
(1916) 02 MAD CK 0052
In the Madras High Court

Raghubhushana Tirthaswami and Another APPELLANT
Vs
Vidiavaridhi Tirthaswami and Another RESPONDENT

Date of Decision : 29-02-1916

Acts Referred:

Evidence Act, 1872 — Section 32

Citation : 34 Ind. Cas. 875

Hon'ble Judges : Phillips, J;Abdur Rahim, J

Bench : Division Bench

Judgement

Abdur Rahim, J.—The 1st appellant (1st plaintiff in the suit) is the Swami of a mutt called the Bhimanakattai and the 2nd appellant (the 2nd plaintiff) was nominated by him to the headship of another mutt called the Bhandarikere. The 1st defendant in the suit is a person who claims to have been nominated Swami of the Bhandarikere Mutt by the 2nd defendant who is described as the Pariyaya Swami. The suit was instituted in order to obtain a declaration that the head of the Bhimanakattai Mutt for the time being is entitled to appoint a Swami to the Bhandarikere Mutt in default of any appointment by the last Swami of the latter mutt during his lifetime and that the Pariyaya Swami of the Krishna temple at Udipi, which is the office held by the 2nd defendant, has no right to appoint a Swami to the Bhandarikere Mutt in case of such vacancy. The next important prayer in the plaint is that the 2nd plaintiff may be declared to have been lawfully appointed to the Bhandarikere Mutt and that he may be put in possession of that mutt and its properties. The learned Subordinate Judge has found against the claims of the 1st and the 2nd plaintiffs. He also found that the Pariyaya Swami has no right to make any appointment to the Bhandarikere Mutt. In the result he dismissed the suit. The plaintiffs have preferred this appeal against the decision of the Subordinate Judge.

2. Bhandarikere Mutt is situated in the district of South Canara and the Bhimanakattai Mutt, which is also called Bhimasethu Mutt, lies in the territory of Mysore but is only about 40 or 50 miles distant from Bhandarikere. Both these

are Madhava Mutts, that is, devoted to the teachings of Madhwa Chariar. In the Udipi Taluk where the Bhandarikere Mutt is, there are also eight other Madhava Mutts belonging to the sect founded by Madhava Chariar. Madhava Chariar apparently flourished in the 13th or 14th century. There can be no doubt but that the two mutts concerned in this suit as well as the eight other mutts at Udipi are very ancient institutions. The earliest history of these institutions is involved in considerable obscurity and it is not possible upon the evidence adduced in the case to assign exact dates of their origin. All that can be said with any degree of certainty is that they must be several centuries old. The office of Pariyaya Swami is held in rotation by the Swamis of the eight Udipi Mutts, the office-holder for the time being distinguished from the others by having in his charge the Krishna temple. The Pariyaya Swami admittedly has certain honours and privileges above those enjoyed by the Swamis of the seven remaining Udipi mutts.

3. One Vidyanidhi was the last Swami of the Bhandarikere Mutt. He died on the 19th November 1901. He had been a lunatic since 1896. Before he became a lunatic, he had nominated his successor one Vidyasamudra: but that man died in 1898. In the same year, while Vidyanidhi was still living, the 1st plaintiff nominated the 2nd plaintiff to the headship of the Bhandarikere Mutt, proceeding on the basis that owing to the lunacy of Vidyanidhi, the office had become vacant. But this claim of the 1st plaintiff was resisted by the guardian of the lunatic Swami. A suit was then instituted by the present 2nd plaintiff-Original Suit No. 39 of 1899 or" the file of the Mangalore Sub Court to establish his right. The 1st defendant in that suit was Vidyanidhi through his guardian ad litem the 2nd defendant, who was also appointed manager of the properties belonging to the mutt by the District Court. The other defendants in that suit were impleaded as they were in possession of some of the idols belonging to the mutt. The Trial Judge dismissed that suit, finding against the plaintiff the allegations on which he based his right. On appeal to the High Court, the decree was confirmed, but only on the ground that there was no vacancy in the office of the Swami of Bhandarikere Mutt by reason of the lunacy of the then officeholder Vidyanidhi and, therefore, the appointment of 2nd plaintiff in the present suit was invalid. The other questions raised in the suit were not decided by the High Court. After Vidyanidhi died in 1901, the 2nd plaintiff was again appointed by the 1st plaintiff to the Bhandarikere Mutt. The 1st plaintiff, the Swami of the Bhimasethu Mutt, based his right to appoint on two grounds. The first ground is (1) that his mutt and the Bhandarikere Mutt are what is called Dwandwa Mutts, the principal incident of which is that one of them or rather the head of one of them has the right of ordination to the other mutt in case the Swami of that mutt dies without having nominated his successor. The next ground on which the learned Vakil for the appellant bases the claim of the Swami of the Bhimanakattai Mutt is that that mutt is the parent or moola mutt, as it is called, with reference to the Bhandarikere Mutt, which is its branch or cowle mutt and that by virtue of this relationship between the two mutts, the Swami for the time being of the Bhimanakattai Mutt is entitled in the case of a vacancy to appoint a Swami to the

Bhandarikere Mutt. The claim to the Pariyaya Swami is founded on the allegations that he ranks highest among the Swamis of the eight Udipi Mutts and that as the eight mutts were founded by Madhava Chariar who also converted the original mutt which was the common ancestor of both Bhimanakattai and Bhandarikere Mutts into a Madhava Mutt, the Pariyaya Swami is in the direct line of spiritual succession to Madhava Chariar and has the authority, therefore, not only over the eight Udipi Mutts but also in a case of necessity like the present over both Bhandarikere and Bhimanakattai Mutts. Whether the Swami of Bhimanakattai Mutt, i.e., the 1st plaintiff, or the Pariyaya Swami, the 2nd defendant, has the right of nomination or not, it is contended by the defendants on the one side that the nomination or ordination of the 2nd plaintiff was not according to law and usage, and, therefore, invalid and on the other side the plaintiffs contend that the appointment of the 1st defendant is similarly invalid. The learned Subordinate Judge has found that none of the claims put forward on either side have been established.

4. As regards the case of the plaintiffs, so far as it is based on the allegation that the Bhimanakattai Mutt is the parent mutt and as such its Swami has a right to appoint to the Bhandarikere Mutt, it can very easily be disposed of. The entire evidence of the plaintiff was adduced to prove the dwandwa relationship between the two mutts in question. That is to say, the Swami of either of them in a contingency such as this has a right to appoint the Swami of the sister mutt and not that the Bhimanakattai Mutt possessed any predominant right, by virtue of being the original mutt, of appointing to the Bhandarikere Mutt. The connection between a moola mutt and the branch or cowle mutt presupposes a certain amount of controlling authority and superiority of position in the one and of subordination in the other; while the idea of Dwandwa Mutts is that they are both of co ordinate and independent authority, but that in cases of urgency, the Swami of each has a right to appoint the Swami of the allied mutt. This is very well established by the evidence with regard to the eight Udipi Mutts which are grouped into twos with the dwandwa right existing inter se. Of these Dwandwa Mutts no one has authority of any sort over the other, and it is only the Pariyaya Swami who, being the custodian of the Krishna temple, has a certain superior authority over all the eight mutts. It is not even suggested that the Swami of Bhimanakattai Matt is entitled to any special honours from the Bhandarikere Mutt or that he exercises any kind of control, supervision or privilege over it. What is claimed on behalf of the Bhimanakattai Mutt is that this was the original mutt founded by the sage Durvasa whose name appears on the top of the pedigree, and that Bhimankattai was the Samasthanam of Visvamurti who was the last Swami of the original mutt before division. Visvamurti had two disciples: Visvapathi and Gadadhara. Visvapathi was ordained successor to Visvamurthi in the original mutt and Gadadhara was placed in charge of a branch mutt which was then established. All this is a matter merely of tradition and cannot be said to be proved by any evidence. It is alleged that Bhimanakattai Mutt is proved at least to be an older mutt than the other and in support of that contention, a

copper plate inscription marked as Exhibit JJ is relied on. If this document could be said to be genuine, there would be good ground for holding that Bhimanakattai Mutt is the more ancient of the two. It is a grant alleged to have been made in the era of Yudhishtira 89 by Janamejaya, the great-grandson of Yudhishtira himself. That would take the matter back to about 3,000 B. C. It is pointed out by Mr. Rice that having regard to the fact that the writing is modern Canarese and also other facts mentioned by him, the copper plate inscription, to say the least, is of doubtful authenticity. The learned Subordinate Judge seems to think that though the date 89 Yudhishtira era cannot be correct, the grant itself is not fabricated and that it can be safely attributed to 14th century. He, however, fails to notice that the grant purports to be by the great-grandson of Yudhishtira himself who is said to have lived about 3,012 B.C. I think the Subordinate Judge was wrong in placing any reliance at all on Exhibit JJ. Similarly I am not inclined to attach any importance to the claim that the sage Durvasa worshipped at Bhimanakattai, alleged to be his hermitage. It is wholly founded on a vague tradition of a non-historical character. The Subordinate Judge has also attached significance to the letter (Exhibit DD) written in 1837 by the Swami of Bhandarikere Mutt to the Swami of "Bhimanakattai Mutt, asking the latter to find out if there were any old accounts and documents in his possession which might be useful in connection with certain suits relating to the land of Bhandarikere. It appears that sometime about 17C5 (Exhibit CC) there was partition between the two mutts of certain jewels, books, brass and copper vessels, and other articles of worship and that apparently explains why the Swami of Bhandarikere Mutt who wrote Exhibit DD thought that the Swami of Bhimanakattai ? Mutt might have some papers which would throw light in the suits relating to the properties of his mutt. Nor does the conclusion of the lower Court, that Gopinath is the principal deity worshipped in the Bhandarikere Mutt while Ramadeva is the original deity worshipped in the Bhimanakattai Mutt, seem to be warranted by the evidence. There is ample evidence corroborated by the statements of witnesses on the plaintiffs' side to show that the images of Rama, Lakshmana and Sita, singly or together, form a principal object of worship in the Bhandarikere Mutt as well. There is, however, the undoubted fact that the grants recorded in the stone inscriptions M, N, O, P, all made in the 16th century are in favour of the deity Gopinath. But admittedly more than one deity is worshipped in these mutts and it is likely that a particular devotee of a particular deity should make endowments for his worship. It is argued by Mr. Ranga Chariar, the learned Vakil for the 1st appellant, that as the grants to the mutts are generally made at the time of their foundation, it is to be presumed from the stone inscriptions that Bhandarikere is more or less a recent mutt. But he does not dispute in fact that the Bhandarikere Mutt dates back much earlier than the 16th century. It would not, therefore, be safe to draw any inference either from the dates of the stone inscriptions or the mention of Gopinath therein. Reliance is placed by the lower Court on the name of Bhimanakattai Mutt, its full name being Bhimasethu Muniverenda Mutt. That, we are told at the Bar, means the mutt of a collection of sages at the bridge over the Bhima river; the name of the

Bandarikere mutt on the other hand is only derived from the village of that name. Having regard to the fact that there exists considerable rivalry between these mutts, the people connected with each mutt being anxious to claim greater prestige and antiquity for their own mutt as is apparent from the evidence in this case, it will not be safe to draw any inference merely from the names. The Bhandarikere Mutt, on the other hand, claims to be the parent mutt treating Bhimarakattai as its branch. The Subordinate Judge has pronounced the important evidence relied on in this connection and furnished by the three letters Exhibits I to III as fabrications; and there can be no doubt that his finding on this point is correct. If we leave them aside, all that we are left with, is practically the stone inscriptions M, N, O, and P, which do not take us back further than the 16th century. My conclusion is that it is not possible to come to any reliable conclusion upon the materials available to us as to which is the parent mutt and which is the cowle mutt or which is the more ancient of the two. Apart from that, even if it were proved that one of these mutts was derived from the other, they have certainly been independent of each other for some centuries, one not acknowledging any superior authority in the other as would have been the case if the relationship of the parent and the cowle mutts existed between the two. And as has already been pointed out, the claim of the Swami of the Bhimanakattai Mutt based on the dwandwa right presupposes an equal status of each of these two mutts, and not the subordination of one to the other.

5. On the question of the dwandwa right we have certain admitted facts. Such a right does exist among the eight Udipi Mutts which are also Madhava Mutts. We have also one undoubted instance of an appointment made by the Swami of Bhandarikere Mutt to the headship of the Bhimankattai Mutt. This instance was admitted on the defendants' side before the learned Subordinate Judge, as would appear from the judgment. The Swami so appointed was Raghu Pravira Tirtta, the 35th in the list of Bhimankattai Swamis; and the Swami of Bhandarikere who appointed him was Vidyasagar, the predecessor of the lunatic Vidyanidhi. No doubt an attempt was made before us to show that what the Bhandarikere Swami did was merely to perform the ceremony of ordination, the nominee in fact being designated by the Swami of Bhimanakattai Mutt during his lifetime. But apparently the suggested distinction between ordination and selection, so far as the particular case is concerned, is an afterthought and was not sought to be drawn before the lower Court. The suggestion is based on the reading of Exhibit FF, which is a document produced to support the case of the plaintiff and which has been found by the Subordinate Judge to be a fabrication, a finding strenuously supported by the learned Advocate-General himself who appeared for the 2nd defendant.

6. I may here conveniently deal with the question whether the finding of the Subordinate Judge regarding Exhibits FF, GG, EE is correct. Exhibit FF is a letter purporting to be written by some villagers of a place called Halesige in the Bombay Presidency to one Anantha Battar who, at that time, that is, in 1821, was the agent of Bhimanakattai Mutt, informing him that Raghunath Thirta, the

Swami of that mutt, died of small pox in Halesige village, that before death, he desired the writers of the letter to write to Anantha Battar to the effect that he should request the Swami of Bhandarikere which was dwandwa to the Bhimanakattai to give asram to the eldest son of Anantha Batta, that is, ordain him to the Samasthanam or office of the Swami of the Bhimanakattai Mutt. This letter refers to the case which, as I have already mentioned, did undoubtedly occur. Exhibit FF was produced first in 1899 and as mentioned in the judgment of the Subordinate Judge who tried the previous suit, it was produced at a late stage of that suit and the present Subordinate Judge was justified in relying on this fact in considering the question of genuineness of the document. It is perfectly true that Raghuna-tha Thirta Swami of Bhimankattai died in Halesige where his tomb is and is worshipped by his devotees. But the Subordinate Judge remarks that it is hardly likely that there should not have been with him some responsible agent or officer of the Samasthanam and that he should have been under the necessity of entrusting his personal effects and an important message to men who must have been more or less strangers. It is also pointed out that Exhibit FF contains statements which are not true or at least are not likely to be inserted in a bona fide document; for instance the statement that the mutts were dwandwa and that the writers were interested in the Samasthanam of the deceased Swami from former times. The latter statement is apparently not proved by any evidence, although the descendants of the alleged writers, that is, plaintiffs' witnesses Nos. 7, 8, 9 and 10 have been examined. On the other hand, plaintiffs' 10th witness, who alone among these witnesses identifies the signature of one of the signatories to FF as that of his great grandfather, belonged to the Utharathi Mutt and is not a follower of the Bhimanakattai Mutt. Plaintiffs' witnesses Nos. 7, 8 and 9 do not prove the writing or signatures of their ancestors in Exhibit FF. The cross-examination of plaintiffs' 10th witness shows that he is hardly a reliable witness. He is a mendicant and makes statements in support of the plaintiffs' case, which, having regard to the fact that he is a follower of Utharathi Mutt, would not ordinarily be within his personal knowledge. I am unable to say that the Subordinate Judge's finding that Exhibit FF is not genuine is wrong. The same with Exhibit GG. That is a peculiar document and though it is extremely likely that it was in existence in the Bhimanakattai Mutt, the entries could easily be rubbed out and other entries substituted in their place. The entries are made on folded pieces of cloth stitched together in the form of a book and blackened with charcoal dust. One has only to "put fresh charcoal dust on and write again with a piece of steel or something like that and no body could tell the difference between that writing and the older writing. The lower Court has also held that Exhibit EE, by which it is sought to prove a case of appointment of a Swami to the Bhandarikere Mutt by a Swami of the Bhimanakattai Mutt, is not genuine. It is a very long letter purporting to be written sometime in 1776 and in it there occurs a statement of persons who are alleged to be the servants of the Bhimanakattai Mutt, to the effect that the then Swami Raghuvaria Thirta of that mutt had ordained the then Swami of Bhandarikere. The Subordinate Judge points out that the name of the Swami of

Bhandarikere is not mentioned and urges that this shows that the men who concocted the document were not certain who was in fact the Swami of Bhandarikere Mutt in 1776. There is no independent evidence to corroborate any of the other statements made in this letter or to show that these men were actually connected with Bhimanakattai. Exhibit EE was also produced in the last suit at a very late stage and I am unable to say that the Subordinate Judge in not accepting the genuineness of it has come to a wrong conclusion. As for the other documents relied on in support of the dwandwa right claimed by the plaintiffs, they resolve themselves into two classes. To the first class belong statements by persons who are now dead, made on a previous occasion when no dispute existed with reference to the dwandwa right between the two mutts in question. To this category belong Exhibits LL and Y. The other class of documents contain statements made after the disputes had arisen and most of them in the previous suit, such as Exhibits RR, NN and OO. All these statements are objected to on the ground that they relate to the fact in issue, namely, the existence of divandua right and not to a relevant fact and are, therefore, not admissible u/s 32 of Clause 4 of the Evidence Act, which makes the statements of relevant facts made by persons who are dead admissible in evidence if such statements give the opinions of such persons as to the existence of any public right or custom or matter of public or general interest. In support of this contention reliance is placed on a decision in *Patel Vandravan Jekisan v. Patel Manilal Chunilal* 15 B. 565 of the learned Chief Justice Sir Charles Sargent and Mr. Justice Candy of the Bombay High Court. They ruled as being inadmissible a statement signed by a large number of persons who were not examined in the case as to the existence of a custom debarring a widow of a certain caste from adopting without the express authority of her husband on the ground that the existence of the alleged custom was a fact in issue and not merely a relevant fact and could not, therefore, be proved under Clause 4 of Section 32. It appears from the facts of that case that the statement in question was admitted by the lower Court, because it held that it would be unreasonable to oblige the party relying upon it to incur the expenses of procuring the attendance of such a large number of witnesses. That obviously was not a proper case u/s 32, Clause 4; for the inconvenience and expense to be taken into account must be with respect to individual witnesses and not arising merely from the number of witnesses which a party wishes to call. But when the learned Judges observe that the statement was inadmissible because it was required to prove a fact in issue, and not merely a relevant fact, I venture to think with all deference that it is not a sound distinction to draw. A fact in issue is always a relevant fact, and I can see no reason for excluding from the operation of Clause 4 of Section 32 statements relating to facts in issue. If they were to be excluded, much valuable evidence hitherto considered admissible would be unavailable as will be apparent from the illustrations to Section 32 and also to the definitions of facts in issue and relevant facts. It is next argued that the dwandwa right alleged to exist between the two mutts is not a public right or custom or a matter of general or public interest within the meaning of Section 32. I do not think that this is a tenable objection;

for the question relating to the mode of appointment of Swamis of the two long before the institution of the previous suit.

7. Exhibit LL is a document undoubtedly of a different category. It is a statement made in a suit of 1879, that is, long before the present dispute arose and was made by a disciple of the Bhimanakattai Swami. He states that if the Swami of his mutt committed any reprehensible or immoral action, the guruji of the Bhandarikere Mutt should make an enquiry and also that the one mutt was dwandwa to the other. Apparently in that suit, one of the subject-matters of the enquiry was the alleged misconduct of the then Swami of the Puttige Mutt which is one of the eight Udipi Mutts. The statement in Exhibit LL was evidently a bona fide statement made by a person who was likely to know whether there was any tradition as to the dwandwa relationship between the two mutts in question. As regards the oral evidence in the case, the learned Subordinate Judge has been unable to place any reliance upon it. Both the parties in the suit adduced much documentary evidence of a spurious character and none of the witnesses on either side can be said to be disinterested or impervious to the influence of the litigating parties. None of them speak from personal knowledge of any instance of succession and in a matter involving so much religious and sectarian zeal, it would be obviously unsafe to rely upon the evidence of the witnesses on either side when they advance their opinion in support of the case of one Swami or the other, except so far as it is strongly corroborated by independent evidence or by undoubted facts.

8. The case of the plaintiffs rests mainly on what inference is to be drawn from the proved instance of an appointment made by the Swami of Bhandarikere to the Bhimanakattai Mutt and from the statement contained in Exhibit LL, which records the opinion of an adherent of the Bhimanakattai Mutt in favour of the dwandwa right expressed in 1879, that is, nearly 10 years before the controversy had arisen. There is also in support of the plaintiffs' case the very significant fact that the dwandwa right has undoubtedly existed among the eight Udipi Mutts, though there is in their case the distinguishing fact that they were. important Madhava Mutts is certainly one in which the Hindus or a large section of them would be interested. As for the statements in Exhibits RR, NN and OO," which are depositions in the previous suit of persons who are now dead, they are not admissible u/s 32 of the Evidence Act inasmuch as they were made after the controversy as regards the right of nomination to the Bhandarikere Mutt had arisen. Section 32 does not, therefore, apply and the statements are not admissible u/s 33 since the previous suit was not between the same parties or their representatives-in-interest. Reliance was placed on *Patinharkuru Vallabhan Chattan Rajah Avergal v. Rama Varma* 24 Ind. 519, where the learned Judges have laid down that the term representative-in-interest" "is not confined to persons who derive title from another but comprises all persons whose rights are litigated bona fide by a person virtually on behalf of a class, though they themselves are not co-plaintiffs on the record." We are not concerned with the question how far this proposition was applicable to the facts of that case. But it is

clear that it would not apply to the present case even supposing that the proposition is sound, upon which I express no opinion of net there the Pariyaya Swami those of his nominee, the 1st defendant, were in question in the previous suit. To say that, because the dwandwa right claimed in this suit was also in litigation in the previous suit that alone would of the witnesses in that suit admissible u/s 33, is to ignore the proviso to the section requiring that the proceeding must have been between the same parties or their representatives in interest in addition to the condition that the questions in issue should have been substantially the same in the first as well as in the second proceeding Exhibit Y is however, strictly speaking, admissible in evidence. It is a statement made by a person who deposed in the previous suit and whose deposition is marked as Exhibit RR. That man, however, was interested in supporting the claim of the 1st plaintiff and the date of Exhibit Y shows that the statement was made not very established by one and the same person and about the same time and are so interconnected that the Swami of one of them, by becoming the Pariyaya Swami, exercises certain permanent authority over the rest. It is also to be borne in mind that the rule of dwandawa is apparently a convenient mode of conducting the business of these mutts in cases of emergency, for instance, where the Swami dies without appointing his successor as is likely sometimes to happen, or the conduct of the Swami of one mutt of a particular sect requires investigation as happened in 1879. It is also the case of both the parties that the mutts were originally one; and it was only in 1795, the date of Exhibit DD, that the division so far as certain jewels and brass and other vessels are concerned was completed. It is, therefore, contended by the learned Vakil for the appellant that the admitted instance of an appointment by the Bhandarikere Swami to the Bhimanakattai Mutt, in the absence of any explanation to the contrary, is to be attributed to dwandwa relationship of these two mutts. But apart from any other evidence, the statements in Exhibit LL show the consciousness of persons interested in those institutions was that such connection existed. It is, on the other hand, argued by the learned Advocate General for the respondent that a single instance should not be accepted as sufficient proof of the dwandwa right, which must be based on the usage of the particular institution in question and is not a matter to be inferred from the usage of other, though similar, institutions. However reasonable the dwandwa right may be, it is not a general rule of law relating to mutts and must, therefore, be made out in each particular case by proof of custom. In the absence of such proof it is for the Court or the Sovereign to make appointment. Ordinarily no doubt, the Court requires proof of at least more than one instance in which the alleged customary right has been exercised; but there is no hard and fast rule to that effect. The usage or custom set up in this case is not in antagonism to or in variance of any general rule of Hindu Law. In fact there is no general rule of law to be found on the point. The custom set up on the other hand, if proved, would supply a rule for the proper management of these two mutts in certain contingencies, which though infrequent are likely to occur at times. In such a case, the Court would not insist upon such strict proof as when a custom or usage is set up in derogation of the general law. It is not

possible to say how many vacancies did actually happen since these two mutts became separated, owing to the last Swami having failed to nominate his successor in the ordinary way; but that more than one instance did occur in the course of several centuries during which these mutts have been in existence may well be presumed. In these circumstances the belief prevalent among persons who were likely to know that these two were Dwandwa Mutts, may not unreasonably be held to be founded on the actual practice of the institutions concerned. This inference receives corroboration from the fact that no other mode of filling such vacancies has been suggested, such as selection by a number of disciples, a procedure prevailing in mutts belonging to other denominations. No doubt, the Pariyaya Swami has put forward a claim in his own right but that claim, as I will show, is unfounded. I think the evidence of the witnesses for the plaintiffs who speak to the existence of the dwandwa right, though if it stood alone, would be of very little value, finds strong corroboration from the instance that has been proved, from the statement in Exhibit Y, from the fact that there has been no other provision to meet such contingencies and from the fact of a similar practice obtaining in the eight Udipi Mutts. I would, therefore, hold that the Bhimanakattai and Bhandarikere Mutts are Dwandwa Mutts.

9. The next question for decision is whether the 2nd plaintiff was validly appointed Swami of the Bhandarikere Mutt by the 1st plaintiff. The contention on behalf of the appellants is that what is required by the law and usage of the Madhava Mutts is that the person to be appointed Swami of a mutt must be sanyasi, that is, a person who has renounced all worldly ties and has been initiated into the brotherhood by a person competent to make the nomination. It is also necessary that the sanyasi to be appointed must have received initiation in the sanya-sam when he was a bala brahmachari, that is, a bachelor below the age of 16. The 2nd plaintiff was, as has been stated, ordained sanyasi in 1898, with a view to appointment to the Bhandarikere Mutt at a time when the Swami of that mutt was still alive, though in a lunatic condition. The 2nd plaintiff then satisfied the condition of bala brahmachari. His appointment, however, to the Bhandarikere Mutt was found to be invalid, as, in the opinion of this Court, no vacancy arose in the office by reason of the lunacy of Vidyanidhi. After the High Court so decided, the 1st plaintiff re-appointed the 2nd plaintiff in 1905 when Vidyanidhi died. Admittedly there could be no further initiation of the 2nd plaintiff into the sanyasam as it had already taken place, and what was done in 1905 was merely a secular act of appointment as evidenced by Exhibit UU. The contention of the respondent, on the other hand, is, that according to the usage of the Madhava Mutts the person to be appointed must be bala brahmachari at the time of the appointment and the ceremony of conferring Asram or initiation into the sanyasam must be performed at the time of the appointment. The theory is that the Swami appointed becomes spiritually affiliated to the mutt to which he is appointed or rather to the previous gurus of that mutt. It is by right of this affiliation, which is analogous to that of an adoption in an ordinary Hindu family,

that he succeeds to the samasthanam and the properties of the mutt. If the head of a mutt nominates a successor in his own lifetime, the nominee becomes affiliated at once to the mutt and becomes a disciple of the Swami who nominated him, though he does not succeed to the Headship until after the Swami's death. Whatever may be the juristic strength of the theory of affiliation, there can be no doubt upon the evidence that a person to be appointed in a vacancy in the absence of any person ordained by the last Swami in his lifetime must be bala brahmachari at the time, and the ceremony of giving the Asram must be performed with a view to appointing to the vacant Swamiship. That is the view held by the Subordinate Judge which I have no hesitation in confirming. It is borne out by statements elicited from the witnesses of the plaintiffs themselves, The 1st plaintiff himself says in cross-examination: "In the mutt which has dwandwa right, if the Swami died, the Asrama and power are given at one and the same time. If he is alive Asrama is given once and afterwards power is given," though no doubt he attempts to modify that position in re-examination. Plaintiffs' 4th witness says: "In the Udipi Ashta Mutts as well as in the Bhimanakattai and Bhandarikere Mutts only brahmacharis could be appointed as successors to the guru and not those who have become sanyasis already." The plaintiffs have examined the 2nd defendant as their 1st witness and he explains the nature of the ceremony of ordination which consists in offering the phala mantraksheta (cocoanut and coloured rice) to him and enjoining him as the Head of the mutts to look after the Achara Vichara of its disciples, to perform the puja of the mutt and to do all things necessary for the welfare of the mutt. It is not disputed that this description is correct. It shows that the ordination has to be made with reference to a particular mutt. It is on the completion of this ceremony which takes three days that the nominated person becomes invested with the rights and duties of the Swami of the mutt to which he has been ordained. The Swami of each of these Madhava Mutts is a person who had been ordained in this way. When a Swami of a mutt himself nominates his own successor, he initiates him into sanyasam while he is a bala brahmachari but the other ceremony of ordination is gone through when the disciple actually assumes office on the death of his guru. In these Madhava Mutts there is only one disciple, that is, the person who has been nominated as successor and it appears from the evidence that it is not the practice for the Swamis to have sanyasis as disciples without having in view their appointment in succession to themselves in their own mutts. If the Swami of the Bhimanakattai Mutt was entitled, as is the case of the appellants, to nominate a successor for the Swamiship of the Bhandarikere Mutt, before the office became vacant, it would follow that there would be two authorities to regulate the succession to the latter mutt at one and the same time, namely, the Swami of the Bhimanakattai Mutt and the Swami of the Bhandarikere Mutt; for ex-consensus the Swami of the Bhandarikere Mutt has the right to nominate his own successor. This is prima facie an untenable position; unless it be said that such a right exists in the Swami of the Bhimanakattai Mutt, when the Swami of the Bhandarikere Mutt has become incapacitated by reason of lunacy, the exact case in question, or by such like

cause. There is no such case put forward and there is nothing in the evidence to support it. The other result of giving effect to the appellants' contention would be to hold that any sanyasi whom the Swami of Bhimanakattai Mutt chooses to initiate into sanyasam might be appointed by him to the Bhandarikere Mutt any time the vacancy may occur. That is not only opposed to the opinion of the general body of witnesses examined in the case but to the actual practice of the eight Udipi Mutts. It may be difficult to say what exactly the spiritual loss would be in the case of appointments by virtue of dwandwa right, if the initiation into the sanyasam and the ceremony of ordination to the mutt were not performed at the same time. But these are matters of usage founded on more or less esoteric doctrines and the only safe guide for the Courts to go upon is to have regard to the practice prevailing in a particular institution or class of institutions. I agree with the Subordinate Judge that the 2nd appellant's appointment to the Bhandarikere Mutt is invalid.

10. The claim of the Pariyaya Swami can be briefly disposed of. It is founded on his supposed direct spiritual succession to Madhava Chari, who it is said succeeded to the Samasthanam of Achuta Prekshaya Chariya and ordained Satyatirtha as his successor. The appellants claim that one Purushotham succeeded Achuta Prekshaya Chariya and not Madhava Chariar, who although he was also one of Achuta Prekshaya's disciples did not concern himself with the management of the secular affairs of a mutt. As the Subordinate Judge points out, it is not possible to determine upon the available materials who succeeded Achuta Prekshaya, nor is it clear why the head of one of eight Udipi Mutts founded by Madhava Chariar should be entitled to nominate to the original Samasthanam of the preceptor. He also observes with great force that this claim of the Pariyaya Swami is quite a new idea and was not conceived until long after the institution of the suit of 1889. I hold that the claim of the 2nd defendant, the Pariyaya Swami has not been made out.

11. In the result the appeal succeeds in part. There should be a decree declaring that the Bhimanakattai and the Bhandarikere Mutts are Dwandwa Mutts and the 1st plaintiff as Swami for the time being of the former is entitled to appoint a proper person as Swami to the latter mutt in the present vacancy and that the 2nd defendant, the present Pariyaya Swami, has no such right. To this extent the decree of the Subordinate Judge will be modified. The respondents will pay the 1st plaintiff half the costs incurred by him both in this and in the lower Court. In other respects let each party bear his own costs.

Phillips, J.

12. First plaintiff (1st appellant) is the Swami of Bhimanakattai Mutt and the suit relates to the office of Swami of Bhandarikere Mutt. The late Swami of Bhandarikere became a lunatic in 1896, and the successor appointed by him died a minor in 1898 without nominating a successor. 1st plaintiff then appointed 2nd plaintiff as Swami, and the latter sued to recover possession in original Suit No. 59 of 1899 (South Canara), but his suit was dismissed on the ground that the

appointment was not valid as being made during the lunatic Swami's lifetime [Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami 1 M.s 235 but 1st plaintiff's right to make the appointment was left undecided. This suit was not disposed of until January 1904. The lunatic died in November 1901, and 2nd defendant, in assertion of his rights as Pariyaya Swami of the eight Udipi Mutts, appointed 1st defendant Swami of Bhandarikere Mutt. In 1905 1st plaintiff again nominated 2nd plaintiff as Swami, and this suit is brought against defendants Nos. 1 and 2 for recovery of the mutt and for a declaration of 1st plaintiff's right to appoint a Swami of Bhandarikere Mutt on the death of the Swami of that mutt without appointment of a successor. The two questions for determination in this appeal are:

- (1) the right of 1st plaintiff to make the appointment and
- (2) the validity of 2nd plaintiff's appointment if such right exists.

13. The right of appointment is based on two grounds. One is that the Swami of Bhi-manakattai Mutt has the right of appointment to Bbandarikere Mutt, because the latter is a branch mutt of the former, which is the parent mutt, and the other is that the two mutts are what is called Dwandwa" Mutts, i.e., that the head of each mutt has the right of appointment to the other mutt when a vacancy occurs. The ordinary mode of succession in these two mutts is for the Swami of the mutt to appoint a successor before he dies, and such nominee succeeds on his death and a similar custom apparently exists in most if not all of the neighbouring Madhwa Mutts. It is only occasionally that a Swami fails to appoint a successor and consequently the occasions for the exercise of the alleged right of 1st plaintiff arise very rarely.

14. So far as the right is based on the fact that the Bhimanakattai Mutt is the parent mutt of Bhandarikere, I think the question can be dealt with briefly. This particular right is not specified in the plaint, nor was it alleged by 1st plaintiff in his evidence, but is based on the evidence of defence witnesses who asserted that Bhandarikere is the parent mutt of Bhimanakattai, and that the former has the right to appoint the Swami of the latter, and on the statement of witnesses that there is a right known as "Mula Kavalu" right, i.e., the right of a parent mutt to appoint the Swami of a branch mutt, and a few instances of such mutts are given. There is, however, no evidence to show that in all cases of parent and branch mutts does this right exist and consequently no inference as to such a custom can be drawn from its existence in certain specified parent and branch mutts. There is, no doubt, evidence of the converse of plaintiffs' proposition, but none at all of the proposition itself. It is, therefore, unnecessary to decide whether Bhimankattai or Bhandarikere is the older mutt, a question which has been discussed at great length by the Subordinate Judge, but about which there is considerable conflict of evidence. Even if Bhandarikere Mutt is an offshoot of Bhima-nakattai, it by no means follows that the latter has the power of appointment to the former, and in the absence of evidence to that effect plaintiffs' claim so far as it is based on this ground must be rejected.

15. We then have to consider the dwandwa right alleged. This is a right appertaining to two mutts called Dwandwa Mutts, according to which the Swami of one has the right to appoint a successor to the Swami of the other when that Swami dies without appointing his successor. It is the common case of both parties that Bhimanakattai and Bhandarikere Mutts were originally one mutt which existed as long ago as the 14th or 15th century or even earlier. Subsequently they became divided, and for two hundred years or more have existed as separate institutions. It is thus not disputed that the two mutts are connected with each other, but the question that is in dispute is whether they are Dwandwa Mutts. As pointed out above, the occasions for the exercise of the dwandwa rights can only be very rare and in the present case there is only one such occasion which is admitted on both sides, i.e., in 1821. On that occasion the Swami of Bhimanakattai Mutt died while absent on tour in the Bombay Presidency and his successor Raghupravira was appointed by the head of the Bhandarikere Mutt. This instance is opposed to the Mula Kavalu right which was urged in appeal, but might well be an instance of the exercise of the dwandwa right set up. The other evidence upon which plaintiffs mainly rely, apart from the oral evidence in the case, consists of the documents Exhibits EE, FF, GG, LL and Y. Exhibit EE is of the year 1776 and is a letter addressed to the Swami of Bhimanakattai by some persons who appear from the contents of the letter to be servants or dependants of that mutt, and in it there is a reference to "the Swami of Bhandarikere Mutt to whom you gave Ashrama," i.e., whom you ordained, Exhibit FF is a letter from some villagers of Halasige in the Bombay Presidency, where Swami Raghunatha Tirtha of Bhimanakattai died in 1821, reciting his death and forwarding to the manager of the mutt his dying instructions. In it is a reference to the Swami of "our Dwandwa Samastan Bhandarikere Mutt." Exhibit GG is an account book of Bhimanakattai Mutt containing an entry of the expenses incurred in the appointment of Raghunatha Tirtha's successor by the Swami of Bhandarikere. If these three documents are genuine they afford very strong evidence of the existence of the divandwa right, but they have been rejected as forgeries by the Subordinate Judge. They were produced in Original Suit No. 39 of 1899 along with other documents including Exhibits CC and DD, which are apparently genuine, by 1st plaintiff as a witness in that suit. Second plaintiff, who was plaintiff in that suit, was then under the protection of 1st plaintiff and the documents might have been produced at an earlier stage of the suit, but the comparatively late production is not a very serious argument against their genuineness, and in this suit 1st plaintiff has not been asked to explain the late production, as he should have been if defendants wished to lay stress on this point. There are, however, other suspicious circumstances; the appearance of Exhibits EE and ?? is not good, and the insertion of the phrase "Dwandwa" Mutt in the latter is somewhat uncalled for. Unless Exhibit VV is genuine no reliance can be placed on Exhibit GG, for it is of such a nature that any entry in it can be rubbed out and re-written without difficulty. The book itself is probably the original book kept in the mutt, but it would be difficult to rely on any particular entry in it without corroboration. A witness (plaintiff's witness No.

10) has been called to prove the signature of his grandfather in Exhibit ?? and has been very briefly cross-examined on the point, but his evidence is not very valuable. While, therefore, I am not prepared to hold definitely that these three documents are undoubted forgeries I think that there is a certain amount of suspicion attaching to them, especially to Exhibits FF and GGr, and it would be unsafe to base any finding on them alone, but I will consider Exhibit EE again later. Exhibit LL is a statement by one Anantakrishnachar, 1st plaintiff's uncle, made in 1880 and he says that Bhandarikere Mutt is dwandwa to Bhi-manakattai Mutt. In the document the name is given as Bhandardara, but that must be a mistake in the copy as it is not suggested that there is any mutt he called. Objection is taken now to the admissibility of Exhibit LL as it is a copy prepared in Mysore State and does not comply with the provisions of Section 78 (6) of the Evidence Act. This objection was not taken in the lower Court, where the defect could easily have been remedied by the party and cannot be allowed now. Exhibit Y is a petition presented in 1896 to the South Canara District Court by the nephew of the late lunatic Swami's father, in which he refers to Bhima-nakttai Mutt as the Dwandwa Mutt of Bandarikere Mutt. The statements in Exhibits LL and Y were both made before the present dispute as to dwandwa right arose, and are consequently of considerable weight. In addition to these documents we have the evidence of plaintiffs' witnesses Nos. II, 12, 13, 15, and 18 that the dwandwa right exists and also a document of 11th October 1898 (Exhibit HH) which is a letter sent by plaintiffs' witness No. 15 and others to the Bhimanakattai Swami asking him to appoint a successor to the minor Swami of Bandarikere who had just died. Although it may be said that the dispute about the dwandwa right had then arisen, Exhibit HH shows that the right was asserted at the very earliest opportunity. There are also depositions in the prior suit of 1899, but they are of no more value than the present oral evidence, as they were given after the dispute had arisen (Exhibits NN, OO, PP, RR, R, S).

16. First plaintiff bases his right on custom, and on an examination of the above evidence we find that (excluding Exhibit EE) only one instance of the exercise of the right has been proved, but we also have evidence that the existence of that right was present to the consciousness of persons who would be likely to know of it as is shown by Exhibits LL, HH, Y, and L. One solitary instance of the exercise of a right can hardly be held to prove a right arising out of custom, unless the evidence is such that an inference can be drawn that the custom was followed when other occasions for exercising the right had arisen. In the present case the custom alleged is not opposed to any law nor is there any evidence that the right of appointment, as to which the custom is alleged, was ever exercised in any way other than the one alleged to be customary. It is practically certain that there must be some method of filling up vacancies occurring in the office of head of the plaint mutt, when owing to the sudden death of the existing Swami or other such cause, the ordinary method of appointment by the incumbent during his lifetime cannot be followed. In different mutts different procedure is adopted : in some the Swami is elected by the disciples or Sishyas, in some the power of

appointment is vested in the Swami of the parent mutt, and in others that power vests in the Swami of a sister or Dwandwa Mutt. The first procedure is not suggested by either party, nor in this case is there any evidence that the second procedure has ever been followed. No doubt 2nd defendant alleges a power in himself as Pariyaya Swami of the eight mutts of Udipi, but there is no evidence to support his claim, except the oral evidence of himself and others very much interested in asserting the claim and some documents which are clearly not genuine, and the claim is a very improbable one, for it is admitted that he has not this power in respect of the eight mutts with which he is most intimately connected. In fact those eight mutts are divided into four groups of two mutts, each group having the dwandwa right inter se. These eight mutts are Madhwa Mutts said to have been founded by Madhwacharya, with whom Bhimanakattai and Bhandarikere Mutts are also connected. We have then the fact that there is no evidence worth the name that any custom other than the one alleged by plaintiffs has ever existed and that the existence of this latter custom is rendered probable by the fact that the similar mutts in the same neighbourhood follow the same custom. We have been referred to a number of cases containing observations as to the nature of the proof required to prove a custom, Rahimatbai v. Hirbai 3 B.s 34, Basava v. Lingangauda 19 B.s 428, Durga Charan Mahto v. Raghunath Mahto 20 Ind. Cas. 810, Lahar Puri v. Puran Nath 29 Ind. Cas. 724 and Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutly 1 M.s 235 and it is argued by the learned Advocate-General that numerous instances must be proved in order to establish a custom. This would be manifestly impossible in the present case, where the instances are only likely to occur once in fifty or hundred years or at any rate very rarely. It is, however, impossible to frame a definite rule which will cover all cases, for as in other cases, in which the exact amount of evidence necessary to prove a particular fact cannot be laid down with certainty, so in proving a custom it is impossible to say that a certain defined amount of evidence is requisite. In appreciating evidence each case must be dealt with by itself; and in appreciating evidence as to custom I do not think that any general rule applicable to all cases can be laid down other than that the custom must be proved by clear and cogent evidence. It would be unfair to demand exactly the same quantum of proof in a case where the custom alleged is not at variance with any law, as in a case where the custom is completely opposed to the existing law. In the present case we have the fact that upon the only admitted occasion which has arisen for the exercise of the alleged right it was exercised in the alleged customary manner. In addition to this we have Exhibit EE, a document which can be differentiated from Exhibits FF and GG- in that its language does not suggest a concoction, for the reference in it to the Bhandarikere Swami "to whom you (i.e., the Bhimanakattai Swami) gave Ashramam" hardly supports the plaintiffs' case of dwandwa right to such an extent as to justify the concoction of such a lengthy and circumstantial document, and, therefore, I think that Exhibit EE must be classed with Exhibits CC and DD as a genuine document. This being so, it is evidence of the alleged customary right being exercised on a second occasion 140 years ago. When a

right is exercised in a certain way upon the only two occasions on which it is known to have arisen during the last 150 years and these two occasions are separated by an interval of 45 years, there is strong evidence to support the theory that that particular method of exercising the right is the customary one. It is also impossible to ignore tradition in a case like this, and Exhibits LL, Y and also Exhibit L afford strong evidence of the existence of that tradition for if that tradition had not been handed down from generation to generation, there is no reason why the persons who made the above statements should have referred to the existence of the customary right. The very fact that 1st plaintiff asserted the right and took action in accordance with it by the appointment of 2nd plaintiff as soon as the occasion arose, is also strong evidence that the exercise was based upon the consciousness of an existing right. Otherwise there, was no reason why 1st plaintiff should have asserted such a right, the more especially as he asserted it prematurely, as was found by this Court in *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami* 27 M.s. 435.

17. It is in the highest degree probable that some one possessed the right of appointment to the plaint mutt in case of a vacancy occurring, and as there is no universal law relating to such a right, the right must be determined by past custom or usage. There is no evidence worth the name to support any custom other than that set up by plaintiffs, and consequently in these circumstances [would find that the evidence is sufficient to prove the right alleged, for the evidence as to the custom is such as will, in my opinion, raise a presumption that the same custom was observed on the previous occasions on which an opportunity for its observance occurred.

18. The next question for determination is whether 2nd plaintiff has been validly appointed. It is alleged by plaintiffs that the person to be appointed Swami must be a bala brahmachari, i.e., a bachelor below the age of sixteen years, and when he is appointed, he is ordained a sanyasi. It is not disputed that 2nd plaintiff possessed the necessary qualifications and underwent the necessary ceremonies when he was appointed in 1898, but that appointment was invalid. At the time of the second appointment in 1905, no ceremonies were performed, but a letter of appointment (Exhibit UU) was given by 1st plaintiff to 2nd plaintiff reciting what had taken place previously and adding that now Pattakanika had been given to the latter. It is contended by Mr. Rangachariar for appellants that there are two essential ingredients in the appointment of a new Swami, one secular and the other religious. The religious portion consists of ordination as sanyasi and more particularly as sanyasi dedicated to the particular mutt of which he is to be Swami, and the secular portion is the mere nomination to the office. It is contended in this case that the religious portion was duly carried out in 1898 and the secular portion in 1905. The learned Advocate-General, however, goes so far as to contend that the appointment in 1898 being invalid, all the ceremonies then performed must be deemed to be invalid, and that consequently 2nd plaintiff's initiation as sanyasi is also invalid. Reliance is placed on the judgment in *Parvatibayamma v. Ramakrishna Rau* 18 M.s. 145, where Justice Muthusami

Aiyar at page 152 observes that when the upanaya-nam of a boy was performed by persons not entitled to perform the whole ceremony it is inefficacious and invalid. It is, however, admitted that in this case 1st plaintiff was qualified to initiate 2nd plaintiff as a sanyasi, although in 1898 he had not power to appoint him to the plaint mutt, and 2nd defendant as P.W. No. 1 says that the ceremonies for ordination of a sanyasi are in the main the same as for ordination of a Swami of the plaint mutt. It would, therefore, be difficult to hold that the ceremony of 1898 was wholly invalid and that 2nd plaintiff is not a sanyasi, especially when defendants also object to his appointment on the ground that in him a sanyasi and not a bala brahmachari has been appointed. When one considers that in ordinary cases of appointment the ordination ceremony may take place years before the appointment actually takes effect on the death of the Swami who ordained, it is difficult for one not versed in the spirit of the Hindu religion to understand in what respect 2nd plaintiff's religious qualifications fall short of those required for a Swami of the plaint mutt, but it is quite possible that in the eyes of his fellows there may be a cloud on his title sufficient to disqualify him for the office of Swami, and in this connection the Court must be guided by the evidence. P.W. No. 3, Swami of Kaniyoor Mutt, says that he got his right in the Kaniyoor Mutt by virtue of being given "Ashramam" and not on account of Pattakanikas being given. The giving of Ashramam is the ceremony necessary for the ordination of a sanyasi. P.W. No. 4, another of the Swamis of the eight mutts, says that only sanyasis must perform the worship in the plaint mutt and that when a sanyasi is ordained he is given a name peculiar to the mutt in which he is ordained. P.W. No. 11 says: It is when the candidate is a balyavastha brahmachari that he is appointed Swami of Bhimanakattai Mutt," and P.W. No. 12, "bala brahmachari should be appointed to these mutts. He must be given sanyasa then." P.W. No. 13 (1st plaintiff) gives much the same evidence, i.e., persons who become sanyasis... should be balyavastha brahmacharis," but he also says sanyasis after taking asramam give dandodaha to their gurus. They pronounce the names of the genealogy of their gurus... persons taking asramam take their names according to the pedigree of the guru of their mutt.... Vidyantidhi being alive Vidyapurna (i.e., 2nd plaintiff) has not been giving dandodaka having taken the name of Vidyasamudra." Again 1st plaintiff says : in the mutt which has dwandwa right if the Swami died the asrama and power are given at one and the same time. If he is alive asrama is given once and afterwards power is given." P.W. No. 18 says: "The appointment to the mutt must have been made on the day when Mantropadesa was done. All this evidence shows clearly that the witnesses are conscious that the appointment of a Swami must be contemporaneous with his ordination as sanyasi and that such ordination must be made with reference to his nomination as successor to the Swami of the particular mutt, and not as a mere unattached sanyasi. If 1st plaintiff had held the power of appointment in 1898 nothing could have been said against 2nd plaintiff's appointment, but as that appointment was invalid the effect of it was either nil, as contended by the learned Advocate-General, or else it had merely the effect of making 2nd plaintiff sanyasi. If the former be the case

no fresh ordination has been held and, therefore, plaintiff has not been properly appointed: if the latter, plaintiff being already a sanyasi is not eligible for appointment. I, therefore, agree that 2nd plaintiff's appointment is invalid.

19. Objection has been taken to the admissibility of certain depositions in evidence, (1) statements of deceased persons as to facts in issue, (2) depositions of deceased witnesses in the prior litigation of 1899. This objection as regards the second class of documents, which have been admitted, u/s 33, Evidence Act, must prevail, as 2nd defendant was not a party to the prior case and cannot be deemed to be representative-in-interest of any of the parties there and I have not relied upon any of them in coming to a conclusion. The other objection is based on *Patel Vandravan Jekisan v. Patel Manilal Chunilal* 15 B. 565 and it is contended that facts in issue" are not relevant facts" within the meaning of Section 32, Evidence Act, and that any statements as to facts in issue are inadmissible in evidence u/s 32. There is one sentence in Sargent, C.J.'s judgment which supports this proposition, i.e., "But that section (i.e., Section 32) is not applicable to a case like the present when the evidence was required to prove a fact in issue and not merely a relevant fact: and the above statement was, therefore, inadmissible to prove the custom as alleged." The statement in that case was one signed by over hundred persons, and it was sought to be proved in evidence in order to avoid the expense and difficulty of procuring the attendance of the persons who made it, and consequently there were good grounds for refusing to receive such evidence. The question of whether facts in issue" are not relevant facts within the meaning of Section 32 was not discussed in the judgment, and consequently I am not prepared to say that this question was meant to be decided by the sentence above quoted. If that was the intention I must venture, with all respect, to differ. This ruling has been referred to in *Tottempudi Venkataratnam v. Tottempudi Sehamma* 27 Msa. 228, in which case a District Judge had rejected a statement made in a Will on the strength of the ruling in *Patel Vandravan Jekisan v. Patel Manilal Chunilal* 15 B.xs 565 on the ground that facts in issue were not relevant facts within the meaning of Section 32. This Court in appeal did not discuss this question but remarked "the statement in the Will that the property was self-acquired is not evidence of the fact that it was self-acquired." Undoubtedly the statement in the Will could be of very little value as evidence, and possibly what was meant by is not evidence" was is not evidence upon which a Court could act," but in the absence of any express finding that such a statement is inadmissible in evidence because it refers to a fact in issue, I do not think it can be said that this question was meant to be decided. If a fact is in issue it is undoubtedly a fact relevant to the case or proceeding. Facts must be eit