

(1924) 01 MAD CK 0002
In the Madras High Court

Souriraja Naidu and Another

APPELLANT

Vs

Rajagopalan and Others represented through Mother and
Guardian Poornathammal

RESPONDENT

Date of Decision : 09-01-1924

Acts Referred:

Easements Act, 1882 — Section 13(b)

Citation : 81 Ind. Cas. 833

Hon'ble Judges : Charles Gordon Spencer, O.C.J.

Bench : Single Bench

Judgement

Charles Gordon Spencer, Offg. C.J.

1. The plaintiffs Nos. 1 and. 2 and 3rd plaintiff owning adjacent plots of land, instituted this suit to establish a common right of easement to take

water over the defendants' land by a channel marked A X Y B. They base their claims on allegations of easement by prescription and easement of

necessity. The District Munsif finding that the plaintiffs Nos. 1 and 2 had not proved any right of easement by prescription and could not claim an

easement of necessity, dismissed their suit. But he granted a decree to the 3rd plaintiff on the finding that he had enjoyed the right of irrigation by

means of a channel X Y for more than the statutory period. The plaintiffs Nos. 1 and 2 appealed against the dismissal of their suit. The defendants

appealed against the decree given, to the 3rd plaintiff.

2. The Subordinate Judge who heard the appeals, found that the plaintiffs Nos. 1 and 2 had got an easement apparent and continuous and

necessary for enjoying their lands which were obtained by means of a sale-deed from the defendants in 1900. In the First Court, there was no

consideration of the question whether the right of plaintiffs Nos. 1. and 2 could fall within Section 13 (b) of the Easements Act. The suit of these plaintiffs was dismissed because the District Munsif found that the easement claimed was not absolutely necessary for enjoying the lands, seeing that it was possible to irrigate them through another channel which would not pass over the defendants' lands. The second appeal is brought against the decrees in favour of both sets of plaintiffs. In respect of the 3rd plaintiff's case, both Courts have found that: he has no means, of irrigating his land except through the channel X Y and that it was so irrigated before it was severed from defendants' lands, and, therefore, nothing more can be said in second appeal against the correctness of the decree which is based on a finding, of fact by two subordinate Courts. But as against the plaintiffs Nos. 1 and 2, it is now suggested that if the easement is to be treated as one apparent and continuous and necessary, there should be a finding that it was apparent between the points Y and B. The Commissioner who went to the spot found that there once existed a Kanni between X and Y . But he was not able to say positively whether any water course existed between Y and B. The Subordinate Judge has found that the channel A X Y B was in existence for a long time and irrigating the lands 9 A C and 8 A, that is, the lands of both sets of plaintiffs. The Subordinate Judge was mistaken in saying that the District Munsif had found the existence of a channel between Y and B and that the Commissioner's report supported its existence. It has been suggested, therefore, that a finding should be called for on the evidence as to who there was an apparent easement between Y and B. I do not consider it necessary to do so. Not only is the conclusion of the lower Appellate Court clear that such a channel existed, but it seems to have been the common case of both parties in the First Court that there was a channel all the way between X and B. Not only did the plaintiffs assert the existence of this channel in their plaint, but the defendants did not deny its existence. Their answer to the plaintiffs claim was to allege that they themselves had dug a small kanni for their own irrigation purposes between X and B. The 3rd plaintiff who was examined as P.W. No. 1, the plaintiff's 2nd witness, the village Munsif, and his 4th witness, a mirasidar of that village, speak to the kanni taking a bend towards the east; and the karnam examined as D.W. No. 2 says that the portion east of Y was seen by him and had

been filled up. As there is evidence to support the Subordinate Judge's finding as to the existence of the channel not only over X Y but also Y B,

the second appeal can be disposed of without referring the matter to the lower Court again. It was suggested at the trial in the lower Court that the

land of plaintiffs Nos. 1 and 2 might be irrigated from the channel at the north of their land by taking water through the cuttings at, M (1) and M

and, therefore, it was argued that the easement was in any case not necessary for enjoying the subject of the transfer. In a recent decision of a

Bench of this Court, *Morla Gongulu v. Thata Jagannadham* 76 Ind. Cas. 331 : 45 M.L.J. 724; AIR (1924) (M.) 108, Devadoss and Coleridge,

JJ., referring to *Watts v. Kelson* (1871) 6 Ch. App 166 : 40 L.J. Ch. 126 : 24 L.T. 209 : 19 W.R. 833 observed that it was no answer to the

plaintiff's claim that a water course was necessary for the use of a tenement conveyed to them, to say that if that supply was cut off possibly some

other supply might be obtained. An easement apparent and 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. It appears, as has been found by the Courts below,

that before the plaintiffs' plots were severed from the defendants' plots, these wet lands were irrigated by means of the channel passing over the

plot which still remains in the defendants' possession. Unless there was a stipulation to the contrary at the time of the transfer, the transferees were

entitled to the same facilities of irrigation that used to be attached to the land transferred, before it was transferred and the defendant are not

entitled now, 20 years later, to tell the transferees to look out for some new source of supply on the ground that they do not wish to let them enjoy

those irrigation facilities which were attached to the land before it was sold. From this point of view the judgment of the Subordinate Judge, is

correct and the second appeal is dismissed with costs.