APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918. *January* 23.

VENKATESH APPASHET AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* KHOJA ABDUL KADIR WALAD KHOJA IJAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Specific Relief Act (I of 1877), section 42—Right to play music in public street—Whether the declaration of right can be claimed as a right—Civil Court.

The plaintiffs, trustees of a Hindu temple, brought a suit for a declaration under section 42 of the Specific Relief Act, 1877, that they were entitled to play music while going in procession past a Mahomedan mosque situated in a public street.

Held, that the plaintiffs were not entitled to have the right to play music in a public street claimed and declared as a right.

Per HEATON J.:—The right to use a street as a thoroughfare is a right which a Court might properly declare; but the right to pass along a street playing music is not a right which the Courts ought to recognise in that sense.

SECOND appeal against the decision of C. V. Vernon, District Judge of Kanara, reversing the decree passed by V. V. Wagh, First Class Subordinate Judge at Karwar.

Suit for a declaration and injunction.

The plaintiffs sued to obtain a declaration and injunction and damages from the defendants stating as follows:—

The plaintiffs were the trustees of the Shri Shivnath temple at Angadi in the Karwar Taluka. The defendants were the Vahiwatdars of the Jumma Masjid at Angadi. On Kartik Vadya 7th every year the *Palki* of Shri Shivnath is conveyed in procession with music to Mavinhalla river and back to the temple by the road in front of the Masjid. Accordingly on November 24, 1910, the plaintiffs arranged to take the *Palki* in procession past the masjid, but the defendants obtained an order from the Sub-divisional Magistrate stopping the

*Second Appeal No. 671 of 191.

procession. The plaintiffs, thereupon, filed this suit praying for a declaration of their right to convey the said *Palki* with music.

The defendants pleaded that they never disputed the plaintiffs' right to go in procession but objected to music being played by the followers of the *Palki* while passing the masjid. They further alleged that the claim for declaration and injunction was not maintainable without proving special damage.

The Subordinate Judge relying on the ruling in *Baslingappa* v. *Dharmappa*[1] allowed the declaration and injunction subject to certain restrictions.

The District Judge, on appeal, reversed the decree observing as follows :—

The question then arises whether such a suit as the present can be maintained there being no proof of special damage. The facts on which the ruling already cited was based closely resemble the facts of the present case. This ruling was followed in *Kazi Sujaudin* v. *Madhavdas*[2] and in *Virupaxappa* v. *Sherif Sab*[3] in which the facts were almost precisely the same as the facts in question. In the latter case doubt was expressed as to whether such a declaration (of a right of going in procession with music along a public street) should ever be made by a civil Court. In view of this perfectly clear authority I am unable to follow the learned Subordinate Judge in applying the principle laid down in *Baslingappa* v. *Dharmappa*[1] to the present case. There is no doubt a difficulty in reconciling the two cases. Moreover the power of a Court to issue such a declaration as is here sought is discretionary, and there are cases in which the discretion should be exercised against the claim.

The plaintiffs appealed to the High Court.

Jayakar with *Nilkant Atmaram*, for the appellant :—The lower Court was wrong in its view that our suit for a declaration and injunction was not maintainable without proof of special damage. The street along which we claim a right to pass in procession is a public street and every man has a right to pass along it. It is an error to say that a suit brought for the

[1] (1910) 34 Bom. 571. [2] (1893) 18 Bom. 693.
[3] (1909) 11 Bom. L. R. 372.

1918.

VENKATESH APPASHET v. ABDUL KADIR.

purpose of obtaining a declaration that we, as members of the general public, have a right to use the street for taking the *Palki* procession is not maintainable. No special damage need be proved: see *Sadagopachariar* v. *Rama Rao*[1]; *Baslingappa Parappa* v. *Dharmappa Basappa*[2]. The case of *Virupaxappa* v. *Sherif Sab*[3] has no application to the present case. There, the object of the suit was in effect to set aside the order passed under section 44 of the District Police Act (Bom. Act IV of 1890). If that was not the object, the decision given is wrong, and should not be followed. What we want in this suit is to obtain a declaration that we have a right to pass in procession along the public street. If that declaration is given to us, as the trial Court did, that is quite sufficient for us. The lower Court has introduced into the case irrelevant matters and thus confused the trial of the proper issues. The passing of the declaratory decree as we have prayed for does not prevent the District Magistrate from passing any order under the District Police Act. That matter stands on an entirely different footing.

Jinnah with *V. R. Sirur*, for the respondents not called upon.

BEAMAN, J.:—In my opinion the decree of the lower appellate Court is right and should be affirmed. The plaintiffs, trustees of a Hindu temple, have brought this suit for a declaration under section 42 of the Specific Relief Act that they are entitled to go in procession playing music past a Mahomedan mosque. The Mahomedan defendants have never, as far as I can see, disputed their right to go in procession; but they very naturally resented the terrible noise which must have been caused by some 50 to 100 musicians playing all

(1) (1902) 26 Mad. 376.

(2) (1910) 34 Bom. 571. (3) (1909) 11 Bom. L. R. 372.

sorts of instruments close against their sacred edifice while they were offering their prayers. They had recourse, very properly I think, to the Police and they obtained protection under the District Police Act. The final order made by the District Magistrate under that Act, we are now told by Mr. Jinnah (counsel for the respondents), has been accepted by the majority of the Hindu inhabitants. This is eminently satisfactory. It is a great pity, I think, that the present plaintiffs should have persisted in litigation of this kind, asking the Courts to declare them entitled to a right, the exercise of which every one must know could only create and perpetuate ill-will between the Hindu and Mahomedan congregations of this small town. Had they, however, a legal right, I do admit that they would be entitled to enforce it and that it would be entirely out of place for me to approach the adjudication of that right in the light of sentimental considerations, however strong. I doubt very much, however, whether it can truly be said that any member or any body of members of the public has a right to play music in public streets. Public streets are intended for the convenience of the public in certain ways and their ordinary use certainly would not include playing music by individuals or large bands. Doubtless, so long as playing music in public streets offends no one, it is not likely that the authorities would interfere to prevent it. But as soon as it does give rise to any risk of bad feeling, as soon as it occasions the probability, as it always must in circumstances such as existed when this suit was brought, of actual disturbance, riot and possibly bloodshed, it is plain, I think, that no Court could be found to declare it as a right. A very little analysis of this notion will, I believe, reveal that in every case of the kind, it is rather in the nature of privilege or concession, always liable to be withdrawn in the interests of

1918.

VENKATESH APPASHET v. ABDUL KADIR.

public peace, or indeed a much less important interest, the comfort and convenience of the neighbourhood.

If I am right in this view, then there would be no foundation whatever for the plaintiffs' suit. The object of that suit is, I think, too plain. The plaintiffs were dissatisfied with the very reasonable and proper order made by the Magistrate, and it is pretty clear, I think, that they desire to obtain a decree, however ambiguously worded, which they might use under section 44 of the District Police Act, when the Mahomedans have recourse to the police for protection against this intolerable nuisance. I should be loath indeed to give colour to any such pretentions and would only do so if I were convinced that the plaintiffs had a strict legal right which the Courts, finding it proved, must enforce.

I have already said that playing music is not one of the natural uses to which public streets ought to be put and, therefore, it does not follow from any of the reported judgments that merely because every member of the public, whether singly or collectively, has a right to use a public road, such member or members have likewise the right to play music over the whole of such public thoroughfare. I agree entirely, speaking generally, with the principle approved, as I understand it, by my learned brother in a decision (*Virupaxappa* v. *Sherif Sab*[1]) to which he was a party.

I have no hesitation whatever in the facts laid before me here in holding that the decree of the lower appellate Court was not only sound from every point of view of sentiment and policy but also in law. In my opinion it ought to be affirmed, and this appeal dismissed with all costs.

HEATON, J. :—In the judgment of my own to which my learned brother has referred, which appears at

[1] (1909) 11 Bom. L. R. 372.

page 372 of 11 Bom. Law Reporter, I expressed a doubt as to whether playing music in a public street could properly be claimed and declared as a right. As the result of further reflection and the arguments which we have listened to to-day, I can say that I can go a good deal further than that and say that I feel pretty certain that it is not a right; I illustrate it in this way. A man has a right to use a street as a thoroughfare, that is for the purpose for which streets are made; and he may legitimately complain if he is prevented from using it as a thoroughfare. But if in addition he claims to pass along the street blowing a trumpet, he has no legitimate ground for complaint when he is prevented from blowing the trumpet provided he is not prevented from passing along the street. This illustrates what there is in my mind as a distinction between what is a right, such as a Court will declare, and what is a thing which a man may do and will very often not be prevented from doing, but which, if there is occasion he may properly be prevented from doing. I feel quite clearly in my own mind that the right to use a street as a thoroughfare is a right which a Court might properly declare; but the right to pass along a street playing music is not a right which the Courts ought to recognise in that sense.

I think, therefore, that the order of the appellate Court is correct and this appeal should be dismissed with costs.

Decree confirmed.

J. G. R.