Chattan Rajah Avergal Vs Raman Varma alias Kolathoor 5th Rajah Moothayil, VallabhauChettam Koil Kuruvikul alias Mankata Kovilagath Vallabhan Chattan Kovil Kuruvikul and Others

Court: Madras High Court

Date of Decision: April 9, 1914

Acts Referred: Evidence Act, 1872 â€" Section 32(5)

Citation: 24 Ind. Cas. 519

Hon'ble Judges: Sheshagiri Aiyar, J; Ayling, J

Bench: Division Bench

Judgement

Sheshagiri Aiyar, J.
In the Walluvanad Swaroopam there are nine stanoms. The first five of them are known as 3 M. 384 : 5 Ind. Jur. 542

: 8 L.A. 149 : 4 Sar. P.C.J. 259 the Walluvanad Vallabhan Valiya Raja Stanom 11 M. 106 Vellalpat Raja 16. Ind. Cas. 839 : 36 M. 570 : 12

M.L.T. 188 : 23 M.L.J. 269 : (1912) M.W.N. 912 Thachalpat Raja 16 Ind. Cas. 365 : 40 Ca. 173 : 16 Cri.L.J. 202 : 17 C.W.N. 137

Etathrapat Raja and 29 M. 390 (F.B.) : M.L.T. 183 : 16 M.L.J. 307 the Kolatlioor Raja Stanam. There are two other stanoms known as the

Patinharakara Raja and the Kizhakkakara. In addition to these seven there are two female stanoms known as the Kalathoor Tliamburatti Stanom

and the Katamien Moothayil Tbamburatti Stanom. It is admitted that, with regard to the first five stanoms mentioned above, the senior in age

belonging to the four Kovilagams attached to the Swaroopam ordinarily succeeds. These four Kovilagams are the Mangada Kovilagam, the Aripra

Kovilagam, the Katanna Manna Kovilagam and the Ayiranazhi Kovilagam. The mode of succession is regulated in this way : On the occurrence of

a vacancy in any one of the stanoms the next in rank fills that place : when the fifth stanom is vacant the senior in age from one of the four

Kovilagams succeeds to it. As regards the Kizhakkekara and the Patinharakara stanoms, the Subordinate Judge has gone into the history of their

origin. I do not consider it necessary for the purpose of deciding this case to ascertain whether they were off-shoots of the Ayiranazhi Kovilagam,

whether the appointment to these two stanoms is by the last holder of the stanoms or whether it is by the Kolatlioor Raja or by the senior of all the

stanom-holders, the Valia Raja : nor is it necessary to consider whether these stanoms can be held only by members of the Ayiranali Kovilagam. I,

therefore, do not propose to follow the Subordinate Judge into a consideration of these questions. There is no question in this case regarding the

two female stanoms and it is not necessary to deal with them, at all.

2. In 1895 the- first defendant in this suit was holding the Patinharakara Raja. On a vacancy having occurred in the fifth stanom he succeeded to it.

Since 1895 on the occurrence of vacancies in the other stanoms he had moved up, with the result that at the time of the suit he was holding the

third stanom. Disputes arose in consequence of the first defendant having occupied the fifth stanom. As a Malikana allowance was attached to it,

under the direction of the Revenue Authorities the Tahsildar took statements in 1896 from the members of the swarupam in regard to the

succession. These will he referred to later on. In 1898 the present 3rd defendant claiming the right to exclude the first defendant on the ground that

he was holding the Patinharakara stanom brought Original Suit No. 14 of 1898 (Exhibit XXV) for a declaration of his right. Mr. Venkataramana

Pai, the then Subordinate Judge, held that the 1st defendant was rightly in possession and that the third defendant was not entitled to oust him. In

appeal (Exhibit XXVI) the District Judge concurred in this view. In second appeal (Exhibit VIII) the High Court called for a finding as to whether

the first defendant was in possession of the properties attached to the office and on the return of that finding held that a suit for a bare declaration

without seeking further relief will not lie. The second appeal was dismissed upon that sole ground. The present plaintiff, alleging that this right as

senior in the four Kovilagams to succeed to the fifth stanom accrued to him in 1903, brought this suit for a declaration that he is so entitled and that

the first defendant had no right to hold any of the five stanom The first defendant pleaded that the fact of his holding the Patinharakara stanom was

not a disqualification for his succeeding to the fifth stanom. He further conteinded that the suit was barred by limitation. The Subordinate Judge

decided that the first defendant had no right to any of the live stanoms. He also held that the plaintiff''s suit was not barred by limitation and gave a

decree to the plaintiff as prayed for. The first defendant has presented this appeal.

3. Before dealing with the questions arising in this ease it is necessary to understand the nature of the office of a stani and its legal attributes. The

late Mr. Justice Sundara Aiyar in an article on. Topics of Malabar Law stanoms"" contributed to the Madras Law Journal (vide 13 M.L.J. 161)

discusses this question at some length. He says in page 163 :

4. Whatever may be the origin of stanom in any particular case, whether it was the result of public law, or owed its origin to a grant by the Ruling

Chief to the holder of an office, or was merely the result of an arrangement amongst the members of a tarwad for the maintenance of its social

prestige and influence, the first essential of a stanom is, that the property vests, not in the family of the holder, but in himself individually and

descends to the person who succeeds to his dignity. Another essential feature is that the stani"s ownership and interest in the property of his tarwad

ceases on his accession to the stanom. His relationship and consanguinity with the family do not cease. For all purposes of religious, funeral, and

other ceremonies, the stani continues to belong to the family."" Then the learned writer points out that the accession to the staniship is not analogous

to adoption under the Hindu Law. He says further that the stani and his tarwad will have the same rights of succession to the properties of each

other as if the severance from the family had been the result, not of his accession to the stanom, but of a voluntary division between him and the

rest of the family"" and that the succsssion to a stanom is generally determined by priority of ago"". As regards the nature of the estate taken by a

stani he observes : The estate taken by a stani in the stanom property is a limited one. It is not a mere life-estate, for the stani is not only entitled

absolutely to the income accruing during his life, but he has also the power of creating a charge upon the estate or of alienating it where such charge

or Alienation is necessary or beneficial to the testate. His position may best be likened to that of a Hindu widow with respect to property inherited

by her from her husband."" The decision of the Judicial Committee of the Privy Council in Venkateswara Iyan v-Shekhari Varma 3 M.a 384 (P.C.)

: 5 Ind. Jur. 542 : 8 I.A. 149 : 4 Sar. P.C.J. 259., is in full accord with the above statement of the law. Their Lordships of the Judicial Committee

say in page 386 : It appears that in the families of the Malabar Rajas it is customary to have a number of palaces, to each of which there is attached

an establishment with lands for maintaining it, called by the name of a stanom. The Palghat family have no less than nine stanoms. Bach stanom has

a Raja as its head or stanomdar. The stanomdar represents the corpus of his stanom much in the same way as a Hindu widow represents the

estates which have devolved upon her, and he may alienate the property for the benefit or proper expenses of the stanom."" The same view has

been held by Muthusami Aiyar and Parker, JJ., in Mahomed v. Krishnan 11 M. 106. In order to be precise it must be pointed out that the stanom

is held either for the life of the stani or of those in the grade above him. The Walluvanad Swaroopam, it is conceded, is not different in regard to the

appointment of those stands from the Palghat Raja stanoms referred to by their Lordships of the Privy Council in Venkateswara Iyan v. Shekari

Varma 3 M. 384 (P.C.) : 5 Ind. Jur. 542 : 8 I.A. 149 : 4 Sar. P.C.J. 259.

5. I have referred to this question at some length, because the various points arising for decision depend upon a proper understanding of the nature

of the estate which a stani possesses.

6. The chief contentions raised in appeal are that the frame of the suit is not proper, inasmuch as there is misjoinder both of parties and of causes of

action : secondly that the suit is barred by limitation, and thirdly that the Subordinate Judge is wrong in holding that the first defendant was not

entitled to succeed to the fifth stanom in 1895.

7. As regards the first point Mr. Rosario contends that all that the plaintiff can lay claim to is to succeed to the fifth stanom and he is not justified in

tacking on to this claim a declaration that the first defendant was not rightly in office in 1895. I. cannot agree with this contention. The principal

relief claimed is that the plaintiff owing to his seniority in age has become entitled to succeed to the fifth stanom in 1903 : but it is necessary for him

in order that he may get into that stanom to prove that the first defendant who is holding the third stanom should vacate it. The relief against the first

defendant is only ancillary to the main relief which the plaintiff seeks. I hold the suit was rightly framed.

8. The next question argued by Mr. Rosario relates to the plea of limitation raised in the 4th issue. The Subordinate Judge has mixed up questions

relating to limitation and prescription in deciding this issue. There are two points to be considered : the first is whether the plaintiff''s suit is barred

by limitation and the second whether the first defendant has acquired a prescriptive right to the office. On the first point I am clearly of opinion that

the lower Court is right. The right of the plaintiff to succeed to the 5th stanom accrued only in 1903. It is, true that he might have sued in 1895 for a

declaration that the first defendant was not entitled to succeed to the fifth stanom : but he was not bound to bring such a suit. I have already pointed

out that the position of a stani is analogous to that of a Hindu widow : and it is settled law that a reversioner of the next life-estate-owner

succeeding after the death of the widow is not bound to bring a suit during her lifetime for a declaration that the acts of the widow are not valid

beyond her life-time. In the case of reversioners under the Hindu Law [See Gazzala Veerayya v. Gazzala Ganaamma 16 Intl. Cas. 839 : 36 M.

570 : 12 M.L.T. 188 : 23 M.L.J. 269 : (1912) M.W.N. 912. and Prosonna Kumar Mukherjee v. Srikant Rant 16 Ind. Cas. 365 : 40 C. 173 : 16

Cri.L. J 202 : 17 C.W.N. 137.] it has been held that they do not claim through each other. The same principle holds good in the case of stanis.

Each has an independent right to the office by being the senior in age when a vacancy occurs. Mr. Rosario referred to an observation in Chiruvolu

Punnamma v. Chiruvolu Perrazu 29 M. 390 : 1 M.L.T. 183 : 16 M.L.J. 307. wherein it is said that succeeding Mahants and Malabar stanis have

been treated as persons claiming through or under their predecessors, though in strictness they do not so claim. I do not think that this observation

can be said to be an authority for the position that stanis claim through each other. I, therefore, hold that the suit is not barred by limitation.

9. The next contention is that the first defendant from the time that he succeeded to the stanom in 1895 prescribed for a right to hold a stanom and

that the gradations through which he passed during the thirteen years preceding the suit gave him a title by prescription to the office of a stani. It is

established that the first defendant did not continue in any of the stanoms for more than six years. : It is not the case, therefore, of a right by

prescription having been acquired with respect to : any one particular stanom, although in the view that 1 have taken of this question the fact of any

such acquisition will not stand in plaintiff''s way of succeeding to the fifth stanom. Reliance : is placed upon Annasami Pillai v. Rama--krishna

Mudaliar 24 M. 219 : 11 M.L.J. 1. for the position, that what the first defendent prescribed for is a right to a stanom independent of the fact that it

related to the fifth,, fourth or third stanom, and as more, than twelve years have elapsed since he so prescribed, his right had become perfected.

The first answer to this contention is that before prescription can give a valid, title, it must be acquired against a specific individul. Prescription

acquired against A cannot be tacked on to prescription acquired against B and G and the prescriber cannot say that as he has been holding on

against A, B and G in succession for over : the statutory period he has acquired a title thereby. The principal requisite of prescription is that the

person prescribing should endeavour to get the rights of an individual in whom the property inheres. : Another answer is that a stanom is not, like a

trusteeship. A trusteeship involves rights and obligations apart from the possession of property, whereas a stanom is dependant upon the

possession of property alone. It has been held in Mundancheri Koman Nair v. Mundancheri Purayil Teyyan 10 Ind. Cas. 110 : (1911.) M.W.N.

353. that there can be no declaration of a right to a stanom independent of rights to property : it follows from this that a right in a stanom, cannot be

acquired divorced from the rights to the property appurtenant to that stanom. Annasami Pillai v. Ramakrishna Mudaliar 24 M. 219 : 11 M.L.J. 1.

has, therefore, no application. On the other hand Ram Kali v. Kedar Nath 14 A. 156 : A.W.N. (1892) 22. is in point. There it was held that when

a third party had acquired a prescriptive right against the widow in possession, the next life-estate-bolder, the daughter, was not affected by the

acquisition of such right and can sue to recover possession of the property. This has been followed in Amrit Dhar v. Bindesri Prasad 23. A. 448 :

A.W.N. (1901) 133., the principle of these decisions being that, until the right to sue accrues either to a succeeding life-estate-holder or to the

reversioner, the prescriptive title will only affect the rights of the party in possession. Following that analogy, I must hold that any prescription

acquired against a stani entitled to possession will only take away his rights to be in enjoyment of the property and will not bar the right of the next

person to claim possession of the property when the succession opens to him. For these reasons I. hold that the suit is neither barred by limitation

nor did the first defendant acquire a title to continue in possession by prescriptive right.

10. On the merits the principal question is whether the first defendant who was a Patinharakara Raja in 1895 rightly became the fifth stani in that

year. This question has been discussed before us from four points of view, namely, that the Patinparakara Raja is a stanidar, that the first defendant

did not relinquish that stanom when he attained to the fifth stanom and consequently he lost his right to the latter, that Ariyittu Vazcha is performed,

to the "Patinharakara Raja and that disables him from succeeding to any of the five stanoms and that there are instances in which the holder of the

Patinharakara stanom has been superseded by his juniors in age indicating thereby that the holding of that stanom is a bar to succeeding to any of

the five stanoms.

11. As regards the question whether the Patinharakara Raja is a stanom, I have come to the conclusion that it is. Exhibit XXIV"" is a letter written in

the year 1847 by the then Valiza Raja to the Revenue Officials. In that the writer says : "" In this Swaroopam there are nine Kooruvazhchas

(stanoms)"" made up of the five principal stanoms and the four other stanoms, namely the Kizhekkakara, the Patinharakara, the Kolathur

Thamburatti and the Katanna Mooththen Thamburatti stanoms. This was long before disputes arose and this document to my mind is conclusive on

the question whether the Patinharakara is a stanom of the same nature as the other five stanoms. Exhibit XIII, a letter written by the Patinharakara

Raja in the year 1859 to the Collector, confirms this view, and it is further supported by Exhibits A, 13 and G. Mr. Rosario relies upon Exhibit F

which contains a written statement filed by the then Patinharakara Raja, in a suit of 1873 in which he speaks of the Kizhekkakara Kovilagam

having lapsed to the Patinharakara Raja, and argues that this right of survivorship is inconsistent with Patinharakara being a stanom. I am not

prepared to accept this contention. Exhibit F makes no reference to the other five stanoms and it is not clear that succession to property on the

extinction of heirs leads necessarily to the conclusion that the person succeeding is not a stanom-holder.

12. The next point to be considered is whether a man can hold two stanoms at the same time. It is conceded that it is not the general practice : but

the evidence on this point is to my mind very inconclusive. The. Subordinate Judge refers to a large number of documents as bearing upon this

question. They are Exhibits G, H, J, N, P, Q, R, AA, and FF. As regards Exhibits H, J, P, Q, R and FF, they only show that a man who

succeeded to one of the stanoms did not concern himself with the management of the affairs of the Kovilagam from which he came. It does not

follow from this that one person cannot hold two stanoms.

13. Mr. Ramachandrier has conceded that, if all the members of the Kovilagam from which the stani came, are dead, there is nothing to prevent

the stani from selling possession of the property of the Kovilagam. Ordinarily'' no doubt by virtue of the stani being provided for from the income of

the properties attached to his stanom, the other members of the Kovilagam will be allowed to enjoy the properties of the Kovilagam to his

exclusion. It does not follow therefrom that the dani has lost all his rights in the Kovilagam. Exhibit G is a written statement by the present first

defendant while he was holding the Patinhara-kara Raja stanom in 1887. In paragraph 2 he says : ""This defendant, having attained Patinharakara

Raja''s stanom, has given up all rights to and management of the Kovilagam properties."" He does not say that he had lost his rights to the properties

by virtue of his succeeding to the Patinharakara stanom. Exhibit N is a deposition by the mother of the first defendant in the year 1886 in which she

says of the then Patinharakara Raja that "" he resides permanently in Patinharakara. Ho has been appointed to that Kovilagam from here. Then, he

has no right whatever to the property of this Kovilagam."" This does not advance the case further. Exhibit AA referred to by the Subordinate Judge

makes no reference to the Patinharakara Raja giving up his rights in the property of his Kovilagam. The inference to be drawn from these

documents may be thus stated : ordinarily a man holding the Patinharakara stanom will not concern himself with the affairs of the Kovilagam from

which he succeeded to the stanom. True there are no instances, excepting in the case of the first defendant, of a man holding one of the five

stanoms also holding the Patinharakaras stanom. It may be the first defendant is holding wrongfully the Patinharakara stanom, but I cannot say it is

proved that he is disqualified from holding any of the five stanoms from the fact of his still retaining the Patinharakara stanom. Mr. Ramachandrier

contends that before a man can attain to one of the five stanorns he must be a Valiya Thamburan of one of the Kovilagams, and that as when a

man becomes the Patinharakara Raja he can no longer be the Valiya Thamburan of the Kovilagam from which he came, he cannot succeed to one

of the five stanoms. The term Valiya Thamburan is applied to the senior male in a Kovilagam. It is not an office or a dignity and 1 see no sufficient

evidence for the position that a man should be a Valiya Thamburan in his Kovilagam before he can claim to hold a stanom. Supposing all the three

or four stanoms become vacant at the same time, the three or four men senior in age will naturally succeed to these stanoms. All of them cannot be

Valiya Thamburans. It is curious, as pointed out by Mr. Rosario, that in Exhibit PPP the only stanom-holder who is mentioned as being disqualified

to attain to any other stanom, is the holder of the Onnu Kura Ayiram stanorn. No reference is made in that document to the disqualification of the

Patinharakara Raja to hold the other stanoms. For all these reasons I hold that the contention must fail.

14. T"he next question for decision is whether the Patinharakara Raja is entitled to the Ariyuthu Vazcha and, if so, whether that is a bar to his

claiming one of the five stanoms. Exhibit XXIV leaves no room for doubt that the Patinharakara Raja is entitled to Ariyuthu Vazcha. It is said to be

the ceremony of coronation : upon the materials before me I must hold that it is only in special cases that this Ariyuthu Vazebais performed. The

Valiya Raja has this Ariyuthu Vazcha and the Thamburatti of Kolathoor enjoys that privilege. The question is what legal effect should be attached

to the performance of the Ariyuthu Vazcha. The witnesses examined in this ease on behalf of the plaintiff say that there is no Ariyuthu Vazcha in the

case of the second, third, fourth and fifth stanoms, because those stanom-holders have something higher to look to, and the learned Vakil for the

respondent asked us to draw the inference therefrom that, where Ariyuthu Vazcha is performed for a particular stani, that man can have no other

stanoms to aspire to. I cannot accept this argument. The converse of what a witness states is not to be taken to be his deposition. Moreover, if, as

the learned Vakil contends, the Ariyuthu Vazcha is conclusive upon the disability of the first defendant to succeed to any of the five stanoms, it

should have been specially pleaded in this case. There is no mention of it in the plaint, no argument was addressed to the Subordinate Judge upon

this question : not only this in the litigation which was started in the year 1898 no reference was made to this ceremony of Ariyuthu Vazcha : and in

the various depositions which were taken by the Tahsildar in the year 1896 shortly after disputes arose, no member of the family deposed that the

fact of Ariyuthu Vazcha being performed to the, Patinharakara Raja was a reason for his being excluded from the five stanoms. I have, therefore,

come to the conclusion that the evidence relating to the legal consequences of the performance of Ariyuthu Vazcha is inconclusive and that as this

point was not relied upon before the Tahsildar or in the previous suit or in this litigation in the Court below, we should not base our decision on it.

15. It is finally contended that there are instances of a Patinharakara Raja" having been superseded by his juniors in age in attaining to the fifth

stanom, and that shows a consciousness on the part of the various Kovilagams that the Patinharakara Raja cannot succeed to any of these

stanoms. Four instances of supersession have been referred to. The first is that of Unni Kunhan who became the fifth Raja in 1025. He belonged to

the Katanamanna Kovilagam. The second is the case of another Unni Kunhan, who became the fifth Raja in 1030. He belonged to the Ayiranazhi

Kovilagam The third is the case of Ummathan who succeeded to the fifth stanom in 1036. He belonged to the Mangada Kovilagam. The fourth is

the case of Ponunni who belonged to Airanazhi and who, the plaintiff says, succeeded to the fifth stanom in 1038, but who, the first defendant says,

attained that stanom only in 1041. All these four instances are said to have occurred when Bhanu Tahmabiran was in the Patinharakara Raja from

1838 to 1865, that is, from the Malayalam year 1013 to 1040. With regard to the first three instances it is denied that these men were junior in age

to Bhanu Thamburan. As regards the fourth instance it is conceded that Ponunni was younger than Bhanu : but it is argued that as Ponunni

succeeded to the fifth stanom only in 1041, that is after the death of Bhanu in 1040. That case is not an instance in point. A large number of

documents were referred to in this connection. They are Exhibits H, Y, Z, AA, BB, CC, DD, FF, KK, LL, MM, NN, FFF and OOO. Before

dealing with these documents, I must deal with the objection raised by Mr. Rosario to some of them on the ground that they are not receivable in

evidence. Exhibit AA is a deposition given by one Kavunni who was the fifth stanom-holder in the year 1885. His evidence relates to the

succession of Ponunni in 1038. The learned Vakil objects to the reception of this document in evidence on the ground that it is not a statement

relating to the existence of any relationship by blood marriage or adoption and consequently it is not covered by Section 32 Clause (5), of the

Evidence Act. Illustration (L) to Section 32 suggests that a letter containing the date of birth will be receivable in evidence. The words "" relationship

by blood, marriage or adoption"" have been construed to include statements relating to the date of the birth of a deceased person. In Ram Chandra

Dutt v. Jogesuar Narain Deo (10) 20 C. 758. and Dhanmull v. Ram Chunder Ghose 24 C. 265 : 1 C.W.N. 270. the learned Judges of the

Calcutta High Court held that evidence of this kind is receivable u/s 32, Clause (5). Following these decisions Bhashyam Iyengar, J., in Oriental

Government Security Life Assurance Co., Ltd. v. Narasimhal Chari 25 M. 183 : 11 M.L.J. 379. decided that documents containing the date of

birth of a deceased person come w properly under Clause (5) of Section 32. The principle of these decisions I take it to be that in order to

ascertain the relationship referred to, the dates of birth or death of deceased persons will be material. The date of birth will in many cases be an

important factor in ascertaining relationship by blood. I must, therefore, hold that Exhibit AA is receivable in evidence. The next objection relates to

the admissibility in evidence of KK, LL and MM. These are depositions given in Suit No. 13 of 1898 brought by the third defendant for

establishing his right to the fifth stanom. The argument of the learned Vakil for the appellant is that, that suit was not between the same parties or

their representatives in interest under the proviso to Section 33 of the Evidence Act and consequently the depositions given in that case should not

be read as evidence in the present case. In that suit the third defendant contested the right of the first defendant to hold the first stanom. He was

litigating a question in which the present plaintiff is undoubtedly interested. It may be that the plaintiff does not claim through the third defendant, but

is he not a representative-in-interest of the 3rd defendant who brought Original Suit No. 13 of 1898? The term ""representative-in-interest"" would

no doubt include persons who have derived title from another. I am of opinion, it also includes persons having the same interest in the subject-

matter of the litigation. It will comprise all persons on whose behalf, though not in their names or as representing them, the previous litigation is

carried on. In other words all persons whoso rights are litigated bona fide by a person virtually on behalf of a class, though they themselves are not

co-nominees on the record, will be considered in the eye of law as representatives-in-interest of the previous litigant. The judgment of Couch, C.

J., in Mrino Moyee Debia v. Boobun Moyee Debia 23 W.R. 42 : 15 B.L.R. 1. tends to show that where the interests are identical and where the

object of the litigation is to advance a common claim, evidence given in a former judicial proceeding can be received in a subsequent proceeding.

The learned Chief Justice leaves the question open whether the principles of English Rules of evidence relating to similar matters should not be

adopted in India. Although the learned Chief Justice does not quote it, it is clear that he was referring to the case of Pyke v. Grouch 91 Eng. Rep.

1387 : 1 Ld. Raym 730. That case supports the view I have indicated. My conclusion is that these documents are receivable in evidence. This

reasoning does not apply to Exhibit NN, which is a deposition given by the third defendant who is still alive and who has not been examined. The

depositions themselves, when closely examined, are not precise in regard to the ago of the persons who succeeded to the station and I am not

inclined to place much reliance upon them. Moreover, all of them were made after controversy had began and it is not safe to act on the statements

contained in them. Nor am I prepared to believe the depositions given by the plaintiff"s first, fourth, and fifth witnesses. As regards Exhibit FFF, it

is clear that it has not been proved to have been written by Bhanu Thamburan. On the other hand the deposition of the plaintiff"s first witness

makes it clear that it was not written by him. If Exhibit FFF is not proved Exhibit Z cannot avail the plaintiff. Still there are Exhibits AA and CC,

depositions given in the year 1885, which make it clear that Ponunni succeeded to the fifth station in the year 1038. As it has been conceded

before us that Ponunni was junior in age and that Bhanu Thamburan did not die till 1040, that is a clear instance of the supersession of a

Patinharakara Raja. I do not think that the inference which the Subordinate Judge draws from Exhibits Z and BB and DD is correct. On the whole

my conclusion is that one instance in which the holder of the Patinharakara sternum has been superseded by his junior in age has been proved.

16. On these findings the question is whether the plaintiff has established that the first defendant in the year 1895 had no right to succeed to the fifth

stanom. It is common ground that the senior in age is entitled to succeed to that stanmn, if no infirmative circumstances exist. The burden is,

therefore, heavily upon the plaintiff to prove his case. All that has been established in the case is that Bhanu Thamburan who was Patinharakara

Raja between 1838 and 1865 was superseded by Ponunni : and also that the first defendant did not renounce his right to the Patinharakara"

station, when he became the fifth Raja. Does it necessarily follow from these facts that it was in the conscious belief that a Patinharakara Raja is not

entitled to the fifth station that the supersession took place? It is consistent with the theory that Bhanu, either because he thought that the chances of

succeeding to the Valia Rajaship by passing through the intermediate stages wore too remote, or becauses there was a palace attached to the

Patinharakara stanom whereas there was none for the fourth, third and second stanoms, considered that he will not be wise in giving up his then

position for the remote chance of succeeding to the first stanom and to the palace attached thereto. The proved instance is as consistent with a

voluntary giving up of rights as with the view that a Patinharakara Raja is not entitled to the fifth stanom. As has been pointed out in Rlama Nand v.

Surgiani 16 A. 221 : A.W.N. (1894) 47. where the proof of custom is consistent with the continuance of the ordinary course of events or with a

deviation from it, the Court should come to the conclusion that the custom has not been proved. There has been no decision of a Civil or Revenue

Court, and there is no record of any kind showing that the Patinharakara Raja is not entitled to succeed to the fifth stanom. The evidence of

neighbouring Swaroopams like that of Palghaut and of the Zomorin should have been available to prove a custom, like this, if there is any

foundation for it. I do not propose discussing the quantum, of proof that is necessary to establish a family custom. The principles enunciated in

various decisions may be thus stated.--To become a family custom, the usage in question must have been prevalent in the family during a long

period. It must have become a distinct tradition in the family. In proof of a family custom one of two things must be shown, either a clear, distinct

and positive tradition in the family that the custom exists or a long series of instances of anomalous successions from which the custom may be

inferred. It is no doubt true, as pointed in Kuar Sen v. Mamman 17 A. 87 : A.W.N. (1895) 10., that the principle of the English Common Law

that the custom must be immemorial does not apply in India. At the same time it has to be remembered, that their Lordships of the Judicial

Committee in ` Bakhsh v. Muna Kunwar laid down where four instances of inheritance in derogation of the ordinary law were proved, that the

custom had not been sufficiently established. In the present case it is for the plaintiff to prove that the first defendant was under a disability at the

time that the fifth stanom became vacant. He has to show that it is the custom of the family that when the senior in age occupies the Patinharakara

Raj, he is disentitled to succeed to any of the five stanoms. He has also to show that there was a consciousness among the members of the

Swaroopam that a tradition exists excluding the Patinharakara Raja from these stanoms. The evidence adduced in this case is altogether insufficient

to establish any of these propositions. I must hold that the plaintiff has failed to prove the case set up by him and that his suit should be dismissed.

In the circumstances of the case I think each party should bear his own costs throughout. Appeal No. 239 will also be reversed.

17. The memorandum of objections will be dismissed.

Ayling, J.

18. I concur.