

# **BOMBAY HIGH COURT**

Chandu Sajan Patil

Vs

Nyahalchand Panamchand

(Chagla, C.J. Gajendragadkar and Tendolkar)

15.10.1948

## **JUDGMENT**

### **Chagla, C.J.**

1. The question referred to this Full Bench is whether a civil suit will lie to establish the right of members of the public to carry a non-religious procession through the public streets. A suit was filed on behalf of the Hindu community of Sakur against the Muslim community of the same place for a declaration that the Hindu community had a right to conduct religious and social processions accompanied with music along certain public thoroughfares upon which certain Muslim mosques abutted. In 1938 the Muslims attempted to obstruct a Dasera procession from marching with music near one of the mosques. The Magistrate issued an order prohibiting the Hindus from carrying out their procession unless they obtained a declaration of their right from a competent civil Court. Hence the suit. The suit was decreed by the trial Court and the decree was confirmed by the learned Extra Assistant Judge at Ahmednagar. The Muslims came in second appeal to this Court, and that appeal having come before Bavdekar and Dixit JJ. they referred the question, as I have set out, to a Full Bench.

2. It is important to note that the suit was filed for a declaration without claiming any special damages, and it is not disputed that a suit for a declaration as to the right of a subject with regard to a public thoroughfare would always lie if special damages are claimed. But the difficulty arises when the suit is for a mere declaration. If there is an obstruction to a public thoroughfare, it constitutes a public nuisance, no special private rights are affected, and the public as a whole is interested in the removal of the nuisance. Therefore, the law has provided that in case of a public nuisance no suit would lie at the instance of a private party unless he can show that he has suffered damages over and above what the public at large had suffered. Under Section 91, Civil P. C., only the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, can institute a suit in respect of a public nuisance. But it must be borne in mind that a public nuisance may also affect private and individual rights. Every citizen has the

right to use a public thoroughfare in a lawful manner. Equally so has a community or a section of a community, and if such a right is threatened or taken away, there is no reason why a suit should not lie for a declaration of such a right. This Court in *Satku v. Ibrahim*, 2 Bom. 457 held that a civil suit in respect of an obstruction to a public road could not be maintained unless the plaintiffs could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. Sir Michael Westropp C. J. and Melvill J. who decided that case followed English precedents as to procedure, and at p. 459 the Chief Justice points out that, speaking generally, no action can, in England, be maintained for a public injury. Therefore, action did not lie for obstructing a man's passage in a highway, because, ordinarily, he has no more damage than others of the Queen's subjects; but the party causing the obstruction must be proceeded against by indictment. If, however, the person had sustained more particular damage by the nuisance than the public in general, then he might sue the party causing it. This decision was followed in *Kazi Sujaudin v. Madhavdas*<sup>1</sup>, *Virupaxappa v. Sherif Sab*<sup>2</sup>, and in *Venkatesh Appashet v. Abdul Kadir*<sup>3</sup>. It may be noted that Sir Michael Westropp did not consider the question as to whether a subject had the right to take out a procession or join in one on a public highway. On the contrary, the learned Chief Justice emphasised the fact that His Majesty's subjects at large had the right to pass and repass along a public highway so long as they did so peaceably and properly. The only point on which that decision turned was a purely procedural one, whether a suit would lie for the declaration of such a right without an averment of special damages. The question with regard to the right of taking out a procession was incidentally considered by Heaton J., both in *Virupaxappa v. Sherif Sab*<sup>4</sup> and in *Venkatesh Appashet v. Abdul Kadir*<sup>5</sup>, and according to that learned Judge, a man had the right to use the streets as a thoroughfare, i.e., for the purpose for which streets were made, but he had no right to pass along a street playing music. We may point out that the right to play music has nothing to do with the right of taking out a procession. The question of music is more a question as to what are the appropriate observances that go with a particular procession. But a discordant and rather a significant note in view of what the Privy Council subsequently decided, was struck by Sir Basil Scott C. J., sitting with Batchelor J., in *Baslingappa v. Dharmappa*<sup>6</sup>. In that case the plaintiffs sued on behalf of themselves and of other members of the religious community to have a declaration of the right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiff's. The learned Chief Justice considered the decisions in *Satku v. Ibrahim*, 2 Bom. 457 and *Kazi Sujaudin v. Madhavdas*, 18 Bom. 693, but distinguished them by holding that those cases dealt with the question of the removal of a public nuisance. But the case before him was a suit for the declaration of the right of an individual community to use the public road. According to him, although a declaratory suit might not lie for the removal of a public nuisance it would certainly lie for asserting an individual right to use the public road. In coming to this conclusion,

he relied on a decision in *Sadagopachariar v. Rama Rao*, 26 Mad. 376, which had been confirmed in appeal by the Privy Council. That case laid down that the right to conduct a religious procession through the public streets a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to directions or prohibitions for the prevention of obstructions to thoroughfares or breaches of the peace, and further that every member of the public and every sect has a right to use the streets in a lawful manner, and it lies on those who could restrain him in its exercise to show some law or custom having the force of law depriving him of the privilege. This case, therefore, enunciated two important principles : The inherent right, apart from any custom, of every person to conduct a religious procession along a public thoroughfare, and also the inherent right of every subject to use public streets in a lawful manner. That decision was affirmed by the Privy Council in *Sadagopa Chariar v. Rama Rao*<sup>7</sup>. Then comes the decision of the Privy Council in *Manzur Hasan v. Muhammad Zaman*<sup>8</sup>, which set at rest the conflict of decisions between the different High Courts in India with regard to the right of conducting a religious procession through a public street. Lord Dundedin in delivering the judgment of the Board first considered the question whether there was a right to conduct a religious procession with its appropriate observances along the high way, and the answer he gave was in the affirmative. Then he considered two other questions: one whether one sect can claim exclusive use of the highway for its worship. That claim was negated. The other question was whether a civil suit lies against those who would prevent a procession with its observances and then the Privy Council points out that there was a discrepancy between Bombay decisions and Madras and Calcutta decisions. Their Lordships referred to the judgment of *Westropp C. J. and Melvill J. in Satku v. Ibrahim*<sup>9</sup> and pointed out that that decision proceeded entirely on English authorities which laid down the difference between proceedings by indictment and by civil action, and they observed that such a way of deciding a case was inadmissible, as the distinction between indictment and action in regard to what was done on a highway was a distinction peculiar to English law and ought not to be applied in India. The Madras and Calcutta view was that a suit for a declaration would lie without proof of special damages, and their Lordships accepted that view as the correct view. It is perfectly true that the Privy Council was considering a case of a religious procession and the observations of their Lordships are naturally with reference to religious processions. The question we will have to consider is whether these observations have a wider import or they must be strictly confined to their context. A later decision of the Privy Council in *Martin & Co. v. Faiyaz Husain*, laid down another important principle that the right to take out a religious procession was not dependent upon any custom, but was an inherent right, subject, of course, to the rights of other members of the public to pass and repass along the same streets and subject to the powers of the appropriate authorities controlling traffic and preventing disturbances. Here,

again, the question would arise whether the inherent right of the members of the public is confined to taking out a religious procession or whether it extends even to non-religious processions.

3. It is difficult to see what is the distinction in principle between the right of conducting a religious procession along a public thoroughfare and the right of conducting a non-religious procession. The right, it seems to us, depends upon the lawful and reasonable user of a highway. Can it be said that conducting a non-religious procession along a thoroughfare is a less lawful and reasonable user of a highway than conducting a religious procession? It has been suggested that the Privy Council in *Manzur Hasan v. Mohammad Zaman*, confined its decision to religious processions because of the peculiar conditions prevailing in India. If that were so, the Privy Council would have been at pains to make it clear that their decision should not be extended beyond what it actually decided. The observations of the Privy Council seem to us more of a general character rather than as being confined to its particular context. Further if, religious processions are a peculiar feature of Indian life, equally so are non-religious processions. A marriage procession going through a public road is as familiar a sight if not more than a religious procession. The principle that emerges according to us from the two Privy Council decisions in *Manzur Hasan v. Muhammad Zaman* and *Martin & Co. v. Faiyaz Husain*, is that when a subject has an inherent right with regard to the user of a highway, he can maintain a suit for declaration of that right without proof of special damages. The Privy Council does not lay down that the only inherent right that a subject has is to join in a religious procession or to conduct a religious procession, and no authority has been cited to us which holds that the right to conduct a non-religious procession is not as much an inherent right as to conduct a religious procession. On the contrary, there are several decisions to which we shall presently refer which have put non-religious processions on the same footing as religious processions. In *Sivappachari v. Mahalinga Chetti*, 1 M. H. C. 50, the plaintiff sued the defendants for having forcibly stopped a marriage procession which he was conducting on a public highway. The District Munsif awarded damages to the plaintiff. The Additional Principal Sadar Amin in appeal disallowed the plaintiff's claim on the ground that the persons of the plaintiff's caste had no right to institute such marriage processions. The High Court disagreed with the opinion of the Additional Principal Sadar Amin that the procession was one which the plaintiff was unauthorised to institute, and it added that the procession being one which was conducted by the plaintiff on the public highway, his right so to make use of the highway could only be questioned by the Magistrate, who, for the preservation of the peace, might if he saw sufficient grounds, interdict the procession. The defendants had no right of preventing the plaintiff from carrying out the procession. *Sundaram v. The Queen*<sup>10</sup>, is a case of religious procession which was referred to with approval by the Privy Council in *Manzur Hasan v. Muhammad Zaman*. But the learned Chief Justice Sir Charles A. Terner at p. 215 refers

to the decision of the Sadar Court in *Sambalinga Murti v. Vembara Govinda Chetti*,<sup>11</sup> In that case a guru of the Devanga caste sued to establish his right to be carried in a palanquin in procession through certain streets in Salem attended by his disciples with bands of music. The defendants pleaded that it was contrary to custom for people of the plaintiff's caste to go in procession through streets inhabited by the people of the defendants' caste, and a Full Bench of the Sadar Court held that the right claimed was a natural right inherent in every subject of the State, and it lay on those who sought to restrain the plaintiff in his exercise of it to prove some law or custom having the force of law depriving him of the right. Therefore, the lawful user of a highway is a natural right inherent in every subject. It is not for the plaintiff to establish that right, but it is for the other side to prove some law or custom which would deprive him of that right. *Velan Pakkiri Taragan v. Subbayan Samban*<sup>13</sup>, was again a case of marriage procession, and the plaintiffs filed the suit against the defendants for a declaration that they were entitled to conduct their marriage procession along the public road, and the Court held that such a suit would lie without allegation of proof of special damage. In *Muhammad Jalil Khan v. Ram Nath Katna*<sup>14</sup>, Sulaiman and Young 33., were dealing with a case of religious procession, but at page 490 they do say that taking out of a procession accompanied with music, whether as a part of religious worship or not, is within the civil rights of a community, but not an exclusive use of the highway for worship. In English law, to organise or take part in a procession on a public highway is not necessarily a nuisance. It is only a nuisance when such a procession constitutes an unreasonable user of the highway or would naturally result in an obstruction. (See Halsbury, Vol. XVI, p. 362), Our attention has been drawn to a decision of this Court reported in *Sangabasavaswami v. Baburao Ganesh*<sup>15</sup>, In that case Sir Harilal Kania, Ag, C. J., in his judgment took the view that the right of the members of the public to carry a religious procession through the public streets does not extend to processions which are not religious. But with very great respect, that observation of the Acting Chief Justice was entirely obiter because the suit was founded only on the claim to take out a vyasantol procession which the plaintiffs alleged was a religious procession. The lower appellate Court held as a fact that the procession which the plaintiffs wanted to carry out was not a religious procession, and Kania J., held that in second appeal the High Court was bound by that finding of fact. The plaintiffs did not allege in the alternative that they had a right to take out a non-religious procession and therefore the question of that right did not at all arise for determination. Besides, this point was apparently not fully argued because the judgment mentions that "in answer to Court Mr. Desai admitted that in no decided case he had found such a general right admitted, conceded or upheld."

4. The question really, therefore, resolves itself into this. Has a citizen or a community or a section of a community an inherent right to conduct a non-religious procession through a public road ? If he has such a right, and in our opinion he undoubtedly has, then it must inevitably

follow that he has also the right to file a declaratory suit without proof of special damages. It must be made clear that any such inherent right is subject to the right of other citizens also to use the highway in a lawful manner and also subject to any orders issued by the State for the purpose of preventing breaches of public peace and for maintaining law and order. The question whether a procession has a right to play music or not is always a question of fact. It would depend upon whether music is an appropriate observance of that particular procession, and Bavdekar and Dixit JJ., were right in not adding the words "accompanied by music" to the question they have submitted to us.

5. We would, therefore, answer the question submitted to us in the affirmative, but we would amend the question by adding the words "without proof of special damages." [When the appeal went back to the division Court for final disposal, Bavdekar and Dixit JJ., after hearing the parties, delivered the following judgment on 25th March 1949.] Bavdekar, J.

6. The Full Bench has now given a reply to the question which was referred to them in the affirmative and amended the question by adding the words "without proof of special damages" which our reference shows were inherent in the question which was referred to the Full Bench. In that view, therefore, the plaintiffs were entitled to the injunction which had been applied for not only in respect of religious processions but also in respect of social processions. This, however, is subject to two restrictions. The first is already mentioned by the learned trial Judge in the order which he has given. That is with regard to the injunction being subject to any order or directions issued by the Magistrate or police for preventing breaches of public peace or obstruction of the thoroughfares or for other matters mentioned in Section 144, Criminal P. C., or under other statutory provisions or for regulation of traffic. It is quite clear, however, that the right of the plaintiffs is also subject to the rights of members of other communities also to use the highway in a lawful manner. We would add these words in the decretal order of the learned trial Judge before the words which we have just quoted and after the word "mosque."

7. This right the plaintiffs will have only in case music is an appropriate accompaniment to the religious or social processions in question.

8. With this modification the appeal of the defendants is dismissed. The order as to costs of the parties will be that the plaintiffs will recover 3/4ths of the costs from the defendants throughout. The defendants will bear their own costs.

Cases Referred.

118 Bom. 693

211 Bom. L. R. 372: (2 I. C. 494)

342 Bom. 438; (A.I.R. (5) 1918 Bom. 162)

4(11 Bom. L. R. 372 : 2 I. C. 494)

542 Bom. 438 : (A. I. R. (5) 1918 Bom. 162)  
634 Bom. 571 : (7 I. C. 663)  
734 I. A. 93 : (30 Mad. 185 P.C.)  
852 I. A. 61 : (A. I. R. (12) 1925 P.C. 36  
9(2 Bom. 457)  
106 Mad. 203 (F.B)  
11(1857) M. S. D 233  
1242 Mad. 271 : (A. I. R. (6) 1910 Mad. 674 F.B.)  
1453 ALL. 484: (A.I.R. (18) 1931 ALL. 841)  
1548 Bom. L. R. 100: (A. I. R. (33) 1946 Bom. 353)