
(1974) 09 MAD CK 0010
In the Madras High Court
Case No : S.A. No. 1504 of 1971

Mohammed Asaraf and others

APPELLANT

Vs

Kulasekaraperumal Pillal

RESPONDENT

Date of Decision : 17-09-1974

Acts Referred:

Easements Act, 1882 — Section 13, 13(b)
Transfer of Property Act, 1882 — Section 8

Citation : (1974) 09 MAD CK 0010

Hon'ble Judges : Gokulakrishnan, J

Bench : Single Bench

Advocate : V. Ratnam, for the Appellant; N.C. Raghavachari, N.S. Varadachari and K. Ramachandran, for the Respondent

Judgement

Gokulakrishnan, J.—The plaintiffs are the appellants. The suit is for a declaration of the plaintiffs' right to take water to the second schedule

land comprised in S. No 612/1A measuring 1 acre 47 cents and 613/measuring 2 acres 95 cents from the first schedule land which is tank

measuring 9 acres 10 cents in S. No. 612/1 A, 616/2 and 718/2 and also for an injunction against the defendant restraining him from cutting the

bund of the tank and allowing the lands of the plaintiffs to be inundated. The case of the plaintiffs is that on 9th January 1965 under Ex-A. 2 the

defendant sold the second schedule to the plaintiff to the plaintiffs. Prior to the sale deed the defendant is the owner of both the first and the second

schedules. It is clear from Ex.A. 6 which is of the year 1907, the second schedule sold to the plaintiffs came in the ayacut of the first schedule. This

is fortified by the village plan, Ex.A. 1 also. Thus the plaintiffs claim as of right that they are entitled to irrigate their lands from the first schedule tank

water. Though this right is not included in Ex.A. 2, the plaintiffs claim that they get this right by virtue of the easementary right and also under S.8 of

the Transfer of Property Act. Since the defendant attempted to cut the bund, the plaintiffs fearing that their lands will be inundated by the water of

the tank have come forward with the above suit.

2. The defendant contended that the plaintiffs cannot have any manner of right in the first plaintiff schedule property and that since a portion of the

tank bed is being used for cultivation, the tank has ceased to be a tank as such.

3. The trial Court after elaborately discussing the evidence on record came to the conclusion that the second schedule land is included in the ayacut

of the first schedule tank, that the said ayacut cannot be changed, that mere cultivation on a portion of the tank will not put an end to the character

of the tank as such, that the bunds were cut by the defendant; and as such there must be an injunction as prayed for by the plaintiffs. Thus the trial

Court decreed the suit as prayed for. Aggrieved by the judgment and decree of the trial Court, the defendant preferred an appeal to the Sub-

Court, Tirunelveli. The lower appellate Court, holding that there was no necessity as such for the plaintiffs to take water from the plaintiff first

schedule tank, allowed the appeal, and thereby dismissed the suit filed by the plaintiffs herein. Aggrieved by the judgment and decree of the lower

appellate Court, the plaintiffs have preferred the above second appeal.

4. Mr. Ratnam, learned counsel appearing for the appellants pointed out the mistakes committed by the lower appellate Court as regards S.13 (b)

of the Indian Easements Act and also pointed out that the reasoning of the lower appellate Court is not in accordance with the various decisions

cited by him.

5. Thirumathi Vimala learned counsel appearing for the respondent submitted that there must be necessity also for the purpose of taking the water

from the first schedule tank and in as much as the plaintiffs also are irrigating their lands through a well, it is not necessary to take water from the

tank. She submits that in as much as there is no necessity for the plaintiffs to take water from the tank, S.13(b) of the Indian Easements Act is not

applicable. She tried to distinguish the case cited by Mr. Ratnam on this aspect of the matter. She also submitted that on a reading of Ex A. 2, it

has to be construed that the defendant never intended to give any right to take

water from the first schedule tank.

6. I have been taken through the judgments of the Courts below and also the evidence on record. It is unnecessary for me to elaborately deal with

the facts of the case. Both the Courts below have concurrently found that the right enjoyed by the plaintiff by taking the water from the plaintiff first

schedule tank is apparent and continuous. The evidence on record both on the side of the plaintiffs and the defendant also makes out that the

enjoyment by the plaintiffs is apparent and continuous. The only question that has to be decided is as to whether S.13(b) of the Indian Easements

Act can be invoked to support the case of the plaintiffs in this case. S.13(b) of the Indian Easements Act states as follows:

13. Where one person transfers or bequeaths immovable property to another,--

(a) * * *

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took

effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

7. In *Ramaswami and Others Vs. Muniswami and Others*, , Ramaswami, J. while dealing with S. 13(b) of the Indian Easements Act, has held that

there are easements called quasi-easements. For this purpose it is enough that the dominant tenement enjoys the property of the servient tenement

to certain extent and it need not be absolute necessity. Dealing with that aspect of the case the learned Judge observed as follows:

In regard to the requirements of quasi-easement and the right of irrigation, the following information can be gathered from Katiaar's Law of

Easements and Licenses in India in (Third Edition) pages 145 to 155; K.N. Joshi's Easements and Licenses, Third Edition, page 65 and following;

Gale on Easements, Twelfth Edition, page 60 and following ; Peacock on Easements (T.L.L.) Third Edition, page 352 and following, and Goddard

on Easements Eighth Edition; page 38; while clauses (a), (c) and (e) of S. 13 of the Indian Easements Act deal with what are known as easements

of necessity, clauses (b), (d) and (f) have as their subject matter quasi-easements.

The meaning of the term quasi-easement which occurs in many modern authorities is as follows: Where Blackacre and Whiteacre both belong to

A, the common owner, and during his ownership an accommodation or privilege is enjoyed by Blackacre over Whiteacre, and A subsequently

parts with Blackacre to B but retains Whiteacre there passes to B in certain cases a right to the above accommodation. This accommodation as it

existed during the common ownership cannot in the strict sense be described as an "easement" but is usually described as a "quasi-easement".

Blackacre is sometimes described as the quasi-dominant tenement, and Whiteacre as the quasi-servient tenement.

Apparent and continuous easements which are necessary for the enjoyment of the dominant tenement in the state in which it was enjoyed at the

time when it was severed from the servient tenement are called quasi-easements. Before such severance they are only ordinary rights of property

and assume the character of rights of easement on such severance only provided they fulfil certain specified conditions, namely, (1) they are

apparent, (2) they are continuous, and (3) they are necessary for the enjoyment of the tenement for which they are claimed, in the same state in

which it was enjoyed before severance from the tenement on which their liability is thrown.

Mr. Ratnam also cited the decision in *Heeralli Ambalam v. Shanmugha Rojeswara Sethupathi* 66 M.L.J. Page 338; 29 L.W. 334 for the

proposition that simply because some portion of the tank bed was cultivated, the character of the tank is not taken away.

8. In the above said decision it has been held that the lands did not cease to be tank bed merely because cultivation was so carried on. It has been

held in *Souriraja Naidu v. Rajagopalan* 47 M.L.J. Page 302; 20 L.W. 245 that where a portion of the land is sold, an easement apparent,

continuous and necessary for enjoying the portions severed from the transferor's land will pass to the transferee unless a contrary intention is

expressed in the instrument of transfer. As far as Ex. A-2 in this case is concerned there is no contrary intention to prohibit the transferee from

enjoying such rights from the plaint first schedule property. Mr. Ratnam also in this respect read S. 8 of the Transfer of Property Act which reads

as follows :

8 Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the

transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents, include, where the property it is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer and all

things attached to the earth; and where the property is machinery attached to the earth, the movable parts thereof; and where the property is a

house, the easements annexed thereto the rent thereof accruing after the transfer and the locks, keys, bars, doors, Windows and all other things

provided for permanent use therewith; and where the property is a debt or other actionable claim, the securities therefore except where they are

also for other debts or claims not transferred to the transferee but not arrears of interest accrued before the transfer; and where the property is

money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. Thus, it is clear that unless a different intention is expressed or necessarily implied transfer of property passes forthwith to the transferee all the

interest which the transferor is then capable of passing in the property and in the legal incidents thereof. In *G. Sreenivasa Chettiar by power of*

attorney agent, *Sundar Rajulu Vs. Ramaru Goundar and Others*, it has been add:

That being the way in which the irrigable area was fixed, it goes without saying that even the proprietor who owns these sources as the owner of

the entire village, is not entitled to divert the water from these sources of supply to the detriment of the wet ayacurdars or to allow any other person

the use of that water for his dry lands.

As far as the present case is concerned, it is an admitted fact that the second schedule property enjoyed the water from the plaintiff first schedule

tank. It was also proved and found by both the courts below that such a user was apparent and continuous. In view of the decision made in

Ramaswami and Others Vs. Muniswami and Others, a quasi-easement is recognised by the Court and S. 13(b) can be safely invoked in the

present case also. The lower appellate Court is not correct when it was observing that there was no absolute necessity for the plaintiffs to take

water from the plaintiff first schedule tank. Apart from the absolute necessity the plaintiffs have proved their quasi-easementary right under S. 13(b)

for the purpose of taking water from the plaintiff first schedule tank. This aspect of

the case of easementary right has been correctly upheld by the trial Court, but unfortunately the lower appellate Court has missed this point of law and was rather guided by the fact that there was no absolute necessity for the plaintiffs to use the plaintiff first schedule tank water. It is not a question of alternate remedy for the plaintiffs in respect of taking water from the plaintiff first schedule tank, but it is a question of right which the plaintiffs are entitled to get under S. 13(b) of the Indian Easements Act.

In these circumstances, the second appeal is allowed and the judgment and decree of the trial Court is restored. There will be no order as to costs.

No leave.