the respondent raised the question of title. We, therefore, submit that the lower Court ought to have gone into that question, and decided it.

Náráyan Vishnu Gókhale for the respondent:—The appellant merely stated in the plaint that the land belonged to him, but he did not pray therein that, if the Court would not give him relief on the rent-note, he should be allowed to stand upon his general title. We, therefore, contend that no alternative case was made in the plaint. The lower Court found that the rent-note sued on was not proved; it was, therefore, right in rejecting the suit. The appellant had relied exclusively on the rent-note, and prayed for possession under it.

SARGENT, C. J.:—Although the plaintiff's claim is based, in the main, on the rent-note, it appears from the first issue which was raised, as well as from the circumstance that both parties gave evidence at the trial on that issue, that the plaintiff's right to recover the land was litigated before the Subordinate Judge on the ground of ownership, as well as on the rent-note. The lower Court of appeal ought, therefore, to have found on the first issue; and we must, therefore, send back the case for a decision on that issue.

Decree reversed and case sent back.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

NURBIBI, (ORIGINAL DEFENDANT), APPELLANT, *v.* MAGANLA'L PARBHUDA'S, (ORIGINAL PLAINTIFF), RESPONDENT.*

1891.
October 1.

Property in a tree—Tree planted by mutavali of a shrine—Land belonging to the shrine—Enjoyment of the fruit by mutavali—Money decree against mutavali—Attachment of tree—Right of ownership.

A tree having been planted by the predecessor of a *mutavali* of a shrine on land admittedly belonging to the shrine, and a judgment-creditor of the *mutavali* having sought to attach the tree under a money-decree against the *mutavali*:—

Held, that although the judgment-debtor's predecessor planted the tree while acting as *mutavali*, he could acquire no property in the tree by so doing, nor could any benefit, which he or the present *mutavali* might have derived by taking the fruit of the tree, enable them to acquire any right of ownership in the tree as

* Second Appeal, No. 590 of 1890.

1891.

NURBIBI v. MAGANLA'L PARBHUDA'S.

against the shrine. The land admittedly belonging to the shrine, the tree must have the same character until the contrary was proved.

THIS was a second appeal from the decision of Ráo Bahádur Chunilál Máneklál, First Class Subordinate Judge of Ahmedabad with appellate powers.

Suit for a declaration of right to attach a tree.

The plaintiff, Shá Maganlál Parbhudás, had obtained a decree in the Court of Small Causes at Ahmedabad against one Fakir Fulshaw Bahádarshaw. The plaintiff having attached a mango tree in execution of that decree, the defendant, Bibi Nurbibi, widow of Fakir Fulshaw, made an application for the removal of the attachment, and the attachment was consequently removed. The plaintiff, thereupon, brought the present suit to obtain a declaration of right to attach the tree on the ground that the tree belonged to Fakir Fulshaw, and was planted by him.

The defendant, Bibi Nurbibi, pleaded that the tree in dispute did not belong to Fakir Fulshaw; that it belonged to Pir Musey Swang, whose property was a religious endowment; that Fakir Fulshaw was till his death the manager of the endowment as its *mutavali*, and that after Fulshaw's death she had been acting as *mutavali* of the endowment.

The Subordinate Judge (Ráo Sáheb N. N. Nánávati) found that the tree in dispute did not belong to the judgment-debtor, Fakir Fulshaw, and that he was merely in enjoyment thereof as the manager of the endowment. The Subordinate Judge, therefore, rejected the plaintiff's claim.

The plaintiff appealed to the District Court, which reversed the decree of the Subordinate Judge and allowed the claim.

Ganpat Sadáshiv Ráo for the appellant:—The lower Court has committed an error in holding that, as there was no direct evidence to show that the tree belonged to the endowment, it must be considered to belong to Fulshaw. We submit that, as the tree stands upon the endowed land, the natural presumption is that it is the property of the endowment; *cujus est solum ejus est usque cœlum*. The burden of proof lay heavily upon the respondent to prove the contrary. It was not necessary for us to show that the tree was dedicated to the shrine. The lower

Court has referred to certain evidence in the case, which shows that the tree was Fulshaw's property. We submit that such statements cannot be taken to signify much, because Fulshaw was the manager of the endowment, and, there being no ostensible owner, he may have stated that the tree was his; but such statements cannot make him the owner.

Govardhanrám Mádhavrám Tripáthi for the respondent:—The appellant is now estopped from asserting that Fulshaw was not the owner. The lower Court has referred to documentary, as well as oral, evidence in the case, which clearly shows that Fulshaw and the present appellant treated the tree as their own property. They enjoyed the fruit of the tree, and exercised other acts of ownership over it.

SARGENT, C. J.:—The Subordinate Judge says that there is no evidence that the tree was dedicated to the shrine; but as the land admittedly belongs to the shrine, the tree must have that character until the contrary is proved. In the present case, the only evidence is that the judgment-debtor's *guru* and predecessor, when acting as *mutavali* of the shrine, planted it. But he could acquire no property in the tree by so doing. Nor could any benefit which the *guru* and his successor, Fakir Fulshaw, whilst acting as *mutavali*, might have derived, by taking the fruit of the tree, enable them to acquire any right of ownership in the tree as against the shrine. We must, therefore, reverse the decree and restore the judgment of the Court of first instance, with costs.

Decree reversed.