APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Carr.

1927

Nov. 14.

RANGOON TURF CLUB

v.

THE CORPORATION OF RANGOON.*

Race course, basis of assessment of—"Contractor's test" inapplicable—Profits of race course owners a good basis for assessment.

Held, that the profits of a race course form a sound basis for assessing the premises, and having regard to the quasi-monopoly values of the premises in question, the "contractor's test" was inapplicable.

Dodds v. *South Shields Union*, [1875] 1 Q.B.D. 9; *Cartwright* v. *Scutcoates*, 2 Q.B.D. 133; *Kingston Union* v. *Metropolitan Water Board*, [1926] A.C. 331; *Ko Po Yee* v. *Corporation of Rangoon*, 5 Ran. 161; *Mersey Docks* v. *Birkenhead*, [1901] A.C. 175; *Port of London* v. *Orsett Union*, [1920] A.C. 273, *Regina* v. *Verrall*, [1895] 2 Q.B.D. 133—*referred to.*

Leach for the appellant.

N. M. Cowasjee for the respondent.

RUTLEDGE, C.J., and CARR, J.—This is an appeal from a judgment of the Chief Judge of the Small Cause Court confirming the order of the Commissioner of the Rangoon Corporation, assessing the premises of the appellant at Rs. 40,000 per mensem.

This Court is only concerned with the basis of the principle of the assessment. In regard to this, the appellant contends that the principle of a hypothetical tenant was not the proper one to apply in this case, and that the assessment should have been based on what is known as "the contractor's test."

We cannot help thinking, as Lord Atkinson said in *Kingston Union* v. *Metropolitan Water Board* (1), "that in this case the appellants have been betrayed into

* Civil Miscellaneous Appeal No. 72 of 1927.

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confounding the measure with the thing to be measured. The thing to be measured is, in all cases, the reasonable *rent* which the hypothetical tenant would be willing to pay. Nothing which can be suggested as a measure of that thing can be substituted for the thing itself."

The learned Chief Judge of the Small Cause Court pointed out this confusion at the beginning of his judgment, but it has been repeated in this appeal. But the real question at issue and the question which has been argued is whether the Commissioner was right in basing his assessment on a consideration of the profits made by the appellant from the use of the premises in question or whether what is known as the "contractor's test" should be adopted as the basis.

We have been referred to the case of *Regina* v. *Verral* (1). That was a case of the assessment of a private race course. All that was held in it was that the books of the proprietors of the race course were clearly elements for consideration in arriving at the value of the occupation. We have also been referred to the following cases :—

Dodds v. *South Shields Union* (2); *Cartwright* v. *Sculcoates* (3); *Mersey Docks* v. *Birkenhead* (4); and the *Port of London* v. *Orsett Union* (5).

It is noticeable that in none of these cases was there any question of the application of the "contractor's test." In the earlier of these cases it was suggested that in ordinary cases evidence as to the actual profits made from the premises in question was not legally admissible, and that the assessment should be made on a consideration of the rents actually paid for similar premises. In the later cases, however, this proposition was considerably modified, and it was held that in all

(1) [1875] 1 Q.B.D. 9.
(2) [1895] 2 Q.B.D. 133.
(3) [1900] A.C. 150.
(4) [1901] A.C. 175.
(5) [1920] A.C. 273.

cases it was open to the assessing authority to take into consideration profits actually made by the occupiers of the premises to be assessed. It would appear, however, that the Courts would still consider it undesirable that there should be an enquiry into the profits if the assessment could be satisfactorily made by the ordinary methods.

Mr. Cowasjee has referred us to the case of *Kingston Union* v. *Metropolitan Water Board* (1), but we do not think that that decision carries the matter any further than the previous cases. The question there was of the assessment of the properties of a water supply undertaking over a number of different rating areas. It was held that in such a case the proper method of assessment was to consider the profits of the undertaking as a whole and then to apportion the total rateable value between the several parishes having regard to the directly and indirectly productive hereditaments therein, according to the recognized practice. The circumstances of that case, therefore, clearly differ considerably from those of the present case.

We do not think it necessary to discuss the abovementioned cases more fully since they have been very carefully considered by the learned Chief Judge, and we agree generally with what he has said about them. We think that, on these cases, there can be no possible doubt that it was open to the assessing authority to take into consideration the profits actually made by the appellant from the premises in question, and we are unable to hold that the authority has erred by not applying the "contractor's test." This test has been discussed at some length by a Bench of this Court in *Ko Po Yee* v. *Corporation of Rangoon* (2), and we have little to add to what has already been said in that case.

(1) [1926] A.C. 331. (2) [1927] 5 Ran. 161.

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In the existing circumstances in Rangoon the actual letting of the race course to a tenant cannot well be imagined, as it is unlikely that the Government would permit this to be done. It is one thing for Government to allow a Club managed by a number of well-known people of high social standing and integrity to reap no pecuniary advantage in carrying on a Racing Club and it is an entirely different thing to allow an individual or syndicate to carry on such an undertaking for profit or gain, and there is no other race course in existence in Rangoon. Consequently, it is impossible to arrive at the annual value of the race course now in question by the ordinary method of comparison with similar properties. It is obvious, therefore, that some other method must be applied, and the only two possible methods are that which the Commissioner has adopted and the "contractor's test," as contended by the appellant.

A very strong objection to the "contractor's test," in our opinion, is the very fact that the premises have at least a quasi-monopoly value, and that, therefore, the benefit to be derived from the premises cannot be arrived at by a consideration only of the value of the land, buildings and machinery. That, we think, is sufficient to bar out the use of the "contractor's test" altogether, and we agree with the learned Chief Judge that the Commissioner has not erred in principle in his assessment.

The other grounds of appeal taken up all relate to matters of detail, and we do not think that any of them can be considered to be questions as to the basis of principle of assessment within the terms of section 91 (3), of the Rangoon Municipal Act. They cannot, therefore, be considered in this Court.

The Commissioner has discussed at some length the question of whether allowance should be made

for the unpaid services of the Stewards of the Club. He admits that their services contribute very greatly to the Club, but, as he finds it impossible to calculate what the value of those services is, he allows nothing for them. Had we been in his position we should have been inclined to make a generous allowance in respect of those services, and we hope that at the next assessment he may reconsider this point. But, as we have already said, we do not think that this is such a question of principle as to come within the jurisdiction of this Court.

The appeal, therefore, fails and is dismissed with costs, ten gold mohurs.

PRIVY COUNCIL.

J.C.* 1927

Nov. 21.

MA SAW KIN AND OTHERS (*Defendants*)

v.

MAUNG TUN AUNG GYAW (*Plaintiff*).

(On Appeal from the High Court at Rangoon.)

Burmese Buddhist Law—Divorce—Desertion—Pleadings—New case—Manugye, V, s. 17.

In a suit in which in 1923 a Burmese Buddhist claimed as heir to his deceased wife, the defendants pleaded that the plaintiff and his wife had been divorced in 1916, and alternatively that the plaintiff had deserted his wife for over three years and entered into a second marriage, and that thereby there had been a dissolution of the marriage. There were concurrent findings by the Courts in Burma that there had not been a divorce by mutual consent. On the issue as to desertion the Appellate Court found that there had been only a living apart by mutual consent, or if there had been any desertion, it was by the wife; they accordingly made a decree for the plaintiff. The Judicial Committee agreeing that the effect of the evidence was as above stated:—

Held, that the appeal failed as the defendants had not established the allegations upon which they had gone to trial, and it was not open to them to set up a fresh case, namely that there had been a living apart which under *Manugye*,

* PRESENT:—VISCOUNT SUMNER, LORD SINHA, SIR JOHN WALLIS and SIR LANCELOT SANDERSON.