
(1974) 03 KL CK 0001
In the High Court Of Kerala
Case No : O.P. No. 1129 of 1974

D. Anantha Prabhu

APPELLANT

Vs

The District Collector and Another

RESPONDENT

Date of Decision : 05-03-1974

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 19(1)(a), 19(1)(b)
Kerala Police Act, 1960 — Section 18, 19

Citation : (1974) KLJ 151

Hon'ble Judges : George Vadakkal, J

Bench : Single Bench

Advocate : K. Ramakumar, for the Appellant;

Judgement

George Vadakkal, J.—The petitioner, who is the Secretary of the Cochin Branch of the Rashtreeya Sevak Sangh (for short, Sevak Sangh) moves for a mandamus to direct respondents Nos. 1 and 2, the District Collector, Ernakulam, and the City Commissioner of Police, Ernakulam, respectively, to sanction the use of Mike Loud Speakers or such other Amplifier appliances by the petitioner and the organisation he represents. He also prays for a certiorari quashing Ext P2 proceedings of the 1st respondent. By Ext. P2 proceedings dated 15-2-1974 the 1st respondent accorded sanction to use the Durbar Hall Ground in this city for conducting the annual day celebrations of the Sevak Sangh subject to three conditions, the first of which is that "mike, loud speaker etc. should not be used at any time". The petitioner's complaint is against the imposition of this condition, and he seeks the aid of this Court to use mike, loud speakers etc. at the annual day celebrations of the Sevak Sangh to be held on 10-3-1974 (it is averred in the petition and submitted at the bar, that the celebrations are decided to be conducted between 5 p. m and 8.30 p.m. on that day) at the Durbar Hall Ground. Mr. Ramakumar, the learned counsel for the petitioner relies on Art.19(1)(a) and (b) of the Constitution and submits that the fundamental rights guaranteed to citizens by these clauses could be curtailed only in the manner provided for by clauses (2) and (3) of that article. The learned counsel

also questions the jurisdiction of the 1st respondent to impose such a condition, and further attacks jurisdiction if any, on the ground that there are no standards or lines to guide and regulate the, exercise of jurisdiction. According to the learned Senior Government Counsel who appears on behalf of the respondents, the petitioner has no fundamental right to use mike and loud speakers in the Durbar Hall Ground which is Government property. He submits that administratively the power to regulate the user of the ground is vested in the 1st respondent, that he can impose any condition in exercise of his power to regulate the user, and can even refuse sanction to hold the celebrations without assigning any reason. The primary question that arises for consideration is whether members of the general public have a right to assemble peaceably and without arms (as envisaged in Art.19(1)(b)) in the Durbar Hall Ground. If the answer to the above question is in the affirmative a further question arises regarding the scope of Art.19 (1)(a) which guarantees freedom of speech and expression; whether that freedom extends to use of mechanical or other contrivances to amplify sound and how far the State or its officers can regulate or restrict such user. Thirdly, this case raises the question whether in the absence of any guidelines (admittedly there are no rules or regulations or executive orders) the power, If any of the 1st respondent to sanction or not to sanction public assembly and/or the use of mike, loud speakers etc on Darbar Hall Ground is arbitrary as enabling him to discriminate between persons, without just classification.

2. Petitioner in Para.3 of his petition states as follows:

The said ground had been used on permission by the Sangh itself on many prior occasions in 1958, 1960, 1962 and 1971. The said ground is used not only by religious/cultural organisations, but also by political parties for holding public meetings. On such occasions Microphone and Loud Speakers are freely used even till mid-night. On occasions like the festival in the adjoining Siva temple. Amplifiers are used round the clock for about 7 days. Organisations such as the Chinmaya Mission and the Panthi cost Sabha use the ground for religious discourses for continuous days using Loud Speakers usually between 5 and 8 P.M. About 15 days back the Panthi cost was conducting one such function continuously for about 20 days.

These averments are substantially admitted in Para.2 and 9 of the counter affidavit of the 1st respondent. In the reply affidavit, In Para.3, the petitioner further states that "the ground has been from time Immemorial used as a public resort". The petitioner filed C.M.P. No. 3355 of 1974 seeking permission to amend the original petition by adding an additional ground B (b) That petition was not opposed and was allowed by me. In Ground B (b) the petitioner states:

The Durbar Hall ground, Cochin has been from time immemorial used by the Public as matter of right for conducting, festivals, public meetings. Even during the time of the Maharajas the ground was being used as of right by the public for the above mentioned purposes.

The additional counter affidavit filed by the 1st respondent does not controvert the statement regarding the immemorial user by the public, though if it is denied that such user was as of right. The right of the general public to assemble on the ground in question has to be determined with the above admitted or non-controverted facts in view.

3. In *Railway Board Representing The Union of India (UOI) Vs. Niranjan Singh*, the Supreme Court, with reference to the right to hold meetings on the premises owned by the Northern Railway said:

It was not disputed that the Northern Railway is the owner of the premises in question. The fact that the Indian Railways are State undertakings does not affect their right to enjoy their properties in the same manner as any private individual may do subject only to such restrictions as the law or the usage may place on them. Hence unless it is shown that either under law or because of some usage the railway servants have a right to hold their meetings in railway premises, we see no basis for objecting to the direction given by the General Manager. There is no fundamental right for any one to hold meetings in government premises. If it is otherwise there is bound to be chaos in our offices. The fact that those who work in a public office can go there does not confer on them the right of holding a meeting at that office even if it be the most convenient place to do so.

The passage recognises the principle that by usage a right to hold meetings on public premises would be created. Referring to this decision, and quoting a subsequent passage therein, viz;

The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please.

Sikri C.J. who spoke for himself and for A.N. Ray J. (as he then was) and Jaganmohan Reddy J. in *Himat Lal K. Shah Vs. Commissioner of Police, Ahmedabad and Another*, said:

This is true but nevertheless the State cannot by law abridge or take away the right of assembly by prohibiting assembly on every public street or public place. The State can only make regulations in aid of the right of assembly of each citizen and can only impose reasonable restrictions in the interest of public order.

This Court in *Babulal Parate Vs. State of Maharashtra and Others*, , rightly observed:

The right of citizens to take out processions or to hold public meetings flows from the right in Art.19 (1) (b) to assemble peaceably and without arms and the right to move anywhere in the territory of India.

Mathew J. in his separate but concurring judgment said as follows:

Public meeting in open spaces and public streets forms part of the tradition of

our national life. In the pre Independence days such meetings have been held in open spaces and public streets and the people have come to regard it as a part of their privileges and immunities. The State and the local authority have a virtual monopoly of every open space at which an outdoor meeting can be held. If, therefore, the State or Municipality can constitutionally close both its streets and its parks entirely to public meetings, the practical result would be that it would be impossible to hold any open air meetings in any large city. The real problem is that of reconciling the city's function of providing for the exigencies of traffic in its streets and for the recreation of the public in its parks, with its other obligations, of providing adequate places for public discussion in order to safeguard the guaranteed right of public assembly. The assumption made by Justice Holmes is that a city owns its parks and highways in the same sense and with the same rights as a private owner owns his property with the right to exclude or admit anyone he pleases. That may not accord with the concept of dedication of public streets and parks. The parks are held for public and the public streets are also held for the public. It is doubtless true that the State or local authority can regulate its property in order to serve its public purposes. Streets and public parks exist primarily for other purposes and the social interest promoted by untrammelled exercise of freedom of utterance and assembly in public street must yield to social interest which prohibition and regulation of speech are designed to protect. But there is a constitutional difference between reasonable regulation and arbitrary exclusion.

The framers of the Constitution were aware that public meetings were being held in public streets and that the public have come to regard it as part of their rights and privileges as citizens. It is doubtful whether, under the common law of the land, they have any such right or privilege but, nobody can deny the de facto exercise of the right in the belief that such a right existed. *Communis error facit jus* (common error makes the law). This error was grounded on the solid substratum of continued practice over the years. The conferment of a fundamental right of public assembly would have been an exercise in futility, if the Government and the local authorities could legally close all the normal places, where alone, the vast majority of the people could exercise the right. Our fundamental rights of free speech and assembly are modelled on the Bill of Rights of the Constitution of the U.S.A. (see *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, . It would be relevant then to look to the ambit and reach of those rights in the United States to determine their content and range in India. On closer analysis, it will be found that the basis of Justice Robert's dictum in (1939) 83 Law Ed. 1423 is the continued de facto exercise of the right over a number of years. I think the same reasoning can be applied here.

Beg J. who also agreed with the decision of the other four judges, but found difficulty to agree with the proposition Mathew J. enunciated on the basis of the maxim "*communis error facit jus*" (common error makes the law) said:

I do not find it possible to accept the view that a merely erroneous assumption can ever form the basis of a right unless buttressed by something stronger.

No doubt a meeting held on a highway will not necessarily be illegal. It may be sanctioned by custom or rest on permission, from an authority prescribed by statute, to put a particular part of the public highway to an exceptional and extraordinary user for a limited duration even though such user may be inconsistent with the real purpose for which the highway exists. The right has, however, to be shown to exist or have a legal basis, in every case in which a claim for its exercise is made, with reference to the particular part of the highway involved.

The learned judge proceeds to say (paragraph 74):

The right to hold a public meeting may be linked with or even flow out of rights under Art.19(1)(a) to express one's opinions and 19(1)(b) to assemble peaceably and without arms, just as the right to take out processions or moving assemblies may spring from 1 or be inextricably connected with these rights, yet in as much as the right to hold a meeting at a particular place must rest on the proof of user of that place for the exercise of a fundamental right, it appears to me that the right to such a user must be established in each particular case quite apart from or independently of fundamental rights guaranteed by Art.19(1) of our Constitution.

In the light of the above pronouncements of law by the Supreme Court and on the admitted and uncontroverted facts as disclosed in this case, I am of the view, that the first question formulated above has to be answered by holding that the general public have a right to assemble peaceably and without arms, and subject to any valid regulations and restrictions on the Durbar Hall Ground in this city.

4. In fact, this right is not denied by Ext. P2 proceedings, but in view of the defence raised by the learned Senior Government Counsel on the other two questions a decision on the first question is necessary, for if the general public has no right to assemble on the grounds in question, and they can do so only by leave and licence, the grantor of such leave and licence can impose any condition, and allow or prohibit public assembly on these grounds at his sweet will and pleasure. On the facts disclosed, and applying the principles above discussed such is not the case so far as these grounds are concerned.

5. Now, I come to the actual grievance of the petitioner, viz., the legality and reasonableness of the prohibition to use mike, loud speakers etc, at the public meeting sanctioned and allowed by the 1st respondent. I may here profitably refer to the decision of Lord Pearson who delivered the judgment of the Privy Council in *Francis v. Chief of Police*, (1973) 2 All E.R. 251. After referring to *Indulal K. Yagnik Vs. State and Others*, (which I will advert to later) as containing a full review of all relevant factors, the Privy Council said that the two conflicting considerations to be reconciled are the differing opinions delivered in the United States Supreme Court in *Sata v. New York*, (1948) 334 U.S. 558 and *Kovacs v.*

Cooper. (1949) 336 U.S. 77 . The passage in *Saia v. New York* relevant so far as the case in hand is concerned is this (taken from the judgment of Lord Pearson):

The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine... Loudspeakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached.

In the next case, *Kovacs v. Cooper*, it was said (also taken from the judgment in *Francis v. Chief of Police*):

The appellant's loud-speakers blared forth a small park in a small "city. The native power of human speech can interfere little with the self protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undesired reading matter. And so utterances by speech or pen can neither be forbidden nor licensed, save in the familiar classes of exceptional situations. *Love II v. Griffin*, (1938) 303 US. 444 ; *Hague v. C.T.O.*, (1939) 309 US. 496; *Schneider v. Irvington*, (1939) 308 US. 147; *Chaplinsky v. New Hampshire* (1942) 315 US. 568 . But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled; the result is intrusion into cherished privacy.

The Privy Council was considering S. 10 of the Constitution of the State of St. Christopher, Nevis and Anguilla, which guaranteed freedom of expression subject to any law reasonably required in the interest of defence, public order, public morality or public health or for the purpose of protecting the reputations rights and freedoms of other persons. That provision in substance corresponds to Art.19 (1) (a) read with sub-article (2) thereof. After noticing the two differing opinions of the United States Supreme Court. Lord Pearson said:

The American judgments show the principles and policy considerations involved, but may not be a guide to the detailed construction of S. 10 of the Constitution of the State of St. Christopher Nevis and Anguilla, because the First and Fourteenth Amendments have no provision corresponding to S. 10 (2). The American judges look for the inherent limitations which there must be in the fundamental freedoms of the individual if the freedom of others and the interests of the community are not to be infringed. There are two ways of construing S. 10. One way is to read into sub-S. (1) the necessary limitations as inherent in the fundamental freedoms of expression and communication. The other way is to look first at sub-S. (1) to see whether according to the literal meaning of the words there is a *prima facie* hindering of or interference with the freedoms of expression and communication, and, if there is, look on to sub-S. (2) to see whether such hindering or interference is justifiable. If the second way is

adopted, the phrase, "public order" must be given a meaning wide enough to cover action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of a substantial number of persons. The phrase would of course cover action for the avoidance of any behaviour likely to lead to a breach of the peace, and perhaps excessive noise can be brought under that heading.

Whatever may be the exact construction of S. 10, it must be clear that (1) a wrongful refusal of permission to use a loudspeaker at a public meeting (for instance if the refusal is inspired by political partiality) would be an unjustified and therefore unconstitutional interference with freedom of communication, because it would restrict the range of communication, and (2) some regulation of the use of loudspeakers is required in order that citizens who do not wish to hear what is said may be protected against "aural aggression" if that might reach unbearable intensity.

It appears to me that the right conferred by Art.19(1)(a) and the restriction that can be put on these rights under Art.19(2) have to be understood in the same way.

6. In *Hirnat Lal*'s case already referred to Mathew J. said:

The basic assumption in a democratic policy is that Government shall be based on the consent of the governed. But the consent of the governed implies not only that the consent shall be free but also that it shall be grounded on adequate information and discussion.

Freedom of speech and expression connotes freedom of the audience to receive ideas and information without any interference and obstruction and freedom of the speaker or the person who wants to express his ideas and opinions to speak or express himself in such a way that his ideas and opinions are effectively communicated to the audience. But at the same time, as the Privy Council pointed out the State can regulate the use of loud-speakers and mechanical or other contrivances to amplify sound. How far such regulation can go is entirely a different question. In the Privy Council case it was said that the phrase "public order" "would cover action for the avoidance of any behaviour likely to lead to breach of peace". That is so. However, it was also said that "perhaps excessive noise can be brought under that heading". In view of the decision of the Supreme Court in *Madhu Limaye Vs. Sub-Divisional Magistrate, Monghyr and Others*, where the phrase "public order" was equated with "order publique" plus absence of all acts which are a danger to the security of the State, the question whether excessive noise can always be classified as not conducive to "public order" requires further scrutiny and study. In *Madhu Limaye*'s case the Supreme Court said:

We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public

disorder. The words "public order" and "public tranquillity" overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. "Public order" no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means what the French designate *ordre public*, defined as an absence of insurrection, riot, turbulence, or crimes of violence. The expression "public order" includes absence of all acts which are a danger to the security of the state and also acts which are comprehended by the expression "*ordre public*" explained above but not acts which disturb only the serenity of others.

Whatever that be, I do not propose to examine this aspect of the matter any further, for admittedly there are neither statutory provisions nor executive orders covering this field reasonableness of which are to be tested in the light of Art.19(2).

7. In *Indulal K. Yagnik Vs. State and Others*, Miaboy J. speaking for the Division Bench and referring to freedom of speech and expression said:

In our judgment, though the right guaranteed by Art.19(1)(a) has many facets, it is but one right. The right of speech and the right of expression are not two separate rights, but, they are two aspects of one and the same right, one being complementary to the other. This fundamental right is not merely a right to make use of one's larynx.....Thus, the essence of the right does not consist in merely making use of the human voice, but it lies in the ability to convey one's views to others.....The essence of the right consists in giving an opportunity to the citizen to reach the minds of his fellow citizens and, thereby, to give him the chance to convert them to his own views. It follows from this that the right includes not merely the right to propagate one's views, but, also comprehends the right to circulate those views to as large an audience as one can possibly reach. If the mechanical appliances and instruments other than the press can help the citizen in reaching a wider circle of audience than the limits of his voice can permit, there does not appear to be any good reason why the citizen should not be permitted to avail himself of them.

Therefore, we have no doubt whatsoever that the right which is guaranteed by Art.19(1)(a) is not merely a right to express and propagate one's views, but also includes in it the right to circulate one's views to others by all such means as are available to the citizen to make known those views. Under the circumstances, in our judgment, any legislation or order which puts a ban on the user of a loud speaker which helps the citizen in circulating his views to as large an audience as he can will be *prima facie* as infringement of the fundamental right of the freedom of speech and expression unless the infringement is justified by clause (2) of Art.19.

8. I am in respectful agreement with what is stated above. Condition No 1 in Ext.

P2 that "Mike, Loud Speaker etc. should not be used at any time" therefore amounts to infringement of the fundamental right of freedom of speech and expression in that the said condition stands across the person who speaks or expresses and the persons to whom he speaks or expresses effectively imposing restraints on communication between them which is the essence of the freedom of speech and expression and without which that freedom is futile and meaningless.

9. The next question for consideration is whether the ban on the use of "mike, Loudspeakers" etc. is a reasonable restriction in the light of clause (2) of Art.19. Ext. P2 proceedings do not state any reason for imposing the condition. The nub of what the 1st respondent states in his counter affidavit is that the ban was aimed at preventing unbearable nuisance, annoyance and disturbance to the inhabitants of the locality and neighbourhood, to all the people living in the vicinity of the Durbar Hall ground. It is stated that, therefore, he has formed an opinion "that, hereafter except in exceptional circumstances it is not advisable or desirable in the public interest to grant permission to use Durbar Hall Ground to any one which may involve incidentally the use of loud speakers particularly extending to night hours." It is nowhere stated, and it was not argued before me, that the nuisance, if any, arising out of use of mike and loud-speakers at the meeting would amount to a threat to any one or the other of the matters specified in Art.19 (2), or that the ban is necessary because speeches might amount to contempt of court, defamation or incitement to an offence. If it were for any of these reasons, one would not have expected the 1st respondent to allow the meeting itself on these grounds. It may also be noticed that as pointed out in Madhu Limaye's case already referred to acts which disturb only the serenity of others are not threats to public order. The ban is therefore not a reasonable restriction justifiable under clause (2) of Art.19.

10. Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others, the Supreme Court said;

This doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority....Secondly such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification. What a Legislature could not do, the executive could not obviously do. But in the present case the executive claims a right to issue a passport at its discretion, that is to say, it can at its discretion prevent a person from leaving India on foreign travel... An executive arbitrariness can prevent one from doing so and permit another to travel merely for pleasure. While in the case of enacted law one knows where he stands, in the case of unchallenged arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of

the executive.

I am afraid that the case in hand is one where (assuming that the 1st respondent has valid power to impose the condition in question) "discrimination is writ large on the face of it". The 1st respondent has formed an opinion as is stated in his counter affidavit to permit use of loud-speakers (even extending to night hours) in exceptional circumstances, and to refuse such permission in ordinary circumstances. There are no norms and guidelines to distinguish exceptional circumstances from ordinary ones. It would enable the 1st respondent to discriminate between person and person, and between meeting and meeting without any valid classification. Denial of right to use makes and loud-speakers on the basis of the opinion formed or decision taken not to grant such permission "except in exceptional circumstance" is in such circumstances violative of Art.14 of the Constitution. The Supreme Court in *Himat Lal's* case also highlighted the dangers of conferring arbitrary discretionary powers and struck down R.7 of Rules for Processions and Public Meetings framed under the Bombay Police Act, 1951, on the ground that the said rule confers arbitrary powers on the officer authorised by the Commissioner of Police.

11. Though arguments were advanced by the learned counsel for the petitioner on the basis of S. 18 and 19 of the Kerala Police Act, 1960, the learned Senior Government Counsel submitted that his clients are not making any reliance on those sections. The next question is as to the nature of the order that should be passed in this case. The first relief sought for is to issue a writ of certiorari quashing Ext. P2 proceedings. However, as contended on behalf of the respondents the petitioner as per Ext. P1 application sought permission to use the Durbar Hall Ground for the annual day celebrations, and the same was granted. The petitioner cannot therefore challenge the grant of sanction. The learned counsel for the petitioner in fact confined the first relief so far as condition No. 1 in Ext. P2 is concerned. The question is whether this could be done. Petitioner has also prayed for mandamus directing the sanction of use of mike, loud-speakers etc. and also for such other writs as this Court feels fit. Condition No. 1 is severable, and the remaining portion of Ext. P2 proceedings can remain without condition No. 1. The said condition is invalid and violative of Art.14 and 19(1)(a) of the Constitution of India. I think this case comes within the scope of the principles laid down in *Y. Mahaboob Sheriff and sons, Y. Mahaboob Sheriff and Others and S. Shamsoddin and Others Vs. Mysore State Transport Authority, Bangalore and Others*, and *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, for all the reliefs read together what the petitioner seeks is that the use of mike, loud-speakers etc. at the meeting shall not be prevented by respondents Nos.1 and 2. This relief could be granted by expunging or quashing the illegal condition, viz. condition No. 1 in Ext P2, and I hereby do so. No other directions are called for in this original petition. The original petition is disposed of as above. There will be no order as to costs.