

(1999) 07 MAD CK 0061

In the Madras High Court

Case No : C.R.P. No. 75 of 1999 and C.M.P. No. 466 of 1999

Ganesan and 4 others

APPELLANT

Vs

M. Sundararaja Thevar and 5 others

RESPONDENT

Date of Decision : 28-07-1999

Acts Referred:

Evidence Act, 1872 — Section 74, 77

Citation : (2000) 1 CTC 545 : (1999) 3 LW 433 : (2000) 1 MLJ 121

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : Mr. R. Subramanian, for the Appellant; Mr. A. Sivaji, for the Respondent

Judgement

1. Plaintiffs in O.S.No. 138 of 1996 on the file of Subordinate Judge's Court at Virudhunagar are revision petitioners.

2. They filed a suit to declare the first plaintiff as ""Ambalam"" of Mela Aviyoor Village and is entitled to all the temple Honours in all the temples of

Aviyoor Village and consequential relief of permanent injunction restraining the defendants, their men and agents from in any way interfering with

the plaintiffs' right to get ""honour"" as ""Ambalam"" and for consequential reliefs.

3. The claim of the plaintiffs was seriously disputed by the defendants.

4. For the purpose of proving their case, they wanted to rely on certain public documents. The genuineness was not disputed. Those public

documents were in the possession of first plaintiff and he wanted those documents to be received in evidence. The details of the documents are 1)

Aviyoor Village "A" Register -- Pages 29, 43, 44, 48, and 50 then, 2) Field Measurement Book -13) Village Plan - 1. In the affidavit in support

of the application, he stated that those documents were handed over to him by the Government while he was a Village Officer. Even though he has retired and handed over charge of the office, the Government did not receive those documents and he continue to retain the same. According to him, those documents will prove that there are two burial grounds, two irrigation tanks for Keela Aviyur and Mela Aviyoor villages. It is stated that being a public documents they could be produced in evidence and to prove its contention, no further evidence is necessary.

5. A counter statement was filed by the respondents objecting the admissibility of those documents on the ground that the petitioner who ought to have returned those documents to Government and having not returned them, it cannot be said that he is in proper custody of those documents.

According to the respondents, only a public officer can have the custody of public document and only on the basis of certified copies furnishes by the public officer, the document could be proved. Since the documents are in the illegal custody, they are inadmissible in evidence.

6. The lower court accepted the objection raised by the respondents and dismissed I.A.No. 400 of 1998. The legality of the order is challenged in this revision.

7. I heard both the counsel.

8. The only question that requires consideration is, whether the impugned order is liable to be revised u/s 115 of Code of Civil Procedure. The fact that the documents produced are vitally important for the disposal of the suit is not disputed by either parties. The documents will have a great bearing with the case is also not disputed.

9. The Lower Court has dismissed the application on the ground that the petitioner cannot have the custody of those documents and therefore they are inadmissible in evidence. It has further held that u/s 74, 76 and 77 of the Evidence Act, a public officer alone can have custody and a certified copy issued by such public officer alone could be admitted in evidence.

10. The question to be considered is, whether this reasoning of the trial court is correct.

11. It is the case of the petitioner that he came into custody of those documents while he was a village officer and the Government entrusted the documents to him. He has not returned the same though he ceased to be in

service. That means, he continues to have the custody of those documents unauthorisedly. The question to be considered in, whether that can be a reason to hold that those documents are inadmissible in evidence if even it is found that they are relevant for deciding the case.

In Magraj Patodia Vs. R.K. Birla and Others, it is a case under the representation of the People Act, a similar question came for consideration. At page 897 of the reports, their Lordships have held thus:

But the fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved.

The above decision was followed by the Hon'ble Supreme Court in Pushpadevi M. Jatia v. M.L. Wadhawan : 1987CriLJ1888 . That is a case

under the Foreign Exchange Regulation Act. In para 20 of the judgment, their Lordships have held thus:

Even if the contention that R.C. Singh was not a gazetted officer or Enforcement within the meaning of Section 40(1) of the FERA were to

prevail, it would be of little consequences. In this case during the investigation statements were recorded by B.T. Gurusawhney, Assistant Director

of Enforcement and R.C. Singh. There is no dispute regarding the competence of B.T. Gurusawhney to record statements u/s 40(1) of the FERA

and the only question is as to whether the statements recorded by R.C. Singh u/s 40(1) could be acted upon. If evidence is relevant the court is not

concerned with the method by which it was obtained. In Barindra Kumar Ghose v. Emperor, ILR (1910) Cal 467 Sir Lawrence Jenkins repelling

the contention that the court must exclude relevant evidence on the ground that it was obtained by illegal search or seizure, said at p. 500 of the

Report.

Mr Das has attached the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still

provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered

by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed

by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in

which those provisions were disregarded.

The question arose before the Judicial Committee of the Privy Council in the well known case of *Kuruma v. Reginam*, 1955 (1) All ER 236. In

dealing with the question Lord Goddard, C.J. delivering the judgment of the Privy Council said:

(T)he test to be applied (both in civil and criminal cases) in considering whether evidence is admissible is whether it is relevant to the matters in

issue. If it is, it is admissible and the court is not concerned with how it was obtained.

The learned Chief Justice further observed:

In their Lordships' opinion, when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained in

tortious but excusable, but whether what has been obtained is relevant to the issue being tried.

Again, the House of Lords in *R.V. Sang*, 1979 (2) All ER 1222 reiterated the same principle that if evidence was admissible it matters not how it

was obtained. Lord Diplock after considering various decisions on the point observed that however much the judge may dislike the way in which a

particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt "it is

no part of his judicial function to exclude it for this reason" and added:

...(H)e has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court

is not concerned with how it was obtained.

There is a long line of authority to support the opinion that the court is not concerned with how evidence is obtained. The rule is however subject to

an exception. The judge has a discretion to exclude evidence procured, after the commencement of alleged offence, which although technically

admissible appears to the judge to be unfair. The classical example of such a case is where the prejudicial effect of such evidence would be out of

proportion to its evidential value. Coming nearer home, this Court in *Magraj Patodia Vs. R.K. Birla and Others*, held that the fact that a document

which was procured by improper or even illegal means could not bar its admissibility provided its relevance and genuineness were proved.

From the extract of the Supreme Court case, it is clear that their Lordships have

followed England principles.

12. In *Murphy on Evidence Fifth Edition 1997* under the Chapter "The Judicial Function in the law of Evidence, in para 10.2, the learned Author

has said thus:

The rule governing the admissibility of illegally or unfairly obtained evidence in civil cases is the same as that in Criminal cases, namely that relevant

evidence is admissible regardless of the manner in which it is obtained. The court is concerned with the relevance, not the source of evidence and

will leave the parties to other remedies for any wrongful acts indulged in to obtain evidence. And just as general exclusionary discretion can be

demonstrated in civil corresponding to that exists in criminal cases, so the judge in a civil case has no discretion to exclude evidence illegally or

unfairly obtained. These observations must be read subject to the decision of Warner J in *ITC Film Distributors Ltd v. Video Exchange Ltd*, 1982

Ch 431, which is dealt with below, but, it is submitted, they remain sound because, in almost every civil case, the judge sits without a jury. The

judge will become aware, in the course of any application to exclude, that there has been an irregularity in the obtaining of the evidence. The judge

may, where necessary, caution himself about the weight of the evidence so obtained or draw any appropriate adverse inferences against the

proponent of the evidence. Consequently, as with other rules of evidence, the potential for prejudice to the opponent is less in many cases than

it would be before a jury. In *Helliwell v. Piggott-Sims* the plaintiff obtained documentary and other evidence pursuant to a court order made at the

end of 1977. Subsequently, in *Rank Film Distributors Ltd. v. Video Information Centre*, 1982 AC 380, the House of Lords held that it was open

to a defendant in such circumstances to refuse to answer interrogatories which might expose the defendant to possible criminal prosecution under

the Copyright Act, 1956 or for conspiracy to defraud relying upon the privilege against self-incrimination. In the light of this decision, the

defendants applied to the trial Judge to exclude the evidence obtained by the plaintiffs, on the ground that it had been obtained in violation of the

defendants' privilege against self-incrimination. The trial Judge refused to exclude the evidence, and the defendants renewed their application in the

Court of Appeal. Upholding the decision of the trial judge, Lord Denning M.R. said

1980 FSR 356:

It seems to me that there is a very short answer to it. Assuming for a moment that the full order ought not to have been made in the first place in

1977, nevertheless it has been implemented. The evidence is available in the hands of the plaintiffs for them to give in evidence. I do not think that

the judge has any discretion to refuse to admit it in evidence. I know that in criminal cases the judge may have any discretion. That is shown by

Kuruma v. The Queen, 1955 AC 197 But so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is

relevant and admissible. The Judge cannot refuse it may have been unlawfully obtained in the beginning. I do not say that it was unlawfully

obtained. It was obtained under an Anton Piller order which was not appealed against. But, even if it was unlawfully obtained, nevertheless the

judge is right to admit it in evidence and to go on with the case as he proposes to do.

Bridge and Oliver LJJ agreed with the judgment of Lord Denning MR..... Also of importance is the decision of Warner J in *ITC Film*

Distributors Ltd. v. Video Exchange Ltd, 1982 Ch 436. The defendant, during the trial of an action for breach of copyright, obtained by a trick

certain papers which the plaintiffs and their solicitors had brought to court for the purposes of the trial. As the papers were undoubtedly relevant

and apparently admissible, the defendant sought to tender them in evidence. The learned judge held that, despite the general rule that the court had

no power to exclude relevant evidence in a civil case, the public interest in the due administration of justice required that parties be free to bring

their papers to court without that they might be filched during trial, and that this consideration outweighed even the competing public interest that

the court should receive all available evidence as means of ascertaining the truth. He regarded the matter as one of public interest Warner J cited a

passage from the judgment of Waller LJ. in *Riddick v. Thanet Board Mills Ltd*, 1977 QB 881, a case which held that a party was entitled to be

protected against the use of materials disclosed on discovery for purposes other than the litigation in which they were disclosed, and continued

1982 Ch at 441:

13. The first Finding of the lower court that because the documents are in the

illegal unauthorised custody of the first plaintiff, they cannot be admitted in evidence, cannot be accepted. The court is only concerned about the truth of the case and if the documents is genuine, the court is not concerned how it was procured.

14. The second finding of the lower Court is that being a public document, the certified copy alone is to be marked. The said finding also cannot legally stand. The certified copies are filed only for the purpose of convenience and the law does not say that a public document cannot be produced in original and it is not admissible. In fact, it is the original document that is admissible and Section 77 of the Evidence Act is the enabling provision which entitles a party to produce a certified copy of the original public document. Sarkar on Evidence Act" commenting of Section 77 has said thus:

A public document may be proved by the production of the original like any other document and it is on the ground of convenience that a public document is allowed to be proved by a certified copy. By the word "may an option has been given to a party of proving the contents of public documents by certified copies, or by production of the original.

In my view, both the reasonings of the court below cannot stand, The order of the lower court is therefore set aside and I.A. No. 400 of 1998 in

O.S. No. 138 of 1996 on its file stands allowed.

15. The petitioners are permitted to produce the documents referred to in the petition and after the trial is over, the court is directed not to return the original to the plaintiffs but send the same to the Government by substituting a certified copy of the same at the expenses of the petitioners. The C.R.P. is allowed as above indicated. No costs, C.M.P.No. 466 of 1999 is closed.