

(1924) 01 MAD CK 0030
In the Madras High Court

Souriraja Naidu and Another

APPELLANT

Vs

Rajagopalan and Others

RESPONDENT

Date of Decision : 09-01-1924

Acts Referred:

Easements Act, 1882 — Section 13(b)

Citation : AIR 1924 Mad 812 : (1924) 20 LW 245 : (1924) 47 MLJ 302

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

Bench : Division Bench

Judgement

Charles Gordon Spencer, Officiating C.J.

1. The plaintiffs 1 and 2 and the 3rd plaintiff owning adjacent plots of land instituted this suit to establish a common right of easement to take water over the defendant's land by a channel marked A, X, Y and B. They base their claims on allegations of easement by prescription and easement of necessity. The District Munsif finding that the plaintiffs 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 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 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 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 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 8A, 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 whether 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 plaintiff's 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. 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. 2 says that the portion cast 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 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 Gangulu*

and Another Vs. *Thata Jagannatham and Others*, , *Devadoss and Coleridge, JJ.* referring to *Watts v. Kelson* (1871) 6 Ch. A. 166. 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 plaintiff's plots were severed from the defendant's 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 defendants 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.