
(1952) 02 MAD CK 0019

In the Madras High Court

Case No : Second Appeal No. 922 of 1947

Palvannam Pillai (since deceased) and Others

APPELLANT

Vs

Ganpathy Ayyar alias Salavady Ayyar and Others

RESPONDENT

Date of Decision : 01-02-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9, 91

Citation : AIR 1954 Mad 179 : (1952) 65 LW 338 : (1952) 1 MLJ 552

Hon'ble Judges : Venkatarama Ayyar, J

Bench : Single Bench

Advocate : K.S. Desikan, for the Appellant; S.V. Rama Iyengar, for the Respondent

Final Decision : Allowed

Judgement

Venkatarama Ayyar, J.—This Second appeal raises a question of some novelty and importance about the rights of members of the public to

take funeral procession through public streets and pathways. The plaintiffs are the appellants. They are residents of a hamlet called Puthukudy

Kallur which is attached to the village of Kodaganallur. The defendants are residents of this latter village. To the west of the hamlet of Puthukudy

Kallur there is a road running north to south, marked Road No. 9-G in the plaint plan, Ex. P. 1. At a point in the said road marked X in Ex. P. 1

there is branch road running east and that is marked X. Y. Z. in the plan. This road passes through the streets in the village of Kodaganallur

between the points X-1 to E E X-6 and at the point Y it turns southwards and leads on to the cremation ground on the banks of the river

Tamraparni marked "Z" in the plan. The plaintiffs allege that the main road 9-G and the branch road X, Y, Z, are public roads belonging to the

District Board, that they are entitled to use these roads for carrying the dead for cremation at the place "Z" and that the defendants are unlawfully

obstructing the plaintiffs in exercise of these rights. They accordingly pray for a declaration that they are entitled to use these roads "for all purpose

inclusive of taking or leading funeral processions" and for an injunction restraining the defendants from interfering with such user by the plaintiffs.

The suit is laid in a representative capacity on behalf of the villagers of Pudukudy Kallur and the defendants are sued as representing the villagers of

Kodaganallur.

2. The defendants admit that the road, 9-G is a public path-way but they contend that a portion of the branch road marked X and X-1 is a private

road belonging to the owners of adjacent lands and that, therefore, the plaintiffs are not entitled to pass along that portion of the road. They also

contend that even if the road is a public pathway the plaintiffs have no right in law to take funeral processions through it as that was not the

customary route. Lastly it is argued that the suit is barred u/s 91, C. P. C. The learned District Munsif rejected all these contentions. He held that

X. X-1 was a public road; that the plaintiffs as members of the public were entitled to use public pathways for funeral processions and that Section

91, C. P. C. was no bar to the maintainability of the suit. The suit was accordingly decreed. On appeal the learned Subordinate Judge reversed this

decree and dismissed the suit. He agreed with the District Munsif that the road X. X-1 was a public one and that the action was not barred by

Section 91, C. P. C. but he held that the right to use public roads for funeral processions was not an ordinary user and that the plaintiffs could not

claim it as a matter of right. In the result he allowed the appeal and dismissed the suit. The plaintiffs prefer this second appeal.

3. In view of the concurrent findings of the courts below that the road X. Y. Z. is a public pathway the only question that arises for determination is

whether the plaintiffs as members of the public are entitled to take funeral processions through the road, X. Y. Z. The right of members of the

public to take processions along a public road or street has been the subject of judicial consideration for over a century. At one time, it was

considered that though a person is entitled to pass and re-pass on public highways, he had no right to take processions as that was an

extraordinary user and could be justified only by custom or special grant. Thus in an early case reported in ""Decisions of the Sadar Adalat"" in --

"Sambalinga Moorthy v. Vembarry Govinda Chetti". (1856) MSD 219 (A) the civil Judge of Salem held that a Guru had no right to be carried in a

palanquin in procession through the streets of Salem merely on the ground that they were public streets and that such a right could be supported

only if there was a ""Sannad or patent granting it."" This was reversed by the Court of Sadar Adalat on the ground that the right to pass in procession

in the streets was

a natural right inherent in every subject of the State not requiring as the civil judge appears to suppose to be created by a sannad or patent.

In -- "Parthasaradi v. Chinna Krishnan", 5 Mad 304 (B) it was held by Sir Charles A. Turner C. J. and Muthuswami Aiyar J. that

persons of all sects are entitled to conduct religious processions through public street so that they do not interfere with the ordinary use of such

streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstruction of the thoroughfare or breaches of

the public peace.

The leading case on the subject is the one reported in -- "Sadagopacharjar v. Rama Rao", 26 Mad 376 (C). Therein it was held by a Bench of this

Court that

the right to conduct religious processions in the public streets is 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 such directions

or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace.

On appeal this decision was affirmed by the Privy Council in -- "Sadagopachariar v. Krishnamurthi Rao", 30 Mad 185 (PC) (D). The question

arose again for decision by the Privy Council in the case reported in -- AIR 1925 36 (Privy Council) . There the dispute was between two sects of

Muhamadans, the Shias and Sunnis as to their respective rights in taking processions during the Muharam. It was held that members of a religious

body have the right to conduct religious processions with appropriate observances along the highways. In -- AIR 1944 33 (Privy Council) the

Privy Council again observed:

The plaintiffs have the right as members of the public to take part in religious processions in the streets; subject of course to the rights of other

members of the public to pass and re-pass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and

preventing disturbance. This right as a normal user of the highway does not originate in custom.

This view had been repeatedly laid down in several decisions of the Madras High Court. Vide -- "Mannada Mudali v. Nallayya Goundan", 32

Mad 527 (G); -- "Andi Moopan v. Muthu Virama Reddi", AIR 1916 Mad 593 (H) and -- "Pakkiri Taragan v. Subbayan Samban", AIR 1919

Mad 674 (I). The law is thus well settled that it is the inherent right of every member of the public to take out a procession along public streets and

pathways so long as the rights of others to use the public pathways similarly are not infringed.

4. But it is contended on behalf of the defendants that the decisions which establish this right were all cases of religious processions and that the

principle of those decisions cannot be extended to other processions especially funeral processions. The decision in -- Sangabasavaswami

Mahantaswami Vs. Baburao Ganesh, is relied on in support of this position. In that case the Lingayats claimed a right to take out a procession with

what was described as Vyasantol, Kania Ag. C. J. delivering the judgment of the Bench observed ""that the general right of the public to take out a

procession which was not religious is not supported by law"" and that

carrying of Vyasantol in procession was not the taking out of a religious procession with appropriate observances as stated by the Privy Council in

AIR 1944 33 (Privy Council)

It was on the strength of this decision that the Subordinate Judge negated the rights of the plaintiffs.

5. Mr. K.S. Desikan the learned advocate for the appellants argues that there is no basis in law for making a distinction between religious

processions and other kinds of processions and that the decision in -- Sangabasavaswami Mahantaswami Vs. Baburao Ganesh, " has since been

overruled by a Full Bench of the Bombay High Court in the decision reported in -- Chandu Sajan Patil and Others Vs. Nyahalchand Panamchand

and Others, . He accordingly contends that on the findings of the courts below that the streets are public streets the plaintiffs are entitled to succeed. Viewing the question on principle, it is difficult to discover any reason why a distinction should be made between one kind of processions and another. When once it is conceded that the right to take religious processions is inherent in every citizen as a member of the public and not derived from any custom or privilege, it must follow that the right to take any other procession also must, without more, be inherent in every member of the public. No reason could be and none has been adduced for recognising a right to take religious processions and refusing the right to take other processions. Nor is there any warrant in the authorities for making any such distinction. The decision in -- " (1856) MSD 219 (A)" already referred to was the case of a non-religious procession, taking a Guru in a palanquin with music. It was held that such a procession could be taken. In -- "Sivappachari v. Mahalinga Chetti", 1 Mad HCR 50 (L) it was decided that a marriage procession could be taken along a public highway. In -- "26 Mad 376 (C)" reference is made at page 380 to an order that ""the Thengalais will be protected in the performance of acts which are not illegal in the village of Tiruvendipuram"" and in holding ""one Egal"" or funeral procession in the streets. "AIR 1919 Mad 674 (I)" is a Full Bench decision where the dispute related to the taking of a marriage procession. In Chandu Sajan Patil and Others Vs. Nyahalchand Panamchand and Others, the Hindu residents of Sakur claimed a right to take both religious and social processions through public streets. The Mussalman residents resisted the claim and contended on the basis of the decision in -- Sangabasavaswami Mahantaswami Vs. Baburao Ganesh, that the, plaintiffs had no right to take non-religious processions through public streets. The Full Bench decided that the plaintiffs had such a right. Delivering the judgment of the Full Bench, Chagla C. J. observed: 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?

After reviewing the authorities and discussing the decision in -- Sangabasavaswami Mahantaswami Vs. Baburao Ganesh, " the learned Chief

Justice went on to say

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.

6. An interesting case on the subject is the one reported in -- "Lowdens v. Keaveney", (1903) 2 Ir. Rep. 82 (M). There a party went in

procession through the streets of Belfast playing band, in disregard of police caution not to play in certain streets. The question arose whether the

action of the members of the party was unlawful. In holding that going in procession with band was not in itself unlawful but that it would become

unlawful only when the user was unreasonable and excessive, Lord O'Brien L. C. J. gave the instance of a funeral procession and observed as

follows:

Take as I said, the case of the funeral of some distinguished man--some great Minister of State --some great military commander --some citizen

prominent for his civic virtues, or some distinguished ecclesiastic. The funeral may consist of so many thousand persons, that the whole street to use

the language of the police sergeant may be swept and the greatest physical obstruction caused -- traffic brought absolutely to a standstill. Everyone

knows that such a funeral is sure to cause a great physical obstruction. It is the natural and probable consequence of the funeral procession moving

along the street. I asked was every man who took part in such a procession obnoxious to criminal liability for so doing (?) It would indeed be a

very anomalous state of the law if that were so. A funeral may be a most edifying manifestation. A large funeral whose numbers pass beyond the

circle of private friendship is often, if not always, the tribute of the living to the conspicuous virtues which had distinguished the dead.

The learned Judge proceeds on to give instances of soldiers' marches civil pageants and trades processions. He held that all these processions

would be lawful unless "the user of the street was an unreasonable one."

Gibson J. observed as follows:

Processions may use the streets for passage on lawful occasions and for lawful objects; and provided the user is reasonable there is no nuisance

and intrinsically a procession with a band is no more illegitimate than a funeral.

Thus the authorities clearly establish that the members of the public have a right to take processions through public streets or pathways whether the

processions be religious or social or political. The distinction made by the Subordinate Judge between religious processions and funeral

processions must accordingly be rejected as not supported either by principle or authority.

7. The court below also held that the user by the plaintiffs of the route, X. Y. Z. would be unreasonable because portions of it were formed only in

1932 and that, before that, funeral processions were taken through a different route. But that route lay through nanja lands and had to be resorted

to in the absence of a public road; It would be clearly unreasonable to bind the plaintiffs to this inconvenient practice of passing along fields when

there are public pathways available.

8. It was stated by the learned advocate for the respondents that there are temples near this route and that it would result in pollution if corpses are

allowed to be taken through it. But the learned District Munsif finds

that along this newly formed route funeral processions from different streets and portions of the defendants' village are being taken to the

cremation ground.

9. I must accordingly hold that the plaintiffs are entitled to use the pathways in question for funeral processions. It is scarcely necessary for me to

add that this user must be reasonable and that it would be subject to all the limitations to which all processions on the public streets are subject.

10. It remains only to deal with the contention of the respondents that this suit is not maintainable for the reason that the facts alleged in the plaint

would amount to a public nuisance and that there being neither special damage nor sanction of the Advocate General the action would be barred

by Section 91, Civil P. C. In -- "AIR 1919 Mad 674 (I)" one of the questions referred to the decision of the Full Bench was

Can a person or body of persons, who claim a right to go in procession along a public highway bring a declaratory suit to establish that right

against a person who threatens to obstruct it without allegation or proof of special damage?

This was answered in the affirmative. Subsequent to "this decision the Privy Council gave a similar decision in AIR 1925 36 (Privy Council) though

it would appear that the Madras decision was not brought to their notice. The same view was also taken in -- " AIR 1916 Mad 593 (H)" and in --

Chandu Sajan Patil and Others Vs. Nyahalchand Panamchand and Others, ". The view taken by the courts below on this question is clearly right

and this objection must also be overruled.

11. In the result the appeal is allowed, the decree of the lower court is set aside and that of the district Munsif restored with costs throughout. No

leave.