

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

1935

July 3.

M. C. PATAIL AND ANOTHER

v.

H. G. ARIFF AND OTHERS.*

Appeal to His Majesty in Council—Substantial question of law—Construction of a clause in the memorandum of association—Language plain and clear—Question of law must be reasonably debatable—Civil Procedure Code (Act V of 1908), s. 110.

Under s. 110 of the Civil Procedure Code it is incumbent upon the Court in a case where the appellate decree affirms the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law fairly open to argument and not merely an alleged question of law, is involved in the appeal.

The High Court on appeal, affirming the decree of a Judge on the Original Side, held that the directors of a company had power under clause 3 (c) and (f) of the memorandum of association of the company to purchase immovable property situate not only in Rangoon but also outside Rangoon, and that such power was clear and manifest from the language used. The applicants contended that whether the directors had such power was a question of law that had arisen between the parties.

Held, that no substantial question of law arose in the case and leave to appeal could not be granted.

N. M. Cowasjee for the applicants.

Paget (with him *Hay*) for the respondents.

PAGE, C.J.—This is an application for a certificate granting leave to appeal to His Majesty in Council. Inasmuch as the decree of the Appellate Court affirmed the decree of the trial Court it is incumbent upon the applicants to satisfy the Court that the appeal “must involve some substantial question of law”.

* Civil Misc. Application No. 38 of 1935 arising out of Civil First Appeal No. 169 of 1934 of this Court.

Now, the learned advocate for the applicants conceded that the only question of law involved in the appeal, which in other respects admittedly turned upon questions of fact, is whether it was *ultra vires* of the directors of the company to purchase the property in suit which was situated outside the town of Rangoon. That depends upon the construction of the memorandum and articles of association of the company.

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The property of the company consisted in part of shares in other companies from which dividends accrued, and in part of other property. In the memorandum of association it was stated *inter alia* that the objects of the company were :

" 3. (c) To receive the dividends of the shares belonging to the company and to invest the same in shares of other companies or in the purchase of any other immovable property within the Town of Rangoon.

(f) To purchase, take on lease, or in exchange or otherwise acquire, rent, hire or employ any property (real or personal) or rights or privileges, which may seem to the company directly or indirectly conducive to its objects or necessary or convenient for the purposes of its business, or capable of being profitably dealt with in connection with any of its objects, property and rights for the time being, or any share, estate or interest therein respectively."

At the hearing of the appeal it was contended on behalf of the appellants that because in clause 3 (c) the power of investment in respect of dividends is limited to immovable property in Rangoon, the power of investment under clause 3 (f) must be held to be restricted to investment in immovable property within the town of Rangoon. The Court was of opinion that there was no substance in such a contention ; indeed, the difference in the language used in the two clauses would tend to show that it was intended that the power of investment in

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immovable property in clause 3 (f) should be unrestricted. It is not now contended, however, by the learned counsel for the applicants that 3 (c) and 3 (f) are in any way dependent upon each other. The motive which induced the vendor of the trust to create the company was to prevent the family estate from being dissipated after his death. 3 (c) relates to the investment of the dividends from the shares held by the company in other companies, and it is laid down that one of the objects of the company is that such dividends should be invested in the shares of other companies or in the purchase of other immovable property within the town of Rangoon.

With respect to 3 (f), however, it is specifically provided that one of the objects of the company is to purchase, take on lease, or in exchange or otherwise acquire, rent, hire or employ any property (real or personal) or rights or privileges that the company may think directly or indirectly conducive to its objects or necessary or convenient for the purposes of its business or capable of being profitably dealt with in connection with any of its objects.

Now, the learned counsel for the applicants contends that under 3 (f) a substantial question of law between the parties arises namely, whether under sub-clause 3 (f) the company was entitled to purchase real or personal property outside the town of Rangoon. In my opinion, his contention is unsustainable. Merely because learned counsel on behalf of the applicants in an application for leave to appeal to His Majesty in Council asserts that a question of law arises it does not follow that the appeal involves a substantial question of law. In the judgment of the Appellate Court it was stated that under clause 3 (f) "the directors plainly were entitled to acquire the

property in suit", and it appears to me that they were specifically empowered to do so by the very terms of clause 3 (f). In my opinion not only does the appeal not involve a substantial question of law, but under clause 3 (f) the power of the directors to acquire immovable property even if it is situate outside the town of Rangoon is clear and manifest.

The learned counsel for the applicants further contended that the words "substantial question of law" between the parties did not mean a question of law which the Court thought was reasonably debatable, but any alleged question of law, good, bad or indifferent, which if decided against his clients would substantially affect their rights. In my opinion, that is not the meaning of these words as used in section 110 of the Code of Civil Procedure. As I apprehend the meaning of that section it is incumbent upon the Court in a case where the appellate decree affirms the decree of the lower Court to be satisfied, before it burdens the Judicial Committee of the Privy Council with the hearing of the appeal, that a question of law fairly open to argument, and not merely an alleged question of law is involved in the appeal. If the Court were to accept the construction of these words for which the applicant contends an aggrieved party in the Appellate Court would be able to obtain leave to appeal to His Majesty in Council in any and every case merely by asserting that a question of law was involved in the appeal. In my opinion the contention on behalf of the applicants that a substantial question of law between the parties is involved in the present appeal upon the construction of clause 3 (f) of the memorandum of association cannot be accepted. It is unnecessary to consider whether under the articles of association or in any

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other way the directors had power to purchase the property in question, because the sole question of law which it is suggested arises is in connection with the construction of clause 3 (f) of the memorandum of association. The case upon appeal turned upon the merits, and was decided upon the facts of the case. I am of opinion that, inasmuch as the decree from which it is sought to appeal to His Majesty in Council affirmed the decision of the lower Court and no substantial question of law is involved in the appeal, the application for a certificate granting leave to appeal to His Majesty in Council must be refused, and it is dismissed with costs,—one set of costs,—seven gold mohurs.

BA U, J.—I agree.

LETTERS PATENT APPEAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

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DAW GYAN

v.

MAUNG MAUNG.*

Easements—Implied easements—Grant of part of a tenement—Quasi easements that go with the grant—Three contiguous houses with one owner—Use of path at back for carriage of night soil buckets—Sale of two houses—Right of user of the path by the purchaser.

On the grant by an owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee all those continuous and apparent easements (which are quasi easements) or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the part granted. In such a case it is a grant of an easement by implication.

* Letters Patent Appeal No. 1 of 1935 arising out of Special Civil Second Appeal No. 99 of 1934 of this Court.