

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1912.
April 25.

V. JAMBULAYYA (DEFENDANT), APPELLANT,

v.

I. RAJAMMA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XLI, rule 23—Decision of first court not on a preliminary point—Power of appellate court to remand.

There are cases in which an order of remand may be made even where the disposal has not gone on a point which can strictly be called a preliminary point.

Kuppala v. Kanjucalli [(1911) 9 M.L.T., 373], followed.

A case in which there was no regular hearing of a matter by the first court and the evidence on which the disposal of the case was made by that court was not placed on record, is a fit one for remand.

APPEAL against the order of J. W. HUGHES, the District Judge of Kurnool, in Appeal No. 148 of 1908, presented against the decree of T. S. KRISHNA, the District Munsif of Kurnool, in Original Suit No. 767 of 1907.

The facts of this case appear from the judgment.

A. Krishnaswami Ayyar for appellant.

K. Parthasarathy Ayyangar for respondent.

MILLER AND
SADASIVA
AYYAR, JJ.

JUDGMENT.—The District Munsif appears to have looked at a receipt and construed it as a settlement out of court and upon it determined the issue whether the settlement after suit is true, but he did not exhibit it as evidence in the suit or taken any other evidence. It is not now alleged that this course was taken by consent of the parties or that the parties agreed that the matter should be disposed of on the construction of the receipt alone.

The District Judge appears to have seen the receipt and considered that it is not a record of the terms of a settlement between the parties, and holding that the plaintiff should be allowed to prove that the document represented only a partial settlement; he has remanded the suit for rehearing and disposal.

Before us it is contended that the District Munsif having determined the issue as to the settlement has not disposed of the suit on a preliminary point, and that therefore the District Judge had no power to order a remand.

* Civil Miscellaneous Appeal No 114 of 1911.

But the decision in *Kuppalan v. Kunjuralli* (1) is an authority for holding that there are cases in which an order of remand may be made even where the disposal has not gone on a point which can strictly be called a preliminary point, and this we think is one of those cases. Here there seems to have been no regular hearing of the matter and the evidence on which the disposal was made was not placed on the record. The procedure is so irregular that we think an order for a complete retrial is required and on that ground we confirm the decision of the District Judge and dismiss the appeal with costs.

JAMBULAYYA
v.
RAJAMMA.
—
MILLER
AND
SADASIVA
AYYAR, JJ.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

P. AMMAN PARIYAYI AND THREE OTHERS (DEPENDANTS),

APPELLANTS,

v.

M. P. PAKRAN HAJI (PLAINTIFF), RESPONDENT.*

1912.
April 24,
25 and 30.

Charge—Government Revenue, due on land—Common burden—Payment by one sharer—Right to claim charge on other shares—No right to a personal decree.

When several shares in the same land or when several lands are liable under a common burden (such as, Government revenue, as in the present case), the discharge of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums for which they were equitably liable. But the common burden being only on the land or lands and not recoverable from the sharers personally there can only be a charge and no personal decree.

Rajah of Vizianagaram v. Rajah Setrucherla Somasekhararaj [(1903) I.L.R., 26 Mad., 686, (F.B.)], followed.

Alaynkammal v. Subbaraya Goundan [(1905) I.L.R., 28 Mad., 493], and *Parbhu Narain Singh v. Babu Beni Singh* [(1909) 14 C.W.N., 361], referred to.

Subramania Chetty v. Mahalinghasami Sivan [(1910) I.L.R., 33 Mad., 41 (F.B.)], distinguished.

APPEAL against the order of remand of A. EDINGTON in Appeal No. 342 of 1910 presented against the decree of M. R. SANKARA AYYAR, the District Munsif of Koottuparamba, in Original Suit No. 624 of 1909.

C. V. Anantakrishna Ayyar for the appellants.

T. K. Govinda Ayyar for the respondent.

The facts of this case are stated in the judgment of MILLER, J.

(1) (1911) 9 M. L. T., 373.

* Civil Miscellaneous Appeal No. 110 of 1911.