

M. Abdul Wahab, A. Muhammed Peerbath and Segu Meeral Vs Natarajan, Rangasamy and Gopal

Court: Madras High Court (Madurai Bench)

Date of Decision: Nov. 3, 2011

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 100
Easements Act, 1882 â€” Section 13, 15, 41

Hon'ble Judges: G. Rajasuria, J

Bench: Single Bench

Advocate: A. Arumugam for Mr. M. Ajmal Khan, for the Appellant; J. Jeyakumaran, for the Respondent

Judgement

G. Rajasuria, J.

This second appeal is focussed by the defendants animadverting upon the judgment and decree dated 29.06.2010 made

in A.S.No.93 of 2009 on the file of the learned Principal Sub Judge, Tirunelveli, in reversing the judgment and decree dated 04.11.2009 made in

O.S.No.290 of 2008 on the file of the learned I Additional District Munsif, Tirunelveli.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3. Broadly, but briefly, narratively, but precisely, the relevant facts absolutely necessary and germane for the disposal of the second appeal, would

run thus:

The plaintiffs filed the suit seeking the relief of easementary right in taking their sewage and sullage water from their respective houses through the

well defined "L" shaped canal in the defendants" plot to Arugankulam drainage canal which is situated to the east of the defendants" property, on

the main ground that earlier there was one litigation between the plaintiffs and the occupiers of the present defendants" property and that a decree

was passed in favour of the plaintiffs and even thereafter, the defendants who are the purchasers of the said property over which the easement is

claimed, started causing hindrance to the exercise of easementary right by the plaintiffs.

4. The defendants filed the written statement resisting the suit on the main ground that the earlier suit was having no binding effect on them, because

their vendor was not a party to the previous proceedings. According to the defendants, the plaintiffs are having the feasibility and possibility of

taking their sewage and sullage water to the front side of their houses and let it into the drainage pits concerned.

5. Whereupon the trial Court framed the relevant issues.

6. During trial, P.W.1 and P.W.2 were examined and Exs.A.1 to A.20 were marked on the side of the plaintiffs. D.W.1 and D.W.2 were

examined and Exs.B.1 to B.9 were marked on the side of the defendants.

7. Ultimately, the trial Court dismissed the suit, as against which the appeal was filed by the plaintiffs. Whereupon the first appellate Court reversed

the judgment and decree of the trial Court and decreed the original suit as prayed for.

8. Being aggrieved by and dissatisfied with the judgment and decree of the first appellate Court, the defendants preferred this second appeal on

various ground and my learned Predecessor while admitting the second appeal framed the following substantial questions of law:

(a) Whether First Appellate Court is legally right in applying the principles of res judicata when the defendants or their predecessors in title was

admittedly not a party to the earlier proceedings in O.S.No.971 of 1981?

(b) Whether the First Appellate Court is legally right in granting easement right to the plaintiffs over the second and third schedule properties

particularly when there is no averment in the plaint and in evidence that the second and third schedule properties belong to the defendants and

when the first plaintiff deposed in evidence that he is the owner of the second and third schedule properties?

(c) Whether the claim of easement to discharge drainage water into the neighbours property can be acquired by easement and whether such a right

to commit nuisance can be acquired by prescription or any other kind of easement?

(d) Whether the plaintiffs can claim right of easement without the necessary legal ingredients of easement by prescription or easement by necessity

and whether such claim is maintainable under Sections 13 & 15 of Indian Easement Act?

(e) Whether a decree obtained against the 3rd party who has no connection with the suit schedule property can bind the subsequent owner of

servient heritage who has purchased the property from the real owner?

(f) Whether the First Appellate Court is right in interpreting Section 13 of the Indian Easement Act?

9. At the outset itself, I would like to fumigate my mind with the following decisions of the Honourable Apex Court:

(i) Hero Vinoth (minor) Vs. Seshammal, .

(ii) Kashmir Singh Vs. Harnam Singh and Another, .

(iii) State Bank of India and others v. S.N. Goya reported in 2009 1 L.W.1.

10. A plain reading of those precedents would reveal and demonstrate that u/s 100 of the Code of Civil Procedure, a Second Appeal cannot be

entertained, unless any substantial question of law is involved.

11. Keeping in mind the aforesaid dictum, I heard the arguments advanced on both sides, whereupon I have felt that the substantial questions of

law, could be reframed as under:

(i) Whether the first appellate Court was justified in holding that the plaintiffs are having easementary right of taking sewage and sullage water from

their respective houses through the "L" shaped canal situated in the defendants' property and in granting reliefs without any reservation or

stipulating any conditions and that too, based on earlier judgment and long usage?

(ii) Whether there is any perversity or illegality in the judgment and decree of the first appellate Court?

12. Both the substantial questions of law are taken together for discussion inasmuch as they are inter-linked and interwoven, entwined and

intertwined with each other.

13. A summarisation and summation of the arguments advanced by the learned Counsel for the defendants would run thus:

(a) In the earlier judgment, the occupiers of the premises over which now the defendants are occupying, were added as the defendants, but the

then owner viz., the Trust was not added so. In such a case, it could only be treated as a judgment in personam having binding effect on the

defendants therein only and not on the present defendants who purchased the property during the year 2003 free from encumbrances and

easement over it from the true owner viz., the Trust.

(b) There could be no presumption of easement in favour of a person to the extent of diverting his sewage and sullage water into his neighbour's

land. There could be no prescriptive right to commit nuisance. The plaintiffs cannot by way of right claim that they are having the right to cause

nuisance to the defendants by letting into their lands the plaintiffs' sewage and sullage water from their houses. As on the date of filing of the suit,

there is no well defined canal much less a cemented canal as claimed by the plaintiffs in the course of the trial.

(c) The property is situated in the Municipal area. The Municipality is now laying Underground sewage pipes and in such a case, the plaintiffs could

rightly let in their sewage and sullage water into that Underground sewage. Even as on date, there could be no easement by necessity for the

reason that the plaintiffs' houses are facing west and there is a road to the west of their houses and in such a case, they have to let their sewage and

sullage water only on the side of the road and not into the defendants' property which is situated behind the plaintiffs' property.

14. In a bid to mince meat, torpedo and pulverise the arguments advanced by the learned Counsel for the defendants, the learned Counsel for the

plaintiffs would pilot his arguments which could tersely and briefly be set out thus:

The defendants in the previous suit are not strangers, but they were connected with the said Trust. In fact, the original defendant in the previous suit

was the trustee of the said Trust and the first appellate Court correctly placed reliance on the true facts and rendered the judgment that the

defendants who are the recent purchasers of the property concerned, cannot simply veer round and take pleas independent of the pleas taken by

their predecessor in occupation of the said premises. As on the date of filing of the suit itself, there was a well defined "L" shaped canal in the land

of the defendants and they cannot obstruct or destroy the same. The plaintiffs have been enjoying such easement for more than twenty years. He

would also submit that now the Municipality is taking steps to lay Underground sewage pipe and in the event of the Municipality extending such

facility to the plaintiffs" area, they would be no more in need of such easementary right and they would let their sewage and sullage water into the

said Underground sewage pipe.

15. The learned Counsel for the plaintiffs, would also in all fairness, submit that his clients do recognise that if running of the sewage and sullage

water along the open "L" shaped canal, would be irksome to the defendants who are occupying the said property and therefore, the plaintiffs

undertake to replace it with PVC pipe till the Municipality lays the Underground sewage pipe on the road side abutting the plaintiffs" property.

16. Trite, the proposition of law is that generally judgments rendered by a Court in matters between two parties, could only be taken as judgments

in personam and not judgments in rem. However, in respect of the easementary rights are concerned, every time the plaintiff who obtained a

decree in his favour asserting his easementary right over the servient tenement need not file separate suit whenever there is a change in the

ownership over the servient tenement. Easementary right runs with the land. The concepts "dominant heritage" and "servient tenement" are self-

explanatory and no elaboration is required.

17. Here, the plaintiffs are claiming that they are the owners of the dominant heritage and the defendants are the owners of the servient tenement.

18. The core question arises as to whether in the earlier suit, the owner of the servient tenement was made a party. It is obvious and axiomatic that

the real owner namely the Trust of the servient tenement was not added as one of the defendants, but only the occupiers were arrayed as

defendants. Based on that alone, the learned Counsel for the defendants herein would contend that the said earlier judgment would not be binding

on the defendants who are the subsequent purchasers from the erstwhile owners.

19. There is considerable force in the argument of the learned Counsel for the defendants, because this Court while rendering the judgment, should

not lose sight of the fact that this judgment would not be cited as a precedent in other cases. Au faith with law and au courante with facts, the

Courts are expected to deal with the matters of this nature as it affects the sentiments of rival parties as well as hygienic atmosphere of an area. In

stric to sensu, if the owner or the servient tenement was party in previous proceedings, then the purchasers of the servient tenement would be

bound by such decree. Per contra, if only the occupier of the servient tenement was a party in the earlier proceedings, then the purchaser of

servient tenement from the real owner would not be bound by the previous judgment.

20. However, according to the learned Counsel for the plaintiffs, the occupiers of the servient tenement were not utter strangers, but they were

very much related to the Trust.

21. However, one important point should not be lost sight of; the earlier litigation was started in the year 1981 and the new present litigation

commenced only in the year 2008. It is quite obvious that for more than twenty years, the plaintiffs have been using the servient tenement for the

purpose of taking their sewage and sullage water from their houses through the servient tenement and in such a case, there is considerable force in

the submission made by the learned Counsel for the plaintiffs that holus-bolus the plaintiffs should not be prevented from taking such sewage and

sullage water through the "L" shaped canal. Even as on the date of filing of the suit, such "L" shaped well defined canal was in existence and it is

quite obvious from the description found in the plaint and the evidence available on record; such factual findings are based on evidence appreciated

by the first appellate Court which is the last Court of facts.

22. A fortiori, the findings of the first appellate Court to that much extent, requires no interference.

23. My mind is redolent and reminiscent of the maxim "" Sic utere tuo ut alienum non laedas."" [So use your own as not to injure another"s

property].

24. At this juncture, I would like to refer to Section 41 of the Indian Easements Act, 1882, thusly:

Section 41. Extinction on termination of necessity:-An easement of necessity is extinguished when the necessity comes to an end.

Illustration

A grants B a field inaccessible except by passing over A"s adjoining land. B, afterwards purchases a part of land over which he can pass to his

field. The right of way over A"s land which B had acquired is extinguished.

25. Once necessity ceases, easement also ceases. This important factor should not be lost sight of when the Courts are dealing with the cases

relating to Easements.

26. The learned Counsel for the plaintiffs would appropriately and appositely, correctly and convincingly point out that once the Municipality

provides Underground drainage facility, then the plaintiffs would divert the course of their sewage and sullage water so as to let it into such

Underground drainage and there would be no more necessity for the plaintiffs to assert their easementary right and till such time, the drainage water

would be caused its flow through the "L" shaped PVC pipe at the cost of the plaintiffs instead of through the said "L" shaped open cemented

canal.

27. Both sides in unison would submit that the parties are not at logger heads insofar as the right of the plaintiffs to enter upon the land of the

defendants for getting whitewashed the eastern side compound walls of the plaintiffs and as such, it is recorded.

28. Accordingly, both the substantial questions of law are answered.

29. On balance, the second appeal is ordered accordingly modifying partly the judgment and decree of the first appellate Court as under:

The plaintiffs are directed to take their sewage and sullage waters from their respective houses through "L" shaped PVC pipe hidden underneath

the ground, which PVC pipe should be laid at the cost of the plaintiffs within a period of four months from the date of receipt of a copy of this

judgment, to the Arugankulam drainage canal and the said facility, they could enjoy till the Municipality provides some drainage facility for the

plaintiffs' houses. The plaintiffs are at liberty to enter upon the land of the defendants for whitewashing the former's compound walls as stated

supra as and when required. This judgment is executable one at the instance of either side. The plaintiffs are having no right to have ingress and

egress into the defendants' property for purposes other than, to whitewash the eastern side compound walls of the plaintiffs' and to lay the PVC

pipe as mentioned supra. Consequently, the connected Miscellaneous Petitions are closed. No costs.