

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY (MERITS)

Judgment of 12 April 1960

The case concerning Right of Passage over Indian Territory (Portugal v. India) was referred to the Court by an Application filed on 22 December 1955. In that Application, the Government of Portugal stated that its territory in the Indian Peninsula included two enclaves surrounded by the Territory of India, Dadra and Nagar-Aveli. It was in respect of the communications between those enclaves and the coastal district of Daman, and between each other, that the question arose of a right of passage in favour of Portugal through Indian territory and of a correlative obligation binding upon India. The Application stated that in July 1954 the Government of India prevented Portugal from exercising that right of passage and that Portugal was thus placed in a position in which it became impossible for it to exercise its rights of sovereignty over the enclaves.

Following upon the Application, the Court was seised of six preliminary objections raised by the Government of India. By a Judgment given on 26 November 1957, the Court rejected the first four objections and joined the fifth and sixth objections to the Merits.

In its Judgment, the Court:

(a) rejected the Fifth Preliminary Objection by 13 votes to 2;

(b) rejected the Sixth Preliminary Objection by 11 votes to 4;

(c) found, by 11 votes to 4, that Portugal had in 1954 a right of passage over intervening Indian territory between the enclaves of Dadra and Nagar-Aveli and the coastal district of Daman and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general;

(d) found, by 8 votes to 7, that Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police and arms and ammunition;

(e) found, by 9 votes to 6, that India had not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general.

The President and Judges Basdevant, Badawi, Kojevnikov and Spiropoulos appended Declarations to the Judgment of the Court. Judge Wellington Koo appended a Separate Opinion. Judges Winiarski and Badawi appended a Joint Dissenting Opinion. Judges Armand-Ugon, Moreno Quintana and Sir Percy Spender, and Judges *ad hoc* Chagla and Fernandes, appended Dissenting Opinions.

In its Judgment the Court referred to the Submissions filed by Portugal which in the first place requested the Court to adjudge and declare that a right of passage was possessed by Portugal and must be respected by India; this right was invoked by Portugal only to the extent necessary for the exercise of its sovereignty over the enclaves, and it was not contended that passage was accompanied by any immunity and made clear that such passage remained subject to the regulation and control of India, which must be exercised in good faith, India being under an obligation not to prevent the transit necessary for the exercise of Portuguese sovereignty. The Court then considered the date with reference to which it must ascertain whether the right invoked existed or did not exist. The question as to the existence of a right of passage having been put to the Court in respect of the dispute which had arisen with regard to obstacles placed by India in the way of passage, it was the eve of the creation of those obstacles that must be selected as the standpoint from which to ascertain whether or not such a right existed; the selection of that date would leave open the arguments of India regarding the subsequent lapse of the right of passage.

Portugal next asked the Court to adjudge and declare that India had not complied with the obligations incumbent upon it by virtue of the right of passage. But the Court pointed out that it had not been asked, either in the Application or in the final Submissions of the Parties, to decide whether or not India's attitude towards those who had instigated the overthrow of Portuguese authority at Dadra and Nagar-Aveli in July and August 1954 constituted a breach of the obligation, said to be binding upon it under general international law, to adopt suitable measures to prevent the incursion of subversive elements into the territory of another State.

Turning then to the future, the Submissions of Portugal requested the Court to decide that India must end the measures by which it opposed the exercise of the right of passage or, if the Court should be of opinion that there should be a temporary suspension of the right, to hold that that suspension should end as soon as the course of events disclosed that the justification for the suspension had disappeared. Portugal had previously invited the Court to hold that the arguments of India concerning its right to adopt an attitude of neutrality, the application of the United Nations Charter and the existence in the enclaves of a local government were without foundation. The Court, however, considered that it was no part of its judicial function to declare in the operative part of its Judgment that any of those arguments was or was not well founded.

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Before proceeding to the consideration of the Merits, the Court had to ascertain whether it had jurisdiction to do so, a jurisdiction which India had expressly contested.

In its Fifth Preliminary Objection the Government of India relied upon the reservation in its Declaration of 28 February 1940 accepting the jurisdiction of the Court, which excluded from that jurisdiction disputes with regard to questions which by international law fall exclusively within the jurisdiction of India. The Court pointed out that in the course of the proceedings both Parties had taken their stand on grounds which were on the plane of international law, and had on occasion expressly said so. The fifth objection could not therefore be upheld.

The Sixth Preliminary Objection likewise related to a limitation in the Declaration of 28 February 1940. India, which had accepted the jurisdiction of the Court "over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date", contended that the dispute did not satisfy either of these two conditions. As to the first condition, the Court pointed out that the dispute could not have arisen until all its constituent elements had come into existence; among these were the obstacles which India was alleged to have placed in the way of exercise of passage by Portugal in 1954; even if only that part of the dispute relating to the Portuguese claim to a right of passage were to be considered, certain incidents had occurred before 1954, but they had not led the Parties to adopt clearly-defined legal positions as against each other; accordingly, there was no justification for saying that the dispute arose before 1954. As to the second condition, the Permanent Court of International Justice had in 1938 drawn a distinction between the situations or facts which constituted the source of the rights claimed by one of the Parties, and the situations or facts which were the source of the dispute. Only the latter were to be taken into account for the purpose of applying the Declaration. The dispute submitted to the Court was one with regard to the situation of the enclaves, which had given rise to Portugal's claim to a right of passage and, at the same time, with regard to the facts of 1954 which Portugal advanced as infringements of that right; it was from all of this that the dispute arose, and this whole, whatever may have been the earlier origin of one of its parts, came into existence only after 5 February 1930. The Court had not been asked for any finding whatsoever with regard to the past prior to that date; it was therefore of opinion that the sixth objection should not be upheld and, consequently, that it had jurisdiction.

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On the merits, India had contended in the first place that the right of passage claimed by Portugal was too vague and contradictory to enable the Court to pass judgment upon it by the application of the legal rules enumerated in Article 38 (1) of the Statute. There was no doubt that the day-to-day exercise of the right might give rise to delicate questions of application but that was not, in the view of the Court, sufficient ground for holding that the right was not susceptible of judicial determination.

Portugal had relied on the Treaty of Poona of 1779 and on *sanads* (decrees) issued by the Maratha ruler in 1783 and 1785, as having conferred on Portugal sovereignty over the enclaves with the right of passage to them; India had objected that what was alleged to be the Treaty of 1779 was not validly entered into and never became in law a treaty binding upon

the Marathas. The Court, however, found that the Marathas did not at any time cast any doubt upon the validity or binding character of the Treaty. India had further contended that the Treaty and the two *sanads* did not operate to transfer sovereignty over the assigned villages to Portugal but only conferred, with respect to the villages, a revenue grant. The Court was unable to conclude from an examination of the various texts of the Treaty of 1779 that the language employed therein was intended to transfer sovereignty; the expressions used in the two *sanads*, on the other hand, established that what was granted to the Portuguese was only a revenue tenure called a *jagir* or *saranjam*, and not a single instance had been brought to the notice of the Court in which such a grant had been construed as amounting to a cession of sovereignty. There could, therefore, be no question of any enclave or of any right of passage for the purpose of exercising sovereignty over enclaves.

The Court found that the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas: Portuguese sovereignty over the villages had been recognized by the British in fact and by implication and had subsequently been tacitly recognized by India. As a consequence the villages had acquired the character of Portuguese enclaves within Indian territory and there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relied for the purpose of establishing the right of passage claimed by it. It had been objected on behalf of India that no local custom could be established between only two States, but the Court found it difficult to see why the number of States between which a local custom might be established on the basis of long practice must necessarily be larger than two.

It was common ground between the Parties that during the British and post-British periods the passage of private persons and civil officials had not been subject to any restrictions beyond routine control. Merchandise other than arms and ammunition had also passed freely subject only, at certain times, to customs regulations and such regulation and control as were necessitated by considerations of security or revenue. The Court therefore concluded that, with regard to private persons, civil officials and goods in general there had existed a constant and uniform practice allowing free passage between Daman and the enclaves; it was, in view of all the circumstances of the case, satisfied that that practice had been accepted as law by the Parties and had given rise to a right and a correlative obligation.

As regards armed forces, armed police and arms and ammunition, the position was different.

It appeared that, during the British and post-British periods, Portuguese armed forces and armed police had not passed between Daman and the enclaves as of right, and that after 1878 such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases: it had been argued that that permission was always granted, but there was nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.

A treaty of 26 December 1878 between Great Britain and Portugal had laid down that the armed forces of the two Governments should not enter the Indian dominions of the other, except in specified cases or in consequence of a formal request made by the party desiring such entry. Subsequent correspondence showed that this provision was applicable to passage between Daman and the enclaves: it had been argued

on behalf of Portugal that on twenty-three occasions armed forces crossed British territory between Daman and the enclaves without obtaining permission; but in 1890, the Government of Bombay had forwarded a complaint to the effect that armed men in the service of the Portuguese Government were in the habit of passing without formal request through a portion of British territory en route from Daman to Nagar-Aveli which would appear to constitute a breach of the Treaty; on 22 December, the Governor-General of Portuguese India had replied: "Portuguese troops never cross British territory without previous permission", and the Secretary-General of the Government of Portuguese India stated on 1 May 1891: "On the part of this Government injunctions will be given for the strictest observance of . . . the Treaty". The requirement of a formal request before passage of armed forces could take place had been repeated in an agreement of 1913. With regard to armed police, the Treaty of 1878 and the Agreement of 1913 had regulated passage on the basis of reciprocity, and an agreement of 1920 had provided that armed police below a certain rank should not enter the territory of the other party without consent previously obtained; finally, an agreement of 1940 concerning passage of Portuguese armed police over the road from Daman to Nagar-Aveli had provided that, if the party did not exceed ten in number, intimation of its passage should be given to the British authorities within twenty-four hours, but that, in other cases, "the existing practice should be followed and concurrence of the British authorities should be obtained by prior notice as heretofore."

As regards arms and ammunition, the Treaty of 1878 and rules framed under the Indian Arms Act of 1878 prohibited the importation of arms, ammunition or military stores from Portuguese India and its export to Portuguese India without a special licence. Subsequent practice showed that this provision applied to transit between Daman and the enclaves.

The finding of the Court that the practice established between the Parties had required for the passage of armed forces, armed police and arms and ammunition the permis-

sion of the British or Indian authorities rendered it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or general principles of law recognized by civilized nations, which had also been invoked by Portugal, could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories. The Court was dealing with a concrete case having special features: historically the case went back to a period when, and related to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice: finding a practice clearly established between two States, which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice. The Court was, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on India had been established in respect of armed forces, armed police and arms and ammunition.

Having found that Portugal had, in 1954, a right of passage in respect of private persons, civil officials and goods in general, the Court lastly proceeded to consider whether India had acted contrary to its obligation resulting from Portugal's right of passage in respect of any of these categories. Portugal had not contended that India had acted contrary to that obligation before July 1954, but it complained that passage was thereafter denied to Portuguese nationals of European origin, to native Indian Portuguese in the employ of the Portuguese Government and to a delegation that the Governor of Daman proposed, in July 1954, to send to Nagar-Aveli and Dadra. The Court found that the events which had occurred in Dadra on 21-22 July 1954 and which had resulted in the overthrow of Portuguese authority in that enclave had created tension in the surrounding Indian district; having regard to that tension, the Court was of the view that India's refusal of passage was covered by its power of regulation and control of the right of passage of Portugal.

For these reasons, the Court reached the findings indicated above.