

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	06.02.2019
Pronounced On	26.02.2019

CORAM
THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

**C.R.P.(PD).No.5015 of 2014
and
M.P.No.1 of 2014**

The Body of 16 Ayacutdars/Shares also known as Sethikaras Holding Permanent lease hold rights to Fishery rights in Water Catchments Public Wells, Ponds and Periya Eri, Sithar Sozhanthangal Eri Athipallai, Kuppam and Pudu Eri at Aliyabath (a) Kalambur Village and their heirs. Polur Taluk represented by:

1.P.Sekar @ Anbalagan

2.Sampath Naidu

... Petitioners

Vs.
सत्यमेव जयते

1.The State of TamilNadu,
Represented by the District Collector,
Thiruvannamalai District,
Thiruvannamalai.

2.The Executive Engineer [P.W.D. - Irrigation]
Thiruvannamalai.

3.The Sub Divisional Officer, P.W.D.Irrigation,
Thiruvannamalai.

4.R.Srinivasan,
Village President, Erikuppam Village,
Polur Taluk.

5.Meganathan

6.Pillaiyar

7.Murugesan

... Respondents

PRAYER: Civil Revision petition is filed under Article 227 of the Constitution of India, against the order and decretal order dated 04.11.2013 made in O.S.No.1 of 2007 on the file of District Munsif Court, Polur, Thiruvannamalai District.

For Petitioners : Mr.M.Sriram

For Respondents : Mr.A.Devnarendran
Government Advocate for R1 to R3

R4 to R7- No appearance

ORDER

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The petitioner is the plaintiff in O.S.No.1 of 2007 before the learned District Munsif Court, Polur, Thiruvannamalai District. In the said proceedings, at the time of trial, the petitioner sought to introduce the copies of the deposition of D.Ws.1 to 5 in O.S.No.19 of 1940 which according to the petitioner establishes the existence of

customary Fishing right in Water Catchment public wells, ponds and Periya Eri in respect of which the above suit was filed.

2. The Court below rejected the request for marking the deposition of D.Ws.1 to 5 in O.S.No.19 of 1940 on the ground that these documents marked were not between the same parties. Aggrieved by the same, the petitioners have filed the present Civil Revision Petition.

3. The learned counsel for the petitioner relied on Section 32(4) and Section 33 of the Indian Evidence Act to state that the lower Court committed an error in rejecting the prayer to mark the documents. Relevant portion of Section 32 and Section 33, reads as follows:

Section 32	Section 33
Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expenses which, under the circumstances of the case, appears to the Court	Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the

Section 32	Section 33
unreasonable, are themselves relevant facts in the following cases:-	witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:
Section 32 (4) (4) Or gives opinion as to public right or custom, or matters of general interests – when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.	Provided— that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the question in issue were substantially the same in the first as in the second proceeding. Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

4.The petitioners claim hereditary rights for fishing through their ancestors under an agreement signed of the year 1875. The said agreement was signed between Chengalvaraya and Narayan Naiker. Later another sale deed dated 25.03.1958 was signed wherein fishery rights were conveyed by one Jainabi and Aisha Bi in favour of

Varadappa Naiker. To establish fishing rights, the petitioners sought to mark depositions of dead persons in O.S.No.19 of 1940.

5.Clause 4 of Section 32 states that the statement of relevant facts made by person who is dead, are admissible, provided such statements give the opinion of such persons, regarding the existence of any public right or custom, or a matter of public or general interest. Statement of dead persons are themselves relevant facts only if it gives the opinion of such person as to the existence of any public right or custom or matter of public or general interest of the existence of which such person would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter had arisen .

6.Thus, statement of deceased persons, of knowledge, ante litem motam alone are admissible in proof. Section 32(4) applies only when it is a public right or a custom, or is a matter of general interest.

7.The learned counsel for the petitioner referred to the decision of the Calcutta High Court in **Munshi Busoid & Others vs Munshi Newaj Ahmed Khan** AIR 1929 Cal 533, Wherein reference was made

under Section 32(4) of the Evidence Act. It was held that the Court in treating the documents irrelevant was not correct. However, the said decision is not applicable to the facts of the present case is that in the present case there is an attempt to mark certain documents containing expression of opinion regarding the matter of private interest by dead person allegedly having knowledge in the matter.

8.The deposition of dead person in O.S.No.19 of 1940 therefore cannot be considered to be opinion of dead person regarding existence of public right or customs or existence of any such public rights or customs or general interest.

9.Under Section 33, statement of a dead person may be relevant in a subsequent judicial proceeding or at a later stage of the same judicial proceeding, if the Court considers that such evidence are relevant for proving the truth of facts.

10.However, such has to be a statement in a proceeding that was between the same parties or their representative interest. This is the requirement of Section 33 of the Act. In this case, the petitioner claim that their ancestors were the parties in O.S. No.19 of 1940 and therefore they were entitled to rely on the depositions of the deceased

persons therein for the purpose of evidence in trial in O.S. No. 1 of 2007. However, there is nothing on record to substantiate that the respondents herein were also the defendants in the said suit.

11. Therefore, the reasoning adopted by the Lower Court cannot be faulted.

12. Further, under the provisions of the Tamil Nadu Land Encroachment Act, 1905, all public roads, streets, land including water courses, rivers, streams, nalas, lakes and tanks etc, are the property of the Government and belongs to the Government and that the Government has jurisdiction to issue notice as per Section 7 of the Act and that the person aggrieved by the said notice can file objections only before the appropriate authorities.

13. Further in **Ramalingam vs Government of Tamilnadu**, 2012 SCC OnLine Mad 1555: (2012) 2 LW 776: (2012) 4 Mad LJ 383, it was held as follows:-

66. As per Section 132 of the Tamil Nadu Panchayats Act, 1994 the fishery right in respect of the suit tanks is to be construed as annual property or income in the village panchayat, therefore, the suit 9 tanks vest in the village Panchayat as per Section 132 of the Tamil Nadu Panchayats Act and it is to be

administered by it for the benefit of the inhabitants or holders. When the suit 9 tanks has been vested in the hands of Village Panchayat as per Tamil Nadu Panchayats Act, then, in respect of the fishery right therein the Panchayat has a right to administer it for the benefit of the inhabitants or holders as mentioned in Section 132 of the Tamil Nadu Panchayats Act, 1994. Therefore, the 2nd Respondent/2nd Defendant Panchayat Union is entitled to conduct fishery right auction as per Rule 11 of Tamil Nadu Panchayat (Lease & Licensing of Fishery Rights), Rules, 1999. As per said the rule, it is made clear that the upset lease amount shall be fixed by the village panchayat and the panchayat union council concerned in consultation with the Inspector of Fisheries of the respective area.

The Court further held that:-

67. Moreover, the Lease of Fishery Rights in the water resources vested in the village panchayats or the panchayat union council shall be given after conducting public auction by the respective village panchayats or panchayat union council as per Rule 11 of the Lease of fishery rights rules as mentioned supra. Further, such lease shall be for a period of five years and that the lease amount shall be raised every year at the rate of 10 per cent over the lease amount of the previous year.

14. Consequently, I do not find any reasons to interfere with the order passed by the Lower Court.

15. The District Munsif Court may therefore dispose the suit within a period of six months from the date of communication of this order.

16. This Civil Revision Petition stands dismissed with above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

26.02.2019

Index :Yes/No
Internet :Yes/No

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To

1. The District Munsif Court, Polur,
Thiruvannamalai District.
2. The District Collector,
The State of TamilNadu,
Thiruvannamalai District,
Thiruvannamalai.
3. The Executive Engineer [P.W.D. - Irrigation]
Thiruvannamalai.

C.SARAVANAN, J.

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4.The Sub Divisional Officer,
P.W.D.Irrigation,
Thiruvannamalai.

5.R.Srinivasan,
Village President,
Erikuppam Village,
Polur Taluk.



Pre-delivery order in

C.R.P.(PD).No.5015 of 2014
and
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