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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20-10-2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

WP NO.31515 OF 2016

U.S.Palanivel

..Petitioner

VS.

1. The Government of Tamil Nadu,
Represented by Secretary to Government,
Public Works Department,
Fort St. George,
Chennai - 600 009.
2. The Chief Engineer,
Public Works Department,
Irrigation (General),
Chepauk,
Chennai - 5.
3. The Chief Engineer (Irrigation),
Pollachi Region,
Public Works Department,
Coimbatore.
4. The Executive Engineer,
Public Works Department (WRO),
Lower Bhavani Basin Division,
Erode - 638 002.
5. The Executive Engineer,
Water Resources Organization,
Public Works Department,
Bhavani Sagar Dam Division,
Bhavani Sagar,
Erode District.



6. The Superintendent Engineer,
Erode Circle,
Tamil Nadu Water Supply and Drainage Board,
No.216, Arumugam Street,
Thirunagar Colony,
Erode - 638 003.

7. The Chairman,
Tamil Nadu Electricity Board,
144, Anna Salai,
Chennai - 2.

8. The Chief Vigilance Officer,
TANGEDCO,
144, Anna Salai,
Chennai - 2.

9. The Superintendent Engineer,
Erode Electricity Distribution Circle,
TANGEDCO,
Erode.

10. The Chief Engineer,
Erode Electricity Distribution Circle,
TANGEDCO,
Erode.

11. The District Collector,
Erode District,
Erode.

12. The District Revenue Officer,
Erode District,
Erode.

13. Kalingarayan Vaikal Neerettu Pasana
Vivasayigal Sangam,
Erode District having its office at
Chinniyampalayam via Modakurichi,
Erode - 638 104 represented by its
Secretary B.Sakthivel.



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14. Thadapalli Arakan Kottai Bhavani,
Nathi Pasana Vivasayeegal Sangam,
Represented by its President
Subi.Thalapathi, No.232, Kacheri Street,
Gobichettipalayam,
Erode District.

(R-13 and R-14 were impleaded as per order of
Court dated 07.09.2021 made in WMP Nos.
32148 of 2016 and 24076 of 2019 in WP
No.31515 of 2016)

..Respondents

Writ Petition is filed under Article 226 of the
Constitution of India, praying for the issuance of a Writ of
Mandamus, directing the respondents to follow all the conditions
stipulated in G.O.Ms No.3339 dated 12.12.1962 and G.O.Ms.No.2259
dated 03.11.1967.

For Petitioner : Ms.R.Shase for Mr.M.Guruprasad

For Respondents-1 to 6, 11&12 : Mr.K.M.D.Muhilan,
Government Advocate.

For Respondents-7 to 10 : No Appearance

For Respondent-13 : Mr.M.Sriram for
Mr.P.P.Shanmugasundaram.

For Respondent-14 : Mr.K.Sudhakar

O R D E R

The relief sought for in the present writ petition is to
direct the respondents to follow all the conditions stipulated in
G.O.Ms No.3339 dated 12.12.1962 and G.O.Ms.No.2259 dated
03.11.1967.

2. The above two Government Orders relate to regulation
of unauthorised pumpsets installed on the Banks of Rivers and
Channels. However, the said Government Orders were passed in the
years 1962 and 1967 respectively and on account of various
developments and changes in agricultural activities, the



Government has to formulate a policy for the purpose of regulating the distribution of water for irrigation and other purposes.

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3. Water is life for every creature in this world. Without water, there is no life. Thus, equal distribution of water is of paramount importance and constitutional mandate. The benefit cannot be restricted to few individuals alone. It has to be distributed by the Government in such a manner keeping in mind the public interest and for all the citizen in equal manner without depriving anybody from getting water for various purposes. Thus the importance of utilisation of water must be sensitised and the policy of the Government should ensure that no citizen is deprived of equal distribution of water for various purposes.

4. The grievance of the petitioner is that certain persons are illegally tapping the river water for irrigation and other purposes without proper permission or approval from the Competent Authorities. Such illegality resulting in deprival of equal distribution of water amongst all the agriculturists and other persons in that locality. Thus, the petitioner is constrained to file the present writ petition for a direction to regulate the distribution of water in accordance with Government Orders passed in the years 1962 and 1967 respectively.

5. This Court is of the considered opinion that huge developments occurred for the past about 40 years, both in agriculture, industrial and other activities. The distribution of water must be regulated by formulating a revised policy and by passing necessary orders. However, such policy is to be formulated by the Government taking into consideration the interest of the State as a whole and considering the interest and the activities in various localities.

6. The learned counsel appearing on behalf of the petitioner made a submission that they are opposing distribution of water to the unregistered ayacuts. However, due to illegal tapping, the distribution of water is being affected. The very relief sought for in the present writ petition is to regulate the distribution of water and not to deprive anyone from getting water for irrigation purposes.



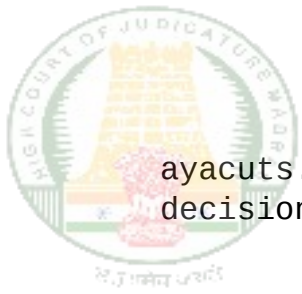
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7. The learned Government Advocate, appearing on behalf of the Department, made a submission that actions are being taken regularly in respect of the pipelines illegally laid for extracting water from the river. Such illegal pipelines were removed periodically and destroyed and electricity service connections to the pipelines were also disconnected by the Electricity Department. However, based on the legal opinion of the Government Pleader, Erode District, the electricity service connections were restored. Thus, the contention of the petitioner to some extent is true that there were many such illegal tapping of water in that locality and the averments in this regard by the petitioner is also substantiated. However, the consistent action in this regard are warranted on the part of the Department Officials.

8. The learned counsel appearing on behalf of the thirteenth respondent (R-13) made a submission that R-13 are also agriculturists and they are unregistered. The R-13 is periodically making representations to regulate their registration relating to ayacuts for the purpose of equal distribution of water to those agriculturists also.

9. This Court is of the considered opinion that population ratio is consistently increasing in our Great Nation. Equally, the extension of agricultural lands are also expanded for irrigation purposes. Mere non registration of ayacuts would not deprive any person from getting water, which is a National property. Registration or non-registration is for regulation of distribution of water and not for depriving any person from getting water for irrigation and other purposes. Therefore, the Authorities Competent are bound to review the registration of ayacuts and in the event of expansion of irrigation lands, all necessary actions are to be initiated for the purpose of regulating unregistered ayacuts and for the purpose of equal distribution of water in a genuine manner for the development of agricultural activities in our Great Nation.

10. By expanding the agricultural lands, the country is benefited. Thus, mere non-registration cannot be a ground to deny water to any person. However, even as per the Minutes of the Meeting of the Superintending Engineer, it is categorically stated that the water will be distributed to the registered ayacuts and thereafter, it will be distributed to unregistered



ayacuts. Such a decision cannot be held as unreasonable. The decision is practical and pragmatic.

11. The Superintending Engineer considered various factors in the meeting and recorded the Minutes by stating that the distribution of water will be considered to registered ayacuts at first and thereafter, to the unregistered ayacuts. Thus, this Court do not find any infirmity as such in respect of the resolution passed by the the Superintending Engineer.

12. Extraction of water for commercial usage is an offence under the Indian Penal Code. The issue in this regard was elaborately considered by this Court in the case of Shanthi Aqua Farms vs. Secretary to Government of Tamil Nadu [(2018) 4 MLJ (Cr1) 658] and the relevant paragraphs 83 to 107 are extracted as under:-

"83. In this context, this Court has to now consider, whether Extraction of Ground Water can be brought under the offences described in any one of the provisions in the Indian Penal Code (IPC). Curiously, this Court had gone into those aspects and Mr.C.Emalias, learned Public Prosecutor, assisted the Court in this regard by producing some of the judgments. When this Court, at the first instance, raised a question with the learned Advocate General that Extraction of Ground Water without proper licence or permission in accordance with the regulations, are to be construed as "theft" and in this context, this Court has sought for the assistance of the learned Public Prosecutor.

84. The learned Public Prosecutor cited the judgment of the Allahabad High Court in the case of Gajadhar, Applicant Vs. State, Opposite Party, reported in 1971 CRI LJ 1361(V 77 C 392) and the relevant paragraphs are extracted hereunder:

"8. In the instant case, applicant took out the deed of agreement from a box kept in the outer sitting room of Chandra Shekhar and tried to run away with it. His intention in doing so was to cause wrongful gain to his brother Moti Lal, so that Banshidhar may not be able to rely



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on the agreement in order to escape his liability from the claim lodged against him by Moti Lal. It is thus obvious that applicant did intend not only to cause wrongful loss to Banshidhar but also to obtain wrongful gain to himself at his expense. Section 425 of the Indian Penal Code reads:—

1. "Whether with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits 'mischief'."

13. It is obvious that in the instant case all the ingredients of Section 378 of the Indian Penal Code are present. The deed of agreement was removed by the applicant with dishonest intention to get his claim for money against Banshidhar decreed and thereby causing wrongful gain to himself. It is not a case where the document has been mutilated only with a view to cause wrongful loss to Banshidhar.

14. When a person commits mischief, he only causes loss to another but does not gain himself. In theft wrongdoer makes dishonest gain at the expense of the victim. This is the essential difference between theft and mischief."

85. In a short judgment, the Allahad High Court in the case of Mahadeo Prasad and Anr Vs. Emperor, dated 1st June 1923, reported in 75 Ind Cas 159, which held as follows:

"4. In re Chockalingam Pillay 13 Ind. Cas. 819 : (1912) M.W.N. 119 : 11 M.L.T. 162 : 13 Cr.L.J. 131 was a case in which the water had been cut off from the natural source and conveyed through pipes, and thus reduced into effective possession. It was held both with reference to the English authority and to the definition of theft contained in Section 378, Indian Penal Code that it could be the subject of theft."

86. In the case of T.S. Raghupathi Aiyar



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Versus Narayana Goundan & Others, decided by the High Court of Madras on 05.09.1928, reported in CDJ 1928 MHC 102, our High Court held as follows:

"7. The expressions "destruction of any property," "such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously," contained in Section 425, Indian Penal Code, appear to me to carry the implication that something should be done to the property contrary to its natural use and serviceableness. It may be mischief to throw the contents of a pot of food upon the fire, but it is not mischief, though it may be theft, to eat the food. And so here, since the graziers, by allowing their goats to graze, did no more than put the grass to its normal use, by the same reasoning their act would not amount to mischief, though it may have amounted to theft. As to this, that offence not having formed the subject of the charge, I do not wish to express a more definite opinion."

87. The Hon'ble Supreme Court of India in the case of State(NCT of Delhi) Vs. Sanjay, reported in (2014) 9 SCC 772, held as follows:

"60. There cannot be any two opinions that natural resources are the assets of the nation and its citizens. It is the obligation of all concerned, including the Central and the State Governments, to conserve and not waste such valuable resources. Article 48-A of the Constitution requires that the State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country. Similarly, Article 51-A enjoins a duty upon every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for all the living creatures. In view of the constitutional provisions, the doctrine of public trust has become the law of the land. The said doctrine rests on the principle that certain resources like air, sea, water and forests are of such great importance to the people as a whole



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that it would be highly unjustifiable to make them a subject of private ownership.

61. Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence."

88. The Hon'ble Supreme Court of India also clarified that "there is no complete and absolute bar in prosecuting persons under the IPC, where the offences committed by persons are penal and cognizable offence".

89. In paragraph 71 of the above said judgment, the Apex Court held that "however, there may be a situation where a person without any lease or licence or any authority enters into river and extracts sand, gravel and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Penal Code."

90. Interestingly, our High Court of Madras decided a case on 17.01.1912 in the case of Chockalingam Pillai Vs. Emperor in Criminal Revision Case No.390 of 1911 and Criminal Revision Petition No.293 of 1911. The Coram decided the above case was Hon'ble Justice.Miller, Hon'ble Justice.Sundara Aiyar and Hon'ble Justice Benson.

91. In that case, the accused has been convicted of the offence of theft by raising the door of Sluice No.154 on the Kannadian canal without the permission of the officers of the Government and thereby lowering the level of the water therein. The object of the accused in doing so was to divert more water to his lands than they would otherwise receive. He was charged in addition with the offence of mischief and convicted of both offences by the District



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Magistrate of Thirunelveli. But the Sessions Judge, on appeal, reversed the conviction for mischief. The question to be decided by this Court is whether the conviction for theft can be sustained.

92. The Hon'ble Justice Miller, is of the opinion that "It would seem to be right to do so in this Country, where water is a highly-priced commodity. In England, water flowing in a river is regarded as not owned by any person. The right of the riparian proprietor is to use it. He is not the owner of the water, which he is entitled to use. The bed of a river which is not tidal and navigable is vested partly in one owner and partly in another, i.e., in the riparian proprietor on either side of the river. On the other hand, in this Presidency, at least in Ryotvari tracts, the bed of the river is vested in the Government."

93. If water in channels is owned by the Government in this Country, there is no reason why the Government should not be regarded as having reduced it to possession in the circumstances proved in this case and why it may not be regarded as the subject of theft whether in the case of any particular river, channel or reservoir, the Government can be said to be in possession must depend on the circumstances. The question must be regarded is one of the fact to be decided on the evidence in each case.

94. There seems to be no great difficulty, therefore, in holding in this case in the circumstances pointed out in the judgments of the lower Courts that the water in the Kannadian Channel was in the possession of the Government.

95. Considering these aspects of the matter, the Hon'ble Justice Miller, arrived a conclusion "The conviction for theft cannot therefore be sustained. The accused must in my opinion be acquitted and the fine, if paid, must be refunded".

96. The Hon'ble Justice Benson, was of a dissenting view and said that its flow, "the



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question of possession must be decided in each case by a reference to the degree of control exercised, and the facts stated in that case do not indicate the same degree of control as is indicated in the present case. To mention only one point:- In that case, the water is said to have run freely through the channel from the river and to have flowed into some Khal or Jhil unless diverted for irrigation. In the present case, the access of the water to the channel is controlled by a Government head-sluice or regulator. Its flow in the channel is at times controlled by dams built by the Government, and the flow ends in a reservoir or tank in the possession and under the control of the Government and, in fact, belonging to the Government."

97. The theft was complete as soon as the dog began to follow him. The essence of the offence consists in the dishonest taking of property out of the Possession of the owner, rather than in the taking of it into thief's own possession. If, however, the word "take" is to be regarded as connoting the idea of the custody passing to the taker, I still think the requirements of Section 378 are fulfilled in the present case, for it is only necessary that the thief should "intend to take," not necessarily that he should succeed in taking, and I find it difficult to understand what other intention the accused can have had if it was not to "take" the water to his land, where it would be in his possession and custody. That some of it might soak into the ground and so be no longer in his custody, or under his control, is immaterial. If any drop of it was capable of being in the thief's custody the argument would have no force.

98. Recording the reasons, the Hon'ble Justice Benson, in his judgment, held as follows:

"12. Both the learned Judges, who heard the Revision Petition were of opinion that the water was in the possession of the Government. With that opinion, I agree and need therefore



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only consider the further question upon which their opinions differ. Now when once it is decided that the water was capable of being stolen, it seems to me impossible to resist the conclusion that it has been stolen in this case. The petitioner certainly intended to take it to his own field, and he took steps, which he must have considered were calculated to bring it there. He did not have it in his custody during that transit, but that, as Benson, J. points out, is not necessary! If the petitioner's intention had been merely to let the water run to waste, possibly the case might have been different, though with regard to illustration (c) to Section 425, Indian Penal Code, it is to be observed that the illustration does not show that A took the ring from Z's possession to throw it away. The petition is dismissed."

99. When the Hon'ble Justice Miller, held that the theft cannot therefore be sustained. The Hon'ble Justice Benson took the view that Water is capable of being stolen.

100. The matter was decided by the Hon'ble Justice Sundara Aiyar, proudly an Indian Judge of Pre-Independence Era. The Hon'ble Justice Sundara Aiyar in his short judgment, held as follows:

"1. Both the learned Judges who heard the revision petition were of opinion that the water was in the possession of the Government. With that opinion I agree, and need, therefore, only consider the further question upon which their opinions differ.

2. Now, when once it is decided that the water was capable of being stolen, it seems to me impossible to resist the conclusion that it has been stolen in this case. The petitioner certainly intended to take it to petitioner certainly intended to take it to his own field, and he took steps which he must have considered were calculated to bring it there. He did not have it in his custody during the transit, but that, as



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Benson, J., points out, is not necessary. If the petitioner's intention had been merely to let the water run to waste, possibly the case might have been different, though with regard to illustration (c) to Section 425, Indian Penal Code, it is to be observed that the illustration does not show that A too the ring from Z's possession to throw it away.

3. The petition is dismissed."

101. In the light of the spirit of the above discussions, let us now consider Section 378 of Indian Penal Code (IPC).

"378. Theft.—Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

Explanation 1.—"A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth."

102. The ingredients of the above provision of the Indian Penal Code (IPC) unambiguously stipulates that whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent. Thus, in respect of the water and other natural resources, the State is the person. It is a National asset. State is the custodian and in possession of all such National assets including water under the Earth. Thus, it is to be examined whether Explanation 1, of Section 378 IPC can be applied in respect of illegal Extraction of Ground Water for commercial usage. Explanation 1 of Section 378 of the Indian Penal Code (IPC), unambiguously enumerates that "A thing becomes capable of being the subject of theft as soon as it is severed from the earth". Thus, it is crystal clear that so long as the water stays with the Earth undisturbed, the provision may not apply. However, once it is severed from the Earth by way of an Extraction,



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it becomes a "theft", if it is extracted without any authority of law. Thus, it is unambiguous that a water is capable of being stolen, the water under the Earth is attached with the Earth. Water, being a National asset, if it is extracted without any authority of law, then it amounts to "theft" and certainly the persons committing such offence of theft under the Indian Penal Code (IPC), is liable to be prosecuted.

103. Section 379 of the Indian Penal Code (IPC), provides Punishment for Theft.

104. Let us now look into Section 425 of the Indian Penal Code (IPC); Mischief. Section 425 of the Indian Penal Code (IPC) stipulates that "Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

105. Explanation 1 of Section 425 of the Indian Penal Code (IPC), which reads as under:-

"It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not."

106. Illustration (b) of Section 425 of the Indian Penal Code (IPC), states that "A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief." Illustration (c) of Section 425 of the Indian Penal Code (IPC), states that "A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief."

107. Looking into the ingredients of Section 425 of the Indian Penal Code (IPC) and

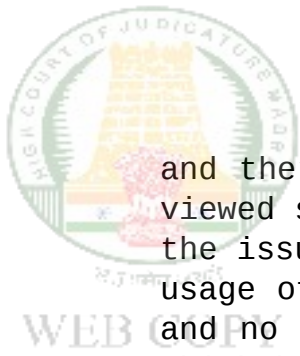


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Explanation 1 and illustrations of the Indian Penal Code (IPC), it is unambiguous that if water attached to the Earth is extracted and wasted by a person, and thereby causing a wrongful loss, then the offence of Mischief under Section 425 of the Indian Penal Code (IPC) is attracted. To make it clear, if any person extract the Ground Water from the Earth and simply wasting with an intention to cause wrongful loss to the State, then the offence of "Mischief" under Section 425 of the Indian Penal Code (IPC) is committed by such person. Section 426 of the Indian Penal Code (IPC) speaks about Punishment for mischief. Thus, it is clear that an offence of mischief may not be applicable in respect of certain cases. However, in respect of the petitioners in all these writ petitions, if they extract water for commercial usage without obtaining any proper licence or permission, such an Extraction or over Extraction, will certainly attract Sections 378 and 379 of the Indian Penal Code (IPC) and all those persons are liable to be prosecuted for the offence of theft."

13. As held by this Court, in the abovesaid judgment, water is capable of being stolen. Thus, if any complaint regarding illegal extraction of water or theft of water is made, a criminal case is to be registered by the jurisdictional Police concerned. Apart from the actions taken by the Public Works Department and Water Resource Organisation Authorities, such criminal cases are to be registered and prosecuted in the manner known to law. Therefore, the petitioner or any other person, is at liberty to file a criminal complaint in the event of theft of water through concealed pipelines or in an illegal manner or otherwise. Therefore, any illegality in the matter of extraction of water is to be dealt in accordance with law and the manner contemplated.

14. However, distribution of water must be done in a judicious manner by the Authorities Competent by formulating a policy in such a manner without depriving any citizen from getting water for their usage. Any such deprivation of water to any citizen amounts to violation of fundamental right of such citizen



and therefore, the denial of equal distribution of water must be viewed seriously and the Government is also expected to sensitise the issue, so as to ensure that every citizen is entitled for the usage of water, as the water is the property of our Great Nation and no citizen can claim any right over the river or dam water, which has to be distributed to all.

15. This being the principles, it is for the Government to regulate the distribution of water. However, such distribution of water cannot be denied to any citizen whether it is registered or unregistered ayacuts. However, the decision to provide water to registered ayacuts at first and thereafter, to unregistered ayacuts is logical and reasonable.

16. However, the claim of R-13 that their ayacuts are also to be registered must be considered as they are also agriculturists and participating in the irrigation process. Thus, there cannot be any discrimination amongst the agriculturists merely on the ground of registration as every agriculturists are in the process of performing agricultural activities and contributing for the development of our Great Nation. Thus, no agriculturist can be discriminated and any such discrimination will lead to unconstitutionality. Therefore, the claim of R-13 for regulating the ayacuts are also to be considered and based on the development of agricultural lands, steps are to be taken then and there to regulate the distribution of water for the benefit of agricultural activities and its developments.

17. Therefore, in view of the facts and circumstances, this Court is inclined to pass the following orders:-

(1) The relief, as such, sought for in the present writ petition stands rejected.

(2) The respondents 1 to 6, 11 and 12 are directed to consider and formulate a policy to regulate distribution of water for irrigation and other purposes, if not already formulated, in a judicious manner and such a policy is to be formulated taking into consideration the public interest involved.

(3) The respondents 1 to 6, 11 and 12 are directed to conduct periodical inspections regarding illegal extraction of water either through pipelines or through any other mode by anybody and in the event of identifying any such illegal extraction of water, criminal case is to be registered and all such persons involved in such illegalities must be prosecuted in



the manner known to law.

(4) The respondents 1 to 6, 11 and 12 are directed to consider the claim of R-13 for regulation of unregistered ayacuts by following the procedures as contemplated.

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18. With the above directions, the writ petition stands disposed of. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS-VI)

// True Copy //

Sub Assistant Registrar

Svn

To

1. The Secretary to Government,
Government of Tamil Nadu,
Public Works Department,
Fort St. George,
Chennai - 600 009.
2. The Chief Engineer,
Public Works Department,
Irrigation (General),
Chepauk,
Chennai - 5.
3. The Chief Engineer (Irrigation),
Pollachi Region,
Public Works Department,
Coimbatore.
4. The Executive Engineer,
Public Works Department (WRO),
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11. The District Collector,
Erode District,
Erode.
12. The District Revenue Officer,
Erode District,
Erode.

+1cc to Mr.P.P.Shanmugasundaram, Advocate, S.R.No.53805

+1cc to Mr.M.Sriram, Advocate, S.R.No.54208

+1cc to Mr.M.Guruprasad, Advocate, S.R.No.53968

+1cc to the Government Pleader, S.R.No.53887

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RSV(CO)
RLP(10/11/2021)