

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice
Muttusámi Áyyár.

1880.
October 11.

MUTHIALU CHETTI AND 9 OTHERS (PLAINTIFFS), APPELLANTS,
v. BAPUN SAIB.*

Order—Magistrate—Music.

An order of the Magistrate directing that all music should cease when any procession is passing a certain place of worship, held *ultra vires*.

THE facts and arguments of Counsel in this case are fully set forth in the judgment of the Court (TURNER, C.J., and MUTTUSAMI ÁYYAR, J.)

Mr. *Johnstone* for the Appellants.

The *Advocate-General* for the Respondents.

The Court delivered the following

JUDGMENT:—The respondents having recently erected a mosque in Shevapett, a suburb of Salem, obtained from the District Magistrate on the 17th January 1878 an order in the following terms:—"The District Magistrate hereby grants permission to the Mussulmans of Shevapett to erect a musjid in the place indicated in the petition now read, subject to the conditions therein stated by them, viz., that they agree to allow free passage to all processions (Hindu and others) while passing and repassing this musjid, and, under G.O., No. 861, dated 9th May 1874, the District Magistrate hereby directs that all music shall cease while any procession is passing or repassing the above musjid." Feeling aggrieved by this order, which interfered with the exercise of a right they alleged and apparently proved they had enjoyed from time immemorial, the appellants, on their own behalf and on behalf of the other Hindu inhabitants of the suburb, instituted this suit to obtain a declaration of their right to use music in their processions and of the invalidity of the order of the Magistrate.

* Second Appeal No. 568 of 1879 against the judgment of J. C. Hannington, District Judge of Salem, dated 28th July 1879, reversing the decree of the District Munsif of Salem, dated 31st March 1879.

The District Munsif decreed the claim; the Judge has reversed the decree and dismissed the suit on the ground that the mosque being a recognized place of public worship the Magistrate's order did not go beyond the orders of Government, and must be upheld, any usage to the contrary notwithstanding.

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We agree with the Judge that usage, however long, would not avail to sanction an infringement of the law, and that it is immaterial for the decision of the question raised in this suit whether the Hindus have heretofore enjoyed the right they assert, or whether the edifice now raised as a place of worship by the Mahomedans has been so used for a shorter or longer period. We cannot, however, agree with the Judge that the notifications of Government to which the Judge alludes would be decisive of the question as to the propriety of the Magistrate's order or the rights of the parties. These notifications have not the force of law.

In the proper governance of a country of which different sections of the inhabitants hold widely divergent creeds, it is of course necessary that regulations should be established securing the members of each sect, in the legitimate performance of their devotional exercises, from improper interference on the part of members of other sects, and such regulations find a place in the law of British India (Indian Penal Code, Chapter XV).

But at times the rights of the several sects to the undisturbed exercise of their religious observances may come into conflict without any criminal intention. In such cases mutual toleration is, and must be, the only and the proper rule. It has then to be determined how far the conflicting rights interfere with and necessarily modify each other.

It is, on the one hand, a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed. It is, on the other hand, 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. If persons passing in procession attended by music pass a place in which others are assembled and engaged in public worship which the music would tend to disturb, it is the duty of the persons composing the procession to refrain from such disturbance; but assemblies for purposes of

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worship are held scarcely in any place at all hours and generally at appointed hours, and therefore it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognized place of worship if attended by music. If indeed the procession be of a religious character, the prohibition of it may be as real an interference with the free exercise of religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship, and if no religious procession is to be allowed to pass a recognized place of worship, whether persons are or are not at the time there assembled and engaged in religious worship, the members of a numerous sect might close every highway to the processions of a sect to which they are opposed by erecting in the neighbourhood of each highway a place of worship.

The law in the restriction it imposes on processions of whatever character does not go beyond the necessity. The order then passed by the Magistrate is not warranted by law, nor has he *generally* authority to declare the law on the subject and anticipate a breach of it by a prohibitory order.

For the preservation of the public peace he has a special authority—an authority limited to certain occasions. His first duty is to secure to every person the enjoyment of his rights under the law, and, by measures of precaution, to deter those who seek to invade the rights of others; but if he apprehends that the lawful exercise of a right may lead to civil tumult, and he doubts whether he has available a sufficient force to repress such tumult, or to render it innocuous, regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorized to interdict its exercise.

The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority.

In our judgment the order which this suit impugns was *ultra vires*, and the appellants had a good cause of action against the respondents who procured it. Reversing the decree of the Judge, we affirm that of the Court of First Instance, substituting for the words "as freely as they usually do in other places" the words "on all lawful occasions and in a lawful manner so

as not to disturb the respondents or other persons assembled for the performance of religious worship or religious ceremonies."

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The appellants will recover from the respondents their costs in all Courts.

APPELLATE CIVIL.

*Before Sir Charles A. Turner, Kt., Chief Justice, and
Mr. Justice Forbes.*

SESHAYYANGÁR AND 3 OTHERS (PLAINTIFFS), APPELLANTS, v.
SESHAYYANGÁR AND 4 OTHERS (DEFENDANTS), RESPONDENTS.*

1880.
August 23.

Liberty to erect places of worship.

In India the members of a sect are at liberty to erect a place of worship on their own property although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect, on their own property, places of worship, either public or private, and to perform worship, provided that, in the performance of their worship, they do not cause material annoyance to their neighbours.

THIS suit was brought on the 2nd December 1877 by some of the worshippers in the Tengalai Temple of Súndrasámi near Negapatam to restrain some Vadagalais from carrying their idol in procession round the four streets surrounding the said temple. A decree was also prayed for to order the removal of a Vadagalai idol from a house in one of the said streets.

The District Judge dismissed the suit with costs.

The plaintiffs appealed.

Mr. *Johnstone*, A. *Rámachandráyyár*, *Rangacharri* and *Tirunaramacharri* for the Appellants.

The *Advocate-General* and *V. Bhashyam Ayyangár* for Respondents 1, 2, 3 and 4.

The *Government Pleader* for the 5th Respondent.

The facts and arguments of Counsel sufficiently appear in the following

JUDGMENT :—The plaintiffs, alleging themselves to be worshippers in certain temples, which are known as Savundararáju

* Appeal No. 32 of 1880 against the decree of J. D. B. Gribble, Acting District Judge of North Tanjore, dated 8th November 1879.