

**(2011) 11 MAD CK 0156**

**Madras High Court (Madurai Bench)**

**Case No:** S.A. (MD) No. 1055 of 2011 and M.P. (MD) No. 1 of 2011

U. Gregory

APPELLANT

Vs

The District Collector,  
Kanyakumari District, Nagercoil,  
Mariantony and Viyagappan

RESPONDENT

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**Date of Decision:** Nov. 1, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100, 91(2)

**Hon'ble Judges:** G. Rajasuria, J

**Bench:** Single Bench

**Advocate:** K. Prabhu, for the Appellant; S. Kumar, Addl. Govt. Pleader for R.1 and Mr. John Jay Kumar for R.2 and R.3, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

G. Rajasuria, J.

This second appeal is focussed by the plaintiff animadverting upon the judgment and decree dated 14.09.2011 made in A.S.No.124 of 2010 on the file of the learned Subordinate Judge, Padmanabhapuram, in reversing the judgment and decree dated 28.08.2010 made in O.S.No.39 of 2008 on the file of the learned Principal District Munsif cum Judicial Magistrate, Eraniel.

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

3. A summation and summarisation, avoiding discursive delineation, of the relevant facts absolutely necessary and germane for the disposal of the second appeal, would run thus:

The plaintiff filed the suit for the following reliefs:

- A. The 1st defendant be directed by a decree of mandatory injunction to remove the construction blocking the use of the suit property as pathway be removed by itself and in case of failure it may be done through court in execution.
- B. The defendants 2 and 3 be restrained by a permanent injunction in interfering with the usage of the suit property as pathway by any means.
- C. The costs of the suit are awarded in favour of the plaintiff.

(Extracted as such)

on the main ground that there is a pathway in R.S.No.623/13 part and the defendants 2 and 3 are obstructing it. It is also the contention of the plaintiff that the pathway is situated in poramboke land over which the defendants 2 and 3 have no right.

4. The defendants 2 and 3 who are brothers, filed written statement resisting the claim of the plaintiff on the ground that they are the exclusive owners of the suit property which is a patta land and not poramboke land and by no stretch of imagination, the suit property could be described as a pathway.

5. The first defendant -District Collector filed the written statement averring that the suit property was not a Government land and the dispute is between the private parties.

6. Whereupon the trial Court framed the relevant issues.

7. During trial, P.W.1 and P.W.2 were examined and Exs.A.1 to A.7 were marked on the side of the plaintiff. D.W.1 was examined and Exs.B.1 to B.5 were marked on the side of the defendants.

8. Ultimately, the trial Court decreed the suit, as against which, the appeal was filed by the defendants 2 and 3, whereupon the first appellate Court reversed the judgment and decree of the trial Court and dismissed the original suit.

9. Challenging and impugning the judgment and decree of the first appellate Court, the plaintiff filed the present second appeal on various grounds and also suggesting the following alleged substantial questions of law:

- 1. Whether the 1st Appellate Court is right in holding that the appellant has not filed the suit in representative capacity without considering that the appellant is one of the affected party and hence he has every right to sue as per Section 91(2) of CPC?
- 2. Whether the 1st Appellate Court is right in holding that the appellant has not established that the suit property is a public pathway when Ex.A.1 and B3 Resurvey plan clearly proves that the suit property is a public pathway?

(Extracted as such)

10. 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.

11. A plain reading of those precedents would reveal and demonstrate that u/s 100 of the Code of Civil Procedure, Second Appeal cannot be entertained, unless substantial question of law is involved.

12. Keeping in mind the aforesaid dictum in mind, I heard the arguments advanced on both sides.

13. The contentions as put forth and set forth by the learned Counsel for the plaintiff could summarily and precisely be set out thus:

(i) The counter of the first defendant in I.A.No.221 of 2010 in A.S.No.124 of 2010 before the first appellate Court would support the case of the plaintiff, but the first appellate Court failed to consider the same.

(ii) As such, it is crystal clear that Nilavial Pathai which is situated in R.S.No.623/12 proceeds across R.S.No.623/13 which is the suit property and in such a case, the first appellate Court was wrong in upsetting and reversing the reasoned judgment and decree of the trial Court warranting interference in second appeal. The first appellate Court was not right in holding that the suit filed by the plaintiff was bad in view of the fact that it was not instituted in the representative capacity. Anyone having the right to use the pathway can bring the suit independently and not necessarily in a representative capacity representing all the users of the pathway.

(iii) Section 91(2) of the CPC was not taken into consideration by the first appellate Court. The Resurvey plan would establish that the suit property is a public pathway and accordingly, he would pray for setting aside the judgment and decree of the first appellate Court.

14. In a bid to mince meat, and torpedo and pulverise the contentions put forth and set forth on the side of the plaintiff, the learned Counsel for the defendants 2 and 3 would pilot his arguments by drawing the attention of this Court to various portions of the evidence as well as the judgment of both the Courts below thus:

(i) Unambiguously and unequivocally, pellucidly and palpably, obviously and axiomatically, the District Collector in his written statement without mincing words, stated that the dispute is between the two private parties relating to a patta land and not relating to any Government land. In such a case, it would not lie in the mouth of the plaintiff to contend that the District Collector admitted that the property belongs to the Government. The District Collector being a Public Official,

having a volte face quite antithetical to what he committed to himself in black and white before the trial Court, cannot veer round and state something which is untenable and his counter cannot be countenanced and upheld as legal and proper one.

(ii) The records would speak that the suit property belongs to the defendants 2 and 3 and accordingly, the first appellate Court appropriately and appositely, correctly and legally rectified the mistake committed by the trial Court warranting no interference in second appeal.

15. In this factual matrix, it is just and necessary to refer to the following excerpts from the written statement filed before the trial Court by the first defendant -the District Collector:

3. The averments in para 1 and 2 of the plaint are denied as false. R.S.No.623/13 of Thalakulam village is a patta land having a total extent of 0.14.5 hectares. It stands registered in the name of Thiru. Swamiyadiyan Nadar and others vider Chitta/Patta No.1209, Abuttng to this R.S.No.623/12 which is having an extent of 0.00.5 hectares and classified as "Nilavial Pathai". Even though it is classified as "Nilavial Pathai" it stands registered in the name of Thiru. Swamiyadiyan Nadar S/o. Chinna Pillai and others vide Chitta/Patta No.6451.

4. The averments stated in para 3 to 5 of the plaint are also denied as false. The suit property is not a public pathway as stated. No obstruction was made by the 2nd and 3rd defendants during the time of presenting grievance day petition before the 1st defendant. The 1st defendant cannot interfere with the litigations between the two private properties on their patta lands.

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6. The averments stated in paras 10 and 11 are also false. The suit property is not classified as Government pathway. But it is a patta land. The usage as pathway in the patta land is a private affair and the litigation is in between the two pattadars. The 1st defendant cannot interfere with this litigation.

(Emphasis supplied)

(Extracted as such)

16. Since the learned Counsel for the defendants 2 and 3 placed reliance on the counter filed by the District Collector in I.A.No.221 of 2010 in A.S.No.124 of 2010, I would like to extract the relevant portion from it, as under:

3.... It is submitted that R.S.No.623/12 of Thalakulam village, Kalkulam Taluk which is having an extent of 0.005 hectares is classified as "Nilaviyal Pathai". It goes through R.S.No.623/13 to Alankal odai (water course). It is absolutely belongs to the State of Tamil Nadu. No one have any right to obstruct this pathway. If there is any construction or obstruction is made in the public pathway which has to be removed.

17. Trite, the proposition of law is that any litigant for that matter, is entitled to disambiguate and disabuse, explain and expound the ambiguity in the pleadings, but they cannot try to confuse the already existing pleadings. Without mincing words, in the written statement, the first defendant -the District Collector being the Head of the District, based on the revenue records, categorically and clearly pointed out that the suit property does not belong to the Government and that it is not a poramboke land; even before the first appellate Court, he did not state in the said counter that the suit property is part of Government property or poramboke land. He stated that the Nilavial Pathai which is existing in R.S.No.623/12 might proceed across R.S.No.623/13. Such sort of ambiguous statement cannot form the basis for rendering judgment in favour of a party who relies upon it.

18. In this regard, I recall and recollect the following maxims:

"Affirmantis est probare." [The person who affirms must prove.]

"Affirmanti, non neganti, incumbit probatio." [The proof is incumbent upon the one who affirms, not on the one who denies.]

19. The onus probandi is on the plaintiff to prove his case. He has chosen to approach this Court averring and projecting that the suit property is a poramboke land and it is a pathway available for the use of the public in general including the plaintiff. There is no iota or shred, shrad or miniscule, jot or pint of evidence to demonstrate and display that the suit property is a poramboke land or Government land. There is also nothing to indicate and evince that there is a pathway, much less a well-trodden pathway in the suit property so as to enable the public to have access to the canal situated on the other side of R.S.No.623/13. Except the plaintiff, no one raised their little finger claiming the said property as a pathway. No representative suit has also been filed by any alleged affected persons. A fortiori, the suit property is a patta land, bereft and niggard of any pathway running across it.

20. Hence, in this factual matrix, I need not dilate on the question whether an individual could file a suit or a group of people in a representative capacity should file the suit, asserting pathway right.

21. My mind is redolent and reminiscent of the maxim "Ubi jus, ibi remedium" [Where there is a right, there is a remedy].

22. Not to put too fine a point on it, when no right is found established either by documentary evidence or by oral evidence, the question of the plaintiff asserting his right of pathway over the suit property will be a well nigh impossibility. The first appellate Court au faith with law and au courante with facts dealt with the appeal touching upon all the salient features involved in the case and found fault with the judgment and decree of the trial Court and correctly reversed it warranting no interference in second appeal. I do not find any question of law much less a substantial question of law involved in this second appeal.

23. On balance, this second appeal is dismissed, confirming the judgment and decree dated 14.09.2011 made in A.S.No.124 of 2010 on the file of the learned Subordinate Judge, Padmanabhapuram, in reversing the judgment and decree dated 28.08.2010 made in O.S.No.39 of 2008 on the file of the learned Principal District Munsif cum Judicial Magistrate, Eraniel. Consequently, the connected Miscellaneous Petition is dismissed. No costs.