge on the point determined was not based on a due consideration of the documentary evidence.

The plaintiff preferred this appeal.

Sundara Ayyar for appellant.

Narayana Rao for respondent.

MUTTUSAMI AYYAR, J.—This is an appeal preferred under Letters Patent against the order of Mr. Justice PARKER. In the suit to which it relates, three issues were raised for decision, viz., (1) whether the plaintiff performed puja to certain idols,

(2) whether the rice claimed in connection with it was a charge on the land mentioned in the plaint, and (3) what was the price of such rice. The parties to this appeal adduced evidence on all the three issues and though the District Munsif recorded it, yet he held on the second issue that the rice claimed was not a charge on the land and dismissed the suit without determining the other issues. On appeal the Subordinate Judge determined the second issue in the affirmative and remanded the case. Mr. Justice PARKER considered that the decision on the second issue was not a decision on a preliminary point, and that the order of remand was illegal. He was also of opinion that neither the partition deed nor the sale subject to the plaintiff's claim created a charge, and set aside the order of remand and directed the Subordinate Judge to replace the appeal on his file, to come to a revised finding on the second issue after considering exhibits A and B, and to dispose of the case in accordance with law. Two objections are taken to this decision, viz., (1) that the order of remand was legal, and (2) that as the respondent purchased subject to the charge claimed by the plaintiff, the decision of the Subordinate Judge on the second issue was correct.

As regards the first objection, it must be observed that the District Munsif recorded evidence on all the three issues, and even assuming that the decision on the second issue was one on a preliminary point, it was still not such a decision as excluded evidence on the other issues and created a necessity for the investigation of the merits. The order of the learned Judge is quite correct according to section 562 of the Code of Civil Procedure as it stood prior to the Amending Act VII of 1888.

The real question is whether the amendment made by the last mentioned Act makes any difference. The amendment consisted in the omission from section 562 of the words "so as to exclude "any evidence of fact which appears to the Appellate Court essen- "tial to the determination of the rights of the parties" and in the substitution at the end of the section of the word "determine" for the word "investigate." The condition necessary to justify a remand consisted prior to Act VII of 1888 in the exclusion of evidence of a material fact, or in the omission to investigate the merits as the consequence of the decision on a preliminary question which the Appellate Court could not uphold. The condition necessary

RAMA-CHANDRA JOISHI v. HAJI KASSIM.

to a remand after the date of the Amending Act is the omission to determine the merits. Further, it seems to me that the expression "preliminary point" was used in section 562 not in the sense of some point collateral to the merits, but of some point preliminary to a general investigation of the merits. This is the sense suggested by the context of the section. If it is taken in the sense of a point not relating to the merits at all, there will be no power of remand when the Court of First Instance, owing to an erroneous decision on some point of law under section 146, or on imperfect view of the evidence under section 154 does not investigate the rest of the merits. In this view the words "preliminary point" must be taken after the amendment to refer to some point either collateral to the merits which precluded their determination altogether, or some particular question which though relating to the merits precluded their general determination. The intention which the amendment suggests and which is confirmed by the report of the Select Committee was not unduly to limit the discretion of the Appellate Court as was found to have been done by section 562 as it originally stood.

It would, therefore, be competent, I think, for the Appellate Court after the amendment to remand a case when the Court of First Instance mechanically records evidence on all the issues and at the final hearing decides the suit on some particular issue without expressing any opinion on the other issues, if in the circumstances of the case the Appellate Court considers a remand desirable. The contention, therefore, that the Subordinate Judge had a discretionary power to remand after the date of the Amending Act and that his order was legal must prevail.

As for the second objection, I see no reason to think that the learned Judge was in error in calling upon the Subordinate Judge to re-consider his finding on the second issue. The decision of that issue must depend on the question whether what respondent actually bargained and paid for was the land burdened with a charge of 4 muras of rice to be paid to appellant every year or the land affected only with notice of a claim to that effect. The sale certificate D which is statutory evidence of his title describes the land purchased as being subject to the charge, but this cannot of itself be treated as conclusive. If as observed by the learned Judge the order on the claim petition C was made without any

enquiry as to whether the claim was well founded, and if there is no legal basis on which to hold that there was a charge, a presumption might arise that what the purchaser intended to buy and did buy was the land itself though with notice of respondent's claim, and that the description in exhibit D was erroneous. Whether it was a misdescription or not, is a question of fact which it was for the Subordinate Judge to determine. His remark that exhibit D is conclusive, and that no other circumstance needs be considered cannot be accepted as sound. Moreover his decision is that there is a charge only in regard to the amount now claimed, but not necessarily so in regard to payments which may hereafter become due is not intelligible since if there is a charge in the one case, there must be a charge in the other also. We are not referred to any evidence showing that the order on the claim petition C was made after an enquiry as to whether there was really a charge. The partition deed did not, admittedly, create a charge and the Subordinate Judge did not consider exhibits A and B. He held apparently that the purchaser was not entitled to show that there was a misdescription in the sale certificate, and I agree with the learned Judge that this view cannot be supported. If, as observed by him, the order on C was passed without any enquiry and if there was no other legal foundation for a charge, I am not prepared to say that the order in requiring the Subordinate Judge to consider exhibits A and B and to come to a fresh finding on the second issue is open to question. I would, therefore, set aside the order of the learned Judge so far as it declares that the Subordinate Judge was not competent to remand the case and otherwise confirm it. I would direct each party to bear his costs of this appeal.

BEST, J.—The learned Judge has set aside the order of the Subordinate Judge (which remanded the suit for trial by the District Munsif) on the ground that "though the District Munsif "decided the suit upon the second issue, he did not decide it upon "a mere preliminary point," and that therefore the Subordinate Judge should not have remanded the suit under section 562 of the Code of Civil Procedure, but should have called for findings upon the other points which arose.

On behalf of the appellant it is contended that the Subordinate Judge's order remanding the suit was right, as the District

RAMA-CHANDRA JOISHI v. HAZI KASSIM.

Munsif had dismissed it upon a "preliminary point," and the decree upon such preliminary point was reversed in appeal.

The first question is therefore as to the meaning of the phrase "preliminary point" as used in section 562.

For the respondent it is contended that it means some point, such as limitation or *res judicata* which can be decided without in any way entering on the merits of the case. I am however unable to find in the wording of section 562 anything warranting this limited construction of the words. There might have been ground for thus narrowing the meaning of the section prior to its amendment by Act VII of 1888, when it contained the words "so as to exclude any evidence of fact which appears to the Ap- "pellate Court essential to the determination of the rights of the "parties." But these words were removed for no other reason than that they were "found to limit unduly the discretion of Appellate Courts." See Report of the Select Committee, published in the Gazette of India, dated 10th March 1888. However, even prior to this enlargement of the scope of the section, the opinion was expressed by Mahmood, J., that the expression "preliminary point," as used in the section, "is not confined to such legal points only "as may be pleaded in bar of suit, but comprehends all such points "as may have prevented the Court from disposing of the case on "the merits whether such points are pure questions of law or pure "questions of fact." See *Sheoambar Singh* v. *Lallu Singh*(1). Cf. also judgment of Edge, C.J., and Mahmood, J., in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*(2), I take it that a suit is disposed of on a preliminary point within the meaning of section 562 when by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issue; and that if in such a case the Appellate Court finds that the issues considered have been wrongly decided, and the suit in consequence wrongly dismissed, and that a consideration of the other issues is necessary for a proper disposal of the suit, a remand is allowable. Nor do I see any good reason for putting a narrow construction on the wording of the section, as none of the parties to the suit can be prejudiced by sending the case back to the Original Court for disposal of the case after

(1) I.L.R., 9 All., 32. (2) I.L.R., 1 All., 289.

deciding the issues which it has not considered in consequence of its decision on other issues which have been found on appeal to have been wrongly decided.

In the present case there has been no decision by the District Munsif on the first and third issues, which refer respectively to the performance of puja alleged by plaintiff and to the price of the rice claimed, a decision on these points having been considered unnecessary by reason of the finding on the second issue in the negative and in favour of the defendant as to the chargeability for the rice of the land in defendant's possession. In my opinion on the Subordinate Judge's finding in appeal that the decision on this second issue was wrong, he had a discretion to remand the suit for disposal by the District Munsif on the other issues.

But was the Subordinate Judge right in holding that the second issue had been erroneously decided? As observed by the learned Judge of this Court the mere fact of the sale certificate D reproducing the order passed on the claim petition, that the property is sold with notice of the claim that it is liable to a charge, will not make such charge binding on the purchaser if the claim has in fact no legal foundation; and as the Subordinate Judge had accepted the statement in D as conclusive and consequently did not consider the other evidence on the point, I concur in upholding the order so far as it remands the case for restoration to the file of the Subordinate Judge for re-consideration of the second issue and disposal according to law, and also in its direction as to costs; and I agree with my learned colleague in directing each party to bear his own costs of this appeal.