1891.

BÁBU MÁDHAV SHANBHOG v. VENKATESH MANJÁYA.

SARGENT, C. J.:—We do not think we ought to accept the District Judge's finding on the question whether defendant No. 1 was justified by urgent necessity in selling the land in question to defendant No. 4, as he has expressed an opinion without discussing at all the several grounds on which the Subordinate Judge came to a contrary conclusion. We must, therefore, reverse the decree and send back the case for decision after recording a fresh finding on the issue raised by the District Judge. Even, in the event of the issue being found in the negative, the defendant No. 4 will still be entitled to the fields which he purchased from defendant No. 1, if, on partition of all the family lands mentioned in the plaint, they can possibly be allotted to the share of defendant No. 1, on the principle laid down in *Uddvám* v. *Rámu* (1), *Náráyan* v. *Mahadu* (2) and *Mahábalaya* v. *Timáya*(3).

Costs to abide the result.

Decree reversed.

(1) 11 Bom. H. C. Rep., 76. (2) P. J., 1889, p. 94.

(3) 12 Bom. H. C. Rep., 138.

APPELLATE CIVIL.

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

RA'MKOR GOPA'LJI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGA'RA'M, VALAD KUSHA'BA, (ORIGINAL DEFENDANT), RESPONDENT.*

1891. *September* 30.

Practice—Issues—Rent-note—Litigation before Subordinate Judge on the ground of ownership as well as rent-note—Omission by Appellate Court to decide on the question of ownership—Reversal of decree.

Where it appeared that an issue was raised as to ownership, and that both parties at the trial before the Subordinate Judge gave evidence on such issue (although the claim was based, in the main, on a rent-note), and the lower Appellate Court declined to find on such issue,

Held, reversing the decree of the lower Appellate Court, that it ought to have found on the issue.

THIS was a second appeal from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Dhulia with appellate powers.

* Second Appeal, No. 538 of 1890.

1891.

RA'MKOR GOPA'LJI v. GANGA'RA'M.

Suit to recover possession of land.

The plaintiff, Rámkor Gopálji, stated in the plaint that he was the owner of the land in dispute; that he had let it out to defendant, Gangárám valad Kushába, under a rent-note dated 29th June, 1886; that the defendant refused to restore possession after the expiration of the period mentioned in the rent-note, and hence the suit. The plaintiff sought to recover possession and damages.

The defendant, Gangárám valad Kushába, contended *(inter alia)* that the land fell to his share after the death of his brother, Bhágoji, and that since then it had been in his possession; that he was thus the owner thereof, and that he had never rented it from the plaintiff.

The Subordinate Judge (Ráo Sáheb R. B. Bhagavat) found on the issues that (1) the land in dispute belonged to the plaintiff; that (2) the rent-note was proved, and that (3) the plaintiff was entitled to recover possession of the land, and also rent and damages as claimed, and awarded the claim.

The defendant appealed to the District Court, which accepted the issues as they were framed by the Subordinate Judge, and reversed the decree; holding that the rent-note, upon which the plaintiff's claim was exclusively based, was not proved; and that as the plaintiff had not in the plaint put forth an alternative case, that if the rent-note be not proved he should be allowed to fall back on his general title as owner, the suit must fail. The Court held it unnecessary to arrive at any finding with respect to the first issue.

Against the decree of the District Court the plaintiff appealed to the High Court.

Ganesh Krishna Deshmukh for the appellant:—The only point in the case is whether the lower Court was right in not investigating the question of title. In our plaint we had made out an alternative case, inasmuch as we say therein that we are the owners of the property; but the case did not rest merely upon the allegation contained in the plaint. The first issue in both the lower Courts related to title, and evidence was given by both parties on that point. Even in his appeal to the lower Court

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.