

In Re: Vijiaraghavachariar

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Court : Chennai

Decided On : Feb-25-1903

Reported in : (1903)13MLJ171

Appellant : In Re: Vijiaraghavachariar

Judgement :

Subrahmania Aiyar, J.

1. It is necessary first to consider the charges against the 3rd and 7th accused, whom the 11th accused has been charged with abetting.

2. Taking up the charge under Section 153 of the Indian Penal Code, the question on which practically the case turns is whether the recitation by the two accused during the procession in question of Prabandhams or Tamil hymns was illegal, not on the ground that it was against any usage of the institution, but with reference to the decision in O.S. No. 295 of 1886 in the District Munsif's Court of Conjeevaram. That decision only declared that the Tengalais were entitled to the Office of Adhyapakam, and in that capacity, as usual to recite the Prabandham on all the prescribed occasions of worship, without let or hindrance by the Vadagalais. It did not in the least affect the rights of the Vadagalais as ordinary worshippers. Having regard to the fact that that suit was entirely in relation to an office, it must, even if the decision had been silent as to the rights of the Vadagalais as ordinary worshippers, not office-holders, be taken that such rights were left untouched but

the decision is not silent on the matter. It in express terms refers to and preserves the rights of the Vadagalais, as ordinary worshippers, to recite the Prabandhams even in the company of and jointly with the office-holders, whose duty it is to recite them on such occasions. The attempt on behalf of the prosecution to construe this reference in the decision to the right of the Vadagalais to so join in the recitation, as a declaration that the Vadagalais are disentitled from reciting except in conjunction with the office-holders is on the face of it untenable. The Tengalais as Adhyapakars are subject to a duty to recite Prabandhams the performance of such duty entitling them to the emoluments of the office. They cannot, in consequence of their being Adhyapakars, claim an exclusive right to recite them and as the recitation of Prabandhams is a recognised form of worship both with the Vadagalais and the Tengalais, every Vadagalai must prima facie be held entitled to recite them by way of worship otherwise than in conjunction with the office-holders. No doubt, if the Vadagalais join the office-holders at the recitation on occasions of worship, it stands to reason that they should do so without in any manner interfering with the due recitation by the office-holders. In such circumstances the office-holders would be entitled to insist that the Vadagalais should recite only those hymns which they themselves were reciting, as otherwise they would be interfered with in the due discharge of their duties. But there is nothing to prevent a Vadagalai by himself or Vadagalais in a body reciting the Prabandhams separately from the office-holders and in doing so reciting verses different from those which the Adhyapakars may be reciting, provided that that is done without interference with the Adhyapakars.

3. Such being the rights of the Vadagalais, did the accused on the occasion in question interfere with the office-holders by the recitation complained of Clearly not. Admittedly, the parties were at that time at a distance of 150 feet from each other. Between them stood the body of torn torn beaters doing their part of the work and those who carried the idol, as well as the motley crowd which assembles at these festivals. Having regard to the bustle and confusion inevitable on such occasions, it is impossible for the office-holders to have heard anything of the recitation by the accused. This is almost conclusively proved by the fact that the office-holders had to send out persons to ascertain whether any recitation by the Vadagalais was taking place. It must consequently be held that the accused did

not interfere with the office-holders, by reciting Prabandhams as they did, and that they were not therefore guilty of any illegal act so as to bring them within the purview of Section 153.

4. The charge under Section 296 of the Indian Penal Code may now be examined. Presumably the object of the section is to secure freedom from molestation when people meet for the performance of acts which ordinarily take place in some quiet spot vested for the time in the assembly exclusively, and one cannot but feel serious doubts as to whether that section was intended to secure to persons who choose to engage in worship in an unquiet place open to all the public as a thoroughfare the immunity from disturbance due to those who meet to worship in a church, a mosque, or temple or other place appropriate for such a purpose.

5. Turning to the language of the provision, it is clear that the persons assembled are given a right in their collective capacity. What is there by constituted as offence has no necessary reference to the individuals forming the assembly and a disturbance punishable under the section may result from acts which involve no violation of their personal rights. The precise point for determination is whether the Tengelais on the occasion in question were an assembly lawfully engaged in religious worship within the meaning of the section, and having regard to the fact that they were then on a highway, an affirmative answer to the question would assume that a procession on a highway has a specific legal character and that the members of the procession have a right to use a highway as a place of religious worship.

6. Are these assumptions well founded? In the discussion of these questions it is scarcely necessary to point out that we should not proceed on the supposition that processions are social phenomena peculiar to this country and consequently that the rule to be laid down in cases like the present must necessarily be different from what prevails in other countries inasmuch as such a supposition would be incorrect. In the words of the judgment in *In the matter of Frazer* 63 Mich. 396. 'it has been customary from time immemorial in all free countries and in most civilized countries for people who are assembled for common purposes to parade together by day or reasonable hours at night with banners and other paraphernalia

and with music of various kinds. These processions for political religious and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims and are valuable factors in furthering them.' 6 Amer. Rep. at 315.

7. With these prefatory remarks let us proceed to examine what are the fundamental legal principles underlying the use of a highway by processions. Such principles, it is obvious, must be essentially the same as those on which the analogous so-called right of the public to use public places for holding meetings must rest, and which have been most carefully examined by Professor Dicey. His observations apply with equal force here. The learned author thus points out the fallacies of the ordinary conceptions on the subject: 'The notion that there is such a thing as right of meeting in public places arises from more than one confusion or erroneous assumption. The right of public meeting--the right of all men to come together in a place where they may lawfully be for any lawful purpose * * is confounded with the totally different alleged right of every man to use for the purpose of holding a meeting any place which in any sense is open to the public. The two rights, did they both exist, are essentially different and in many countries are regulated by totally different rules. It is assumed again that squares, streets or roads which every man may lawfully use are necessarily available for the holding of a meeting. The assumption is false. A crowd blocking up a highway will probably be a nuisance in the legal, no less than in the popular, sense of the term, for they both interfere with the ordinary citizen's right to use the locality in the way permitted to him by law.' Dicey's Law of the constitution 4th Ed. 430 The learned author's exposition of the true legal aspect of meeting in those places is as follows: 'The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C, to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass and to say what he likes to B so that his talk is not libelous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E and F, and so on ad infinitum leads to the consequence that A, B,

C, D and a thousand or ten thousand other persons may (as a general rule) meet together in a place where otherwise they each have a right to be for a lawful purpose in a lawful manner.' Dicey's Law of the constitution p. 258 Interference with a lawful meeting will therefore not be, to use the words of the same writer, 'an invasion of a public right, but an attack on the individual rights of A and B, and must generally resolve itself into a number of assaults on definite persons, members of the meeting. A wrongdoer who disperses a crowd is not indicted or sued for breaking up a meeting, but is liable (if at all) to a prosecution or an action for assaulting A, a definite member of the crowd.'

8. Another learned writer, Justice Collett, in his comments on the Indian Penal Code, takes the same view and in addition puts processions on a highway on precisely the same footing as public meetings. His observations are as follows: 'It may be convenient here just to notice the popular error that there is some such right as to hold a meeting in a public place or to move in procession along public streets. There can, in truth, be no such right other than or 'apart from that of each individual to pass and re-pass in a public place and therefore no right of public meeting or procession (however lawful the purpose) in any sense paramount to general convenience * *. Apart from all express law there can ex natura rei be no such right as to hold meetings or to move in procession in public places' Collett on the Indian Penal Code 235, 236

9. Before passing to another authority bearing on the present question, it is perhaps well to point out that the alleged right of procession must not be confounded with a reasonable interruption limited as to time such as that caused by fairs and markets, subject to which interruption a dedication of a highway may lawfully be made. The alleged right of procession suggests a right on the part of as many of His Majesty's subjects as may be so disposed, to occupy a highway whenever and so often as they may wish for a procession, or possibly for more than one procession to be conducted by persons of conflicting views and sympathies, beliefs and opinions. That such a right cannot be rested on dedication as at present known to the law follows from what was said by Wills and Grantham, JJ. in *Ex parte Lewis* 21 Q. B. D. 191 with reference to the alleged right of meeting. The learned Judges say: 'We were informed by Mr. Lewis that there was

no statute conferring or recognising such rights. He alleged that they rested upon dedication. It is, however, a species of dedication at present unknown to the law and of which there is no trace in our law books. The only dedication in the legal sense that we are aware of is that of a public right of passage of which the legal description is a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance.'

10. Upon the authorities I have thus referred to, it is perfectly clear that, in the eye of the law, a procession as such has not any specific legal character and that the only rights claimable by those constituting a procession on a highway are what appertain to them as individuals using the highway. Such right is to pass and re-pass, allowing these words the largest possible construction with due reference to all the exigencies of the public. No doubt, many acts may be done on a highway by persons using it which though not strictly passing and re-passing would yet be in the nature of incidents to such passing and re-passing. Though it would not be easy to enumerate them exhaustively and precisely, yet there can be no difficulty generally in drawing the line between what is so incidental and what is not, for nothing can be treated as so incidental which is inconsistent with, in the words of Collins, L.J., ' the paramount idea that the right of the public is that of passage '-- *Hickman v. Maisey* (1900) 1 Q.B. 757. But in no view can it be held that the doing of anything so altogether foreign to that paramount idea as the carrying on of religious worship on a highway is a proper incident to the right of passage even according to the most extended notions that can reasonably be entertained of that right. Though ordinarily it would, no doubt, be difficult to hold that persons passing along a highway appropriate it for purposes of worship merely by doing such equivocal acts as singing hymns and the like, yet this case presents no difficulty, inasmuch as here the prosecution case itself is that what the Tengalais were doing on the occasion in question did constitute religious worship and it is impossible to avoid the conclusion that such user of the highway was altogether wanting in lawfulness.

11. The soundness of this view is supported not only by decisions in cases where the question of lawfulness arose with reference to the owner of the freehold, but also by decisions in cases where such question arose with reference to liability of

those who were bound to maintain a highway in a proper state of repair but who had neglected to do so. *Stinson v. City of Gardiner* 42 Maine 248 cited in *Bevan on Negligence* (p. 431) is a leading decision on the point. The law as to the proper use of a highway was there laid down in the following terms: 'All persons have the right to pass and re-pass upon public roads so long as they violate no laws for the common good or for the protection of individuals. Within these restrictions they are entitled to the use of the highway for the purposes of travel whether the object of that travel is business or pleasure, whether they pass on foot, with carriages or in the various modes which each individual may choose to adopt. Any part of the highway may be used by the traveller and in such direction as may suit his convenience or taste provided he therein conforms to all laws and well-settled rules connected with such use. Children are not restricted in passing and re-passing upon the streets and roads more than adults. And the same rules are to be applied equally to all in regulating the use of highways for the objects designed.' And notwithstanding the broad view thus taken of the law it was held that 'when children appropriate a part of the road for their sports and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged although the injuries may take place through a defect in the road.' And as at the trial of the case the Judge has refused to instruct the Jury that if the plaintiff, a child, had at the time of the accident been using the highway as a play-ground, and not as a traveller, she could not recover, a new trial was granted on the ground that if, as alleged, she had been using the road as a play-ground and not as a traveller, the use for purposes of travel must be regarded as entirely suspended and that she had been using the ground for an object altogether different from that contemplated by the statute which imposed on the city the liability to maintain the road in repair. Precisely the same decision was given in *Blodgett v. City of Boston* 8 Allen 241 cited in note at 66 Amer. Dec 284 And in *Me Carthy v. Portland* See same note it was held that a person using a highway wholly for the purpose of horse-racing could not recover for injuries happening to him because the town did not afford him and his horse a safer and more perfect track. In *Vosburg v. Moak* 1 Cush. 453 Amer. Dec. 613 also cited in *Bevan* p. 126, it was held that where a number of persons were playing a game of cricket on a

highway and the ball hit a passer-by not only the particular individual who sent the ball, but all the persons engaged in the play were liable in damages as joint tortfeasors, inasmuch as they combined in using the highway for a purpose foreign to the appropriate user of the same.

12. Compare *Truro Corporation v. Row* (1902) 2 K.B. 709 where the mere fact of the defendant marking off a part of the foreshore for depositing oysters dredged by him in deep water, and claiming property in the oysters deposited therein was held to have rendered his user of the foreshore in excess of the right accorded to every subject to use the foreshore for the purpose of fishing.

13. To guard against any misconceptions arising with reference to the view adopted by me, I would observe that, upon the principles already expounded, processions per se are quite unobjectionable and that, as rightly decided in the American Case of *S. v. Hughes* 70 Penn. 86 'a peaceable procession in the streets of a town if lawful and if the streets are not obstructed more than is ordinarily the case under such circumstances is not an indictable offence on the part of the members composing it.' The cases cannot in my opinion, be taken to lay down anything more.

14. I may further observe that even when the members of a procession transgress the limit of lawful user of a highway a by setting up an untenable right to carry on worship there, they are not necessarily guilty of a common nuisance, for to be indictable there must be much more than a user' not lawful Though authority may scarcely be necessary for such an obvious proposition I may quote a few lines from *Fairbanks v. Kerr* L.R. 5 Ch. D. 713 as there allusion ,s made, by way of illustration, to the very use in question here Agnew, J., said: 'a street may not be used in strictness of law for public speaking, even preaching or public worship, but it does not follow that every one who speaks or preaches in the street or who happens to collect a crowd there by other means is. therefore, guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance Per se This statement, which I adopt as perfectly correct, must be sufficient to repel the idea that every user of a highway such as that in question here, could be interfered with

without reference to the question of a real nuisance having been caused thereby (as to some of the considerations governing the determination of which see *Original Hartpool Collieries' Co. v. Gibb* 3 Dec. M.& G. 304 and *Attorney-General v. Sheffield Gas Consumer's Co.* 24 R.R. 353. So long as that is not the case the authorities should and would treat the matter in the spirit in which Cozens-Hardy, J., viewed the case of the clergymen who set up a right to deliver sermons to the public on the foreshore. Though upon the authority of *Blundell v. Cotter* all 4 where it was held that, according to the common law the public at large having the right to go on the foreshore for two purposes only, viz., navigation, commerce etc and for fishing, they could not go there for the purpose of bathing, the right set up by the clergymen was negatived yet an injunction against him was refused for reasons thus humourously expressed by the learned judge: 'There are persons who derive satisfaction from listening to the addresses and the defendant derives satisfaction from delivering these addresses, I cannot conceive why they should be deprived of their innocent pleasure.' *Llandudno Urban District Council v. Woods* (1899) 2 Ch. 705

15. But it is one thing thus to take an indulgent view of the matter, and quite another to treat the members of a religious procession on a highway as an assembly lawfully engaged in worship there for the purpose of fixing criminal responsibility on others under Section 296 of the Indian Penal Code on the extraordinary ground that they were similarly engaged there and in the teeth of the rule that all His Majesty's subjects have in respect of a highway equal rights.

16. My conclusions on this part of the subject may be put shortly thus. There is no peculiar right known to the law as a right of procession ; though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful ; but as the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage already referred to, be of such a character as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question constituted an assembly engaged in worship lawfully

within the meaning of Section 296 of the Indian Penal Code,

17. The result is that the charges against the 3rd and 7th accused under both sections fail and with them those against the 11th as abettor.

18. Before concluding it seems but right to observe that one specially objectionable feature of this case is that the accused have been convicted and punished for acting in obedience to, or, at all events, in the spirit of, the District Magistrate's order passed in connection with a festival in the principal temple of the place, which was going on at the same time, whereby the Vadagalais were prohibited from joining the Tengalais in the recitation, but were allowed to recite separately--an order evincing judgment and discretion, inasmuch as whilst it prevented collisions between these rival sects, it secured to them both the opportunity of worshipping peaceably.

19. I would, therefore, reverse their conviction, set aside the sentences passed on them and acquit them. The fines, if levied, should be refunded.

Davies, J.

20. Taking the facts to be as found, namely, that the Vadagalais joined the procession in a separate goshti or group and recited one portion of the Prabandham in Tamil while the Tengalais in front were reciting another portion also in Tamil, and that this action of the Vadagalais was an innovation, it seems to me that they committed neither of the offences charged against them nor any other offence.

21. To constitute an offence under Section 153 of the Penal Code the Vadagalais must have been acting illegally and also with the intention of provoking a riot. On the first point the case for the prosecution is that the Vadagalais were acting illegally in that they were disobeying the injunction of a Civil Court. But on reading the judgment and decree of the Civil Court referred to. I can find no injunction prohibiting the Vadagalais from doing what they did. On the contrary I find that the particular prayer of the Tengalais that the Vadagalais should not be allowed to recite the Prabandham either jointly with or separately from the Tengalais, that is

that, the Vadagalais should not be allowed to recite the Prabandham at all, was expressly refused. While the exclusive right of the Tengalais to the emoluments attached to the performance of the service of recitation was declared, the right of the Vadagalais to recite the Prabandham 'as ordinary worshippers' was recognized and was reserved to them. No attempt was made to define their rights as ordinary worshippers. It was not laid down that they must worship singly or by twos or by threes and not in a large group, nor that they must march together with the Tengalais and not separately, nor that they might not utter Tamil--these being matters of ritual which are beyond the province of a Civil Court to determine. Therefore, it cannot be said that the Vadagalais in the present instance exceeded their rights as ordinary worshippers and consequently they did not act 'malignantly or wantonly by doing anything which is illegal.' Of course if they, being five or more, had attempted to enforce their rights by means of criminal force or show of criminal force, they would have been amenable to the criminal law, but they did nothing of the kind here. Now comes the second point, that is, whether they were intending to provoke a breach of the peace, and in regard to this I must also hold them to be innocent. By separating themselves from the Tengalais and going far behind them with the idol between, they were only following the directions of the District Magistrate in respect to a similar procession carried on at about the same time and place for the express purpose of preventing a breach of the peace. So that the conviction for the offence under Section 153 of the Penal Code entirely fails.

22. As to the other offence under Section 296 of the Penal Code, disturbing a religious assembly, the case for the prosecution is that the recital by the Vadagalais disturbed the recital by the Tengalais by, it would seem, the noise if made, but the facts show that this could not have been the case. In the first place a certain amount of noise is of the essence of these street processions of a deity. It is not alleged that whatever the noise was the Vadagalais that made it drowned all other noises, and from the evidence it would appear that it did not reach the ears of the Tengalais who were well away in advance so long as they remained there. It was only by some of the Tengalais coming back to where the Vedagalais were reciting that it was known they were reciting and in Tamil. If they had been reciting in Sanskrit, however loudly, the Tengalais could have had no objection,

because the right of the Vedagalais to form a separate group reciting in Sanskrit is admitted. So that the head and front of the Vadagalais' offending even in the eyes of the Tengalais was really nothing more than their reciting in Tamil instead of in Sanskrit. This could not have been a 'disturbance' of the worship of the Tengalais within the meaning of Section 296 of the Penal Code, unless it prevented the Tengalais from performing their part of the worship, which it never did. The conviction under this section therefore, in my opinion also fails. I wish to offer no opinion as to whether religious processions in public streets in India are 'lawful' or not, as from my point of view the decision of the question is unnecessary for the disposal of this case. I would quash both the convictions and acquit the three accused. The fines inflicted on them, if levied, must be refunded.

23. I should add that the whole proceedings in the Criminal Courts have been taken upon the erroneous view that the right of the Tengalais was a sole right to worship instead of a sole right to the emoluments attaching to the worship.

Benson, J.

24. With regard to the charge under Section 153, Indian Penal Code, the two questions for decision are, firstly, whether the action of the accused Vadagalais in forming a separate group (goshti) behind the idol, and there singing the Tamil hymn (Prabandham) was in contravention of the injunction contained in the decree of the Civil Court, and, secondly, whether it was 'wanton' or 'malignant.' If their action was in contravention of the decree, it was 'illegal' within the meaning of that word as defined in Section 43, Indian Penal Code, and having regard to the previous disputes between the two sects, there can be little doubt that it was also 'wanton' and 'malignant' unless the accused bona fide believed that they were acting in accordance with the orders of the District Magistrate, who, as Magistrate, had the power to regulate the processions in such a way as to prevent a breach of the public peace. If their action was not 'illegal,' no offence under Section 153 could have been committed. If it was 'illegal,' it must also appear that it was 'wanton' or 'malignant' in order to justify the conviction. On both points I am of opinion that the decision must be in favour of the accused. The decree established the exclusive right of the Tengalais as office-holders and to the enjoyment of the

emoluments of the office, and it restrained the Vadagalais from interfering with the Tengalais by reciting the hymns as office-holders, though it expressly preserved the right of the Vadagalais to recite the hymns as 'ordinary worshippers.' The exact order or ritual to be followed by 'ordinary worshippers' is naturally not defined in the decree, but there is nothing in it to prevent a Vadagalai, or a group of Vadagalais from reciting the hymns as ordinary worshippers in any part of the procession, provided that they do not do it in such a way as to interfere with the office-holders discharging their duty as such, In the present case there was no such interference, and, therefore, no illegality in the action of the Vadagalais, and no offence under Section 153. Even if the action of the Vadagalais was illegal, it would, I think, be difficult to say that it was 'wanton' or 'malignant' since it was in accordance with the orders of the District Magistrate in regard to the kindred processions to the big temple which had been going on for the previous four days--orders which the District Magistrate issued with a view to preventing the rival sects coming into collision and which were carried out under his own supervision and were successful in achieving the object aimed at. No special order was issued as regards the procession, out of which the present prosecution arose, but the circumstances were so similar to those connected with the big temple processions as to raise a strong presumption in favour of the bona fides of the accused, a presumption which is not rebutted by the evidence or by other circumstances connected with the procession.

25. As regards the offence under Section 296, Indian Penal Code, viz. 'voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship and ceremonies' I cannot accept the contention that the Tengalais were not 'lawfully' engaged in religious worship because they were engaged in it on a highway. No doubt a highway is primarily intended for the use of individuals passing and re-passing along it in pursuit of their ordinary avocations, but in every country, and especially in India, highways have from time immemorial been used for the passing and re-passing of processions as well' as of individuals and there is nothing illegal in a procession or assembly engaging in worship while passing along a highway, any more than in an individual doing so. No doubt, if a religious or any other procession interferes with the ordinary use of the highway by persons not members of the procession, the procession may be prohibited or

controlled by the proper authorities, and I take it that no court would convict a person under this section on an allegation that he voluntarily disturbed a religious procession if he could show that he was only using the road in the ordinary way and with due regard to the rights of others equally entitled to use it. But, subject to such control and the rights of others entitled to use the highway, there is, in my judgment, nothing illegal in a procession engaging in worship on a highway. In a case referred to in a note to 1 Russell on Crimes p. 787, sixth Edition, it was held that 'a peaceable procession in the street of a town, if lawful, and if the street is not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of the members composing it.'

26. The same view was accepted as beyond dispute by Turner, C.J. and Muthuwami Aiyar, J. in the case of Parthasarathi v. Chinnakrishna I.L.R. 5 M. 304 where it was stated that persons of whatever sect 'are entitled to conduct a religious procession through the public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrate may lawfully give to prevent obstruction of the thoroughfare or breaches of the public peace'. The passage was referred to with approval in the recent case of Shadagopachari and Ors. v. Rama Row--Appeal No. 211 of 1900--(not yet reported) in both of which the dispute was between the same rival sects as in the present case.

27. Again, in Muthialu Chetti v. Bapun Saib I.L.R. 2 M 140 Turner, C.J. and Muthmwami Aiyar, J., said 'It is a right recognized by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music so that they do not obstruct the use of it by other persons.' Again in the Salem Full Bench case Sundaram v. The Queen I.L.R. 6 M. 203 Turner, C.J. reaffirmed in no uncertain terms the right to go in procession through the public streets subject to the control of the Magistrate, and referred to previous decisions of this Court in support of his view, and Innes, J., said "I entirely concur with the Chief Justice in his exposition of the law relating to processions which is in accordance with the decisions of this and of the late Sadr Court for many years past.'

28. Lord Esher, M.R., has well expressed the necessity for caution in restricting the use of highway by a too narrow reference to their primary purpose as a means of merely passing and re-passing. Referring to the judgment in *Reg v. Pratt* 4 E.B. 860 he says: ' I must observe that I think that if the language of Erle, J. and of Crompton, J, in *Reg v. Pratt* 4 E. & B. 860 , were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable, exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or re-pass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that this is so. Highways are, no doubt, dedicated prima facie for the purpose of passage ; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser,' *Harrison v. Duke of Rutland* (1893) 1 Q.B. 142.

29. This passage is referred to with approval by Collins, L.J. in *Hickman v. Maisey* (1900) Q.B. 752 and he adds: " Now primarily the purpose for which a highway is dedicated is that of passage as is shown by the case of *Dovaston v. Payne* 2 H. B1. 527 and, although in modern times a reasonable extension has been given to the use of the highway as such the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and re-pass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage.'

30. With these remarks I entirely agree. The practice of using the public highways for religious processions has existed in India for thousands of years, History, literature and tradition all tell us that religious processions to the village shrines formed a feature of the national life from the very earliest time. That alone is sufficient to raise a presumption that it is lawful and to throw on those who allege it

to be unlawful the onus of showing that it is forbidden by law, but this it admittedly is not. The law recognizes the use of the highway by processions as lawful, and gives the Magistrate and superior officers of Police power to direct the conduct of assemblies and processions through the public streets and to regulate the use of music in connection with them, and to prevent obstructions on the occasions of such assemblies and processions (Madras Police Act XXIV of 1859, Section 49). The law recognizes religious processions as lawful just as much as it recognizes other processions. If it were necessary to refer to the origin of the use of highways for religious processions to a dedication of the highway to such use, I should find no difficulty in presuming such a dedication, for it is unreasonable to suppose that the dedicator would make a reservation against religious processions which would be wholly opposed to the sentiment of the Community, and of which we can find no trace in the history or customary law of the country. It is more reasonable to suppose that he would dedicate the highway to the purposes for which, in accordance with the custom of the country, it would be required by the people. The penal law of India extends a special protection against voluntary disturbance to all assemblies lawfully engaged in religious worships. A procession is but an assembly in motion and if it is a religious procession it is, in my judgment, entitled to the special protection given by the Penal Code to assemblies lawfully engaged in religious worship.

31. It may or may not be desirable to declare that religious processions on highway are unlawful, and that the processionists are trespassers, but this must be done, if at all, by the Legislature not by the Courts.

32. I think, then, that it cannot be said that the Tangalais were not lawfully engaged in religious worship within the meaning of Section 296, but I am of opinion that the other element required to constitute the offence, viz., "disturbance" has not been made out. No doubt the courts below -have both held that there was 'disturbance,' but it is clear that this finding was based on the supposed illegality of the Vadagalais' action. That action, however, as we have seen, was not, in fact, illegal, and that being so, it was not, in my judgment, of such a character as to cause any disturbance within the meaning of the section.

33. For these reasons I concur with my learned brothers in holding that the conviction must be reversed, and the fines, if levied, refunded.

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