
(1945) 02 CAL CK 0013
In the Calcutta High Court
Case No : Suit No. 166 of 1944

Syam Chand Nandi

APPELLANT

Vs

The Calcutta Stock Exchange Association Ltd.

RESPONDENT

Date of Decision : 13-02-1945

Acts Referred:

Citation : (1945) 02 CAL CK 0013

Judgement

S.R. Das, J.—The plaintiff in this suit in the firm name of Syam Chand Nandi & Co., of which he is the sole proprietor was, until the time hereinafter mentioned, a member of the defendant association holding share No. 172. The defendant association is a limited liability company incorporated under the Companies Act 1913 with a capital of Rs. 3,00,000 divided into 306 shares of Rs. 1,000 each.

2. The objects for which the defendant association has been established are stated in its memorandum of association to be, inter alia, as follows:

(a) To acquire and take over all or any of the assets and liabilities of the present unincorporated association known as "The Calcutta Stock Exchange Association" and to conduct the affairs of the Stock Exchange founded by the Association and generally to support and protect the character, status and interest of brokers and dealers in stocks and shares on the Stock Exchange at Calcutta and elsewhere.

(b) To facilitate the transaction of business on the Stock Exchange and to make rules and bye-laws regulating the mode and conditions in and subject to which the business on the Stock Exchange shall be transacted and the conduct of the person transacting the same and generally for the good order and government of members of the Association.

(c) To establish just and equitable principles to settle points of practice and to decide upon any questions of business usage or courtesy between or among members of the Association.

* * * *

(h) To sell, improve, manage, develop, exchange, lease or let, under-lease or sub-let, mortgage, dispose of, turn to account or otherwise deal with, all or any part of the property of the Association.

* * * *

(n) To establish and support or aid in the establishment and support of any Association funds, trusts and conveniences calculated to benefit members or employees or ex-employees of the Association or of member of the Association or the dependents or connections of any such persons and to grant pensions and allowances and to make payments towards insurance and to subscribe or guarantee money for charitable or benevolent objects or for any exhibition or for any public, general or useful object.

* * * *

(p) To do all such other things as may be conducive to, or incidental to the attainment of, the above objects or any of them.

3. Under Art. 19 of the Articles of Association no share is to be allotted otherwise than upon the full amount being paid up or credited as fully paid up. Article 20 enjoins the due and regular payment of all the subscriptions that may be prescribed by the bye-laws. Under the heading "Expulsion, Suspension and Forfeiture" are grouped 14 articles, namely, Arts. 21 to 34. Article 21 empowers the committee to expel or suspend any member on the happening of any one of eight specified events with a proviso prescribing certain formalities by way of safeguard in the case of four of the events specified therein. Article 22 provides that any member who has been declared a defaulter by reason of his failure to fulfil any engagement between himself and any other member and who fails to fulfil such engagement within 6 months from the date upon which he has been so declared a defaulter shall, at the expiration of the 6 months, automatically cease to be a member. Article 23 empowers the committee to suspend a member pending the consideration of his expulsion. Article 24 lays down that upon any member ceasing to be a member under, Art. 22 or upon any resolution for his expulsion being passed under Art. 21 or upon his being adjudicated insolvent the share held by such member shall ipso facto be forfeited. Article 26 provides for the giving of notice to the member of the forfeiture and for the making of an entry of the forfeiture with the date thereof in the register. Article 27 lays down that any share so forfeited shall be deemed to be the property of the defendant association and directs the committee to sell, re-allot and otherwise dispose of the same for the satisfaction of all debts due to the defendant association or any of its members arising out of share transactions. Article 28 preserves the liability of the member whose share has been so forfeited for payment of all moneys due to it with interest without any deduction or allowance for the value of the share. Article 29 provides that the forfeiture of a share shall involve the extinction of all interest in and also of all claims and demands against the defendant association in respect of the share. Article 30 makes a verified declaration in writing in

certain form the conclusive evidence of the forfeiture. Article 31 gives the defendant association a first and paramount lien upon the share and Art. 32 empowers it to enforce the lien by sale of the share and Art. 33 provides that the nett proceeds of such sale shall be applied towards satisfaction of debts etc, due to it and the residue shall be paid to the member or his legal representatives. Article 34 empowers the committee upon any sale after forfeiture or for enforcing a lien to cause the purchaser's name to be entered in the register and extends to the purchaser immunity from impeachment of his title on account of any irregularity in the proceedings. By Art. 89 the control of the association and its business is vested in the committee who, in addition to the express powers conferred on them are empowered to exercise all such powers and do all such acts and things as may be exercised or done by the defendant association and are not by the articles or statute law expressly directed or required to be exercised or done by the defendant association but subject nevertheless to the provisions of any statute law or of the articles and to any regulations made by the defendant association in general meeting, Art. 90 expressly confers certain specific powers on the committee. Item 17 of these powers is as follows:

To establish, maintain, support and subscribe to any charitable or public object and any institution, society or club which may be for the benefit of the association or its employees or may be connected with any town or place where the Association carried on business; to give pensions, gratuities or charitable aid to any member or members or to any person or persons who have served the Association or to the wives, children or dependents of such member or members, person or persons that may appear to the Committee just or proper whether any such person, his widow, children or dependents have or have not a legal claim upon the Association.

Clause 93 authorises distribution of profits amongst members with the sanction, by an extra-ordinary resolution, of the defendant association.

4. In the course of his transactions in shares with certain other members of the defendant association the plaintiff became liable to pay the aggregate sum of Rs. 8348 to them. The plaintiff did not pay and thereby failed to fulfil his engagement with those members. Accordingly on 25th July 1940, on proceedings initiated by one aggrieved member, the plaintiff was declared a defaulter and was also suspended from membership under Art. 21. The plaintiff was again on 15th August 1940 declared a defaulter and suspended from membership at the instance of another aggrieved member. The first resolution of 25th July 1940, it is alleged, stood and remained in full force. The period of 6 months from 25th July 1940 expired on 25th January 1941 without the plaintiff having fulfilled his engagements and therefore under Art. 22 he automatically ceased to be a member of the defendant association. Moreover, on 6th February 1941, a resolution was passed expelling the plaintiff on and from the said date and forfeiting the share. A duly verified declaration in writing was issued under Art. 30 and notice of forfeiture was given to the plaintiff.

5. Almost on the eve of the expiry of 3 years from 6th February 1941, namely, on 3rd February 1944, to be precise, the plaintiff filed this suit for the several reliefs set forth in the prayers of the plaint. Shortly put the plaintiff claims that the articles providing for forfeiture of a fully paid up share and in particular Arts. 21, 22 and 24 are invalid, illegal and ultra vires, that share No. 172 has not been properly forfeited and the forfeiture is irregular, void and inoperative, that the register of the defendant association be rectified by restoring the name of the plaintiff as the owner of the said share or in the alternative a decree for Rs. 55,000 being the value of the said share less Rs. 8348, that alternatively the plaintiff is entitled to the surplus of the sale proceeds and decree for Rs. 23,452 representing such surplus with interest thereon, payment of all dividends and damages. The claims are mainly founded on the contention that the articles are invalid and ultra vires. The claim for the surplus sale proceeds is also based on an alternative ground pleaded in para. 16 of the plaint which is in terms following:

The plaintiff states that it has been the uniform practice of the said company since its incorporation to pay the surplus of such sale proceeds of a forfeited share to the holder thereof and the defendant company has all along acted in accordance with the said practice. The plaintiff submits that the said practice is binding on the defendant company.

6. The defendant association filed a written statement traversing the plaint. Affidavits of documents were filed by both parties. Thereafter the plaintiff took out a summons against the defendant association for further discovery disclosing other relevant documents which might enable the plaintiff to establish the fact that in the past the defendant association paid over the surplus sale proceeds of forfeited shares to the members whose shares had been forfeited. The defendant association opposed that application on the ground, inter alia, that the alleged practice was ultra vires the objects of the defendant association and therefore evidence of such practice would be useless and inadmissible and that no claim could be founded on such practice as pleaded. The defendant association also took out a summons for setting down the suit for trial of these issues. On this application of the defendant, association an order was made on 22nd August 1944, directing that this suit be placed on the peremptory list for the trial on evidence of the following issues:

(1) Is the alleged practice relied on in Para. 16 of the plaint contrary to the express terms of the memorandum and articles of association of the defendant company and as such is evidence of such practice inadmissible and is the practice ultra vires and void?

(2) Is the plaintiff entitled in any event to rely on such alleged practice as constituting any cause of action or so as to have any legal effect binding on the defendant company?

The suit was accordingly placed on the peremptory list and came up before me

for trial of those issues. No evidence was adduced on either side and the matter was argued on legal points.

7. At the outset I desire to make two observations. In the first place, the procedure adopted in this case, namely, that of setting down the suit for trial of these issues does not appear to me to be satisfactory. Broadly speaking, the plaintiff bases his claim on two grounds, namely, invalidity of the forfeiture and the alleged practice. If these issues set down for trial are decided against the plaintiff, the latter will still be entitled to go on with the suit and rely on the invalidity of the forfeiture. If these issues are decided in favour of the plaintiff he will at the further hearing of the suit be entitled to adduce evidence to establish the alleged practice as a fact and at the same time raise the question of invalidity of the forfeiture as an alternative ground. Therefore, the disposal of these issues relating to the alleged practice, one way or the other, will not completely dispose of the suit. On the other hand, if the issues as to the invalidity of the forfeiture is decided against the plaintiff the latter will be entitled to rely on the alleged practice for getting the surplus sale proceeds whereas if that issue is decided in favour of the plaintiff these issues as to the alleged practice will not arise at all. Therefore, in one event the disposal of the issues relating to the invalidity of the forfeiture will completely dispose of the suit. Therefore the issue relating to the forfeiture appears to me to be the more important of the two sets of issues. The separate trial of the two sets of issues does not enure for minimising the costs, nor does the disposal of one set of issues necessarily dispose of the suit. In these circumstances I doubt whether this piecemeal trial of issues is of any real advantage to the parties. However, the Court having directed the trial of these issues relating to the alleged practice and the parties also having invited me to take up such trial I have taken up the matter, although in my opinion the suit could and should have been more conveniently tried on all issues at one and the same hearing. In the second place the wording of issue 1 as settled does not appear to me to be happy. An alleged practice may be ultra vires if it cannot be brought within the terms of the memorandum or the articles although it is not contrary to any express terms of the memorandum or the articles. Therefore issue 1 should have been split up into three issues, namely; (i) Is the alleged practice contrary to the express terms of the memorandum or the articles? (ii) If yes, is evidence of such alleged practice admissible? (iii) Is the alleged practice ultra vires the objects and powers of the defendant association and void? With these preliminary observations I proceed to consider and discuss the arguments advanced on the issues set down for trial.

8. Issue No. 1: 1st part - It is conceded by Mr. Moitra that issue 1 proceeds on the assumption that the provisions of the memorandum and the articles are valid and binding on the parties. Taking them as valid I have to see whether the alleged practice is contrary to the express terms of the memorandum and the articles. Mr. Khaitan, however, has not referred me to any such express term. His argument proceeded mainly on the ground that the alleged practice is not sanctioned by and is wholly outside the terms of the memorandum and the

articles. This argument, however, is relevant when one considers the third part of Issue 1 and it has no bearing on the first part of that issue. Since I find no term either in the memorandum or in the articles which expressly prohibits the payment of the surplus sale proceeds of a forfeited share the first part of issue 1 must be answered in the negative.

9. 2nd part-In view of the answer to the first part of this issue the second part does not arise for it proceeds on the basis that the first part has been answered in the affirmative.

10. 3rd part-If the provision of the memorandum and the articles are valid and binding on the parties-and I have already pointed out that issue 1 proceeds on the assumption that they are-then it follows that the defendant association has the right to suspend and expel a member and to forfeit his shares (Arts. 21-24) that the written declaration of forfeiture is conclusive evidence of the facts stated therein (Art. 30), that on forfeiture the share becomes the property of the defendant association and the rights of the expelled member become extinct and he cannot even claim that the liabilities should be paid out of the sale proceeds (Arts. 27-29). Mr. Moitra referred me to Art. 33 but that article clearly appears to me to apply to the proceeds of sale in enforcement of the lien of the defendant association and not to a sale following upon a forfeiture. In other words, Arts. 31 to 33 go together and I have so held in *Naresh Chandra Sanyal v. Ramani Kanta Roy*, (Suit No. 268 of 1939). The result, therefore, is that the alleged practice amounts only to a gratuitous payment out of the funds of the defendant association to an expelled member. The question then is whether the committee or the defendant association has any power to make any such gratuitous payment? The answer to the foregoing question must depend on the true meaning and effect of the provisions of the memorandum and of the articles of association of the defendant association. It is well known that the memorandum sets out the objects for which the particular company is established and that the company cannot travel beyond the limits specified therein. The articles of association regulate the internal management of the company and define the powers of directors. It is firmly established that the articles cannot enlarge the scope of the objects specified in the memorandum. If the articles go beyond the memorandum they are to that extent *ultra vires* the company. The memorandum, observed Lord Cairns in *Ashbury Railway Carriage, etc., Co. v. Riche*, (1875) 7 H.L. 653 at p. 671 : (44 L.J. Ex. 185)

is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit.

The articles cannot alter or control the memorandum. It does not, however, follow that in construing the memorandum the articles must not be looked at at all. The articles constitute a contemporaneous document and may throw light on the meaning of the provisions of the memorandum and may explain the ambiguity if there be any in the memorandum. Thus, said Sir George Jessel M.R.

in Anderson's case, (1878) 7 Ch. D. 75 at p. 99:

Where there are two contemporaneous documents executed and assented to by the same persons at the same time (and these really are so substantially and are therefore to be treated as contemporaneous documents), it appears to me that the ordinary rule applies according to which contemporaneous documents are to be read together so that, if there is any ambiguity in one it may be explained by the other, and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency.

This principle, however, must be acted on with great caution and the criticism by Bowen L. J. in *Guinness v. Land Corporation of Ireland*, (1883) 22 Ch. D. 349 at p. 381 : (52 L.J. Ch. 177), must be constantly borne in mind. There the learned Lord Justice observed:

In any case it is as it seems to me certain that for anything which the Act of Parliament says shall be in the memorandum, you must look to the memorandum alone. If the Legislature has said that one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument.

11. It is, therefore, clear that primarily the memorandum alone must be looked at for the purpose of ascertaining the objects of the company. It is only in case of ambiguity that the articles may be referred to for the very limited purpose of explaining the ambiguity.

12. The Legislature has from the earliest times provided that the memorandum should amongst other things, state the objects of the company (S. 6 of our Companies Act). The practice, however, grew up of inserting in the memorandum not only the objects but also the powers with which those objects are to be achieved. Where this practice was adopted, the Courts felt bound to search for what might be regarded as the main or dominant or primary object of the company and read all the other clauses as merely subsidiary or ancillary to that object. To prevent this result sometimes a clause is inserted in the memorandum declaring that each item of the object clause is to be treated as an independent object and not to be controlled or whittled down by the rest. There is no such clause in the memorandum of the defendant association. Therefore the ordinary rule of construction applicable to all written documents" has to be followed, namely, the memorandum must be read as a whole.

13. The object clause in this memorandum sets forth 16 objects in sub-paras. a to p of cl. 3 and closes with the following words:

To do all such other things as may be conducive to or incidental to the attainment of the above objects or any of them.

These words are perhaps superfluous, since incidental powers can always be implied. I have to read the memorandum as a whole and ascertain if sanction can be found for any such gratuitous payment as we are concerned with in this

suit within the terms of the memorandum. The only provision in the object clause of the memorandum which expressly refers to gratuitous payments is to be found in sub cl. (n) which I have already quoted. Such a provision is also to be found in Art. 90(17). If this article goes beyond sub-cl. (n) of cl. 3 of the memorandum it is to that extent ultra vires. Subject to the limitation reference may be made to this article, although for the very limited purpose I have mentioned. Mr. Moitra did not seriously contend that payment over of the surplus proceeds of sale of a forfeited share to an expelled member, i.e., a person who has ceased to be a member can be justified by either of these two provisions. Learned Counsel relied on sub-cl. (c) of cl. 3 of the memorandum which I have quoted above. The concluding words of that sub-clause, namely "between or among members of the association" appear to me, however, to govern the whole sub-clause and in this view of the matter this sub-clause cannot help the plaintiff who has ceased to be a member. Mr. Moitra then relied on sub-cl. (b) of cl. 3 of the memorandum. He referred me to Ss. 17 and 86H of the Act and Regulation 71 of Table A and Arts. 89 and 90(3) of the articles of association of the defendant association in support of his contention that subject to the restrictions laid down in S. 86H, the committee had all the ample powers of the defendant association to dispose of the property of the defendant association in any way they liked. His argument proceeded on the basis that sub-cl. (h) was to be regarded as an independent object conferring plenary powers on the defendant association to dispose of any property for any purpose and therefore a gratuitous payment of the kind we are discussing was not outside the scope of the memorandum. If the defendant association had this power the committee, argued Mr. Moitra had the same power under Arts. 89 and 90(3) subject to S. 86H. I have already pointed out that in this memorandum there is no provision that each of the sub-clauses of the object clause is to be regarded as an independent object. That being so, all the sub-clauses of cl. 3 of the memorandum have to be read together. I find it difficult to regard sub-cl. (h) as an object at all and far less an independent object by itself. It appears to me to be more in the nature of a power which is taken for the purpose of attaining the main and dominant objects for which this association was established. In any event, it must be regarded as ancillary to the other objects. Otherwise, this power might be used by the committee to dispose of the bulk of the property of the defendant association for an object wholly foreign to the main and dominant objects of the defendant association, for the committee have subject only to S. 86H all the powers of the association under Art. 89. If Mr. Moitra's contention were correct the members may one fine morning find their Stock Exchange Hall turned into a Cinema Hall at the instance of a lessee or a purchaser from the committee. I have found no case where a gratuitous payment by a company or its directors which is unconnected with the carrying on of its business in a normal way has been sought to be justified on such a clause which is usually inserted in every trading company's memorandum. On the other hand I find from the reported decisions that wherever a gratuitous payment has been upheld it has been so upheld because it was conducive to the attainment of the main object of

the company or institution. This leads me to a consideration of the judicial authorities bearing on the point.

14. The first case that I may refer to is that of *Taunton v. Royal Insurance Co.*, (1864) 2 H. & M. 135 : (33 L.J. Ch. 406). In that case the directors of the defendant company which was an insurance company, offered to pay to its policyholders losses caused by a gun-powder explosion although the policies contained an express exception of such losses and although the company did not admit any legal liability to do so. A share-holder filed a bill for restraining the payments. It appeared on evidence that it was usual and advantageous for such companies to make such payments although not strictly bound to do so. It was held that this was a mode of carrying on the business with which the Court could not interfere and the bill was dismissed. Wood V.C. at p. 141 observed as follows:

It is one thing to say that the directors are paying something which they are not bound to pay and quite another thing to say that they are making payments for purposes not within the objects of the company. In this case the answer of the directors is that they make the payments as the course most conducive to the objects and the interests of the company. It was on this principle that the case of *Simpson v. Westminster Hotel Co.*, (1860) 8 H.L.C. 712 at p. 717 : (2 L.T. (N.S.) 707) was decided where Lord Campbell puts it entirely on the power to do things conducive to the attainment of the described objects of the undertaking.

15. In *Hampson v. Price's Patent Candle Co.*, (1876) 45 L.J. Ch. 437 : (34 L.T. 711), Jessel M.R. held that the application by the directors of a sum of ?1500 out of the undivided profits of a manufacturing company in paying a gratuity of one week's extra pay to each worker in the factory who had worked there with good character throughout the year was not ultra vires and was a reasonable exercise of the powers of management conferred on the directors.

16. *Hutton v. West Cork Ry. Co.*, (1883) 23 Ch. D. 654 : (52 L.J. Ch. 689), is also to be noted. There, a railway company which had no provision in its articles for paying remuneration to directors and had never paid any, sold its undertaking to another company at a price to be fixed by arbitration. By the Act authorising the transfer it was provided that on the completion of the transfer the company should be dissolved except for the purpose of regulating their internal affairs and winding up the same. The purchase price was to be applied in paying the costs of arbitration and in paying off any revenue debts or charges and the residue was to be divided among the debenture-holders and share-holders. After the completion of the transfer the company at a general meeting resolved to apply ? 1050 of the purchase money in compensating the paid officials for their loss of employment although they had no legal claim and ?1500 in remuneration to the directors for their past services. It was held that a company carrying on business had power to expend a portion of its funds in gratuities to servants or directors provided such grants were made for the purpose of advancing the interests of the company, but that this principle did not apply to a case where the company had transferred its undertaking to another company and was being wound up.

The two earlier cases I have mentioned were distinguished on the ground that the companies concerned in those cases were going concerns. After referring to those two cases Cotton L.J. at p. 665 observed:

The principle of those cases, as I understand, is this that where there are directors of a trading company those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business with a view to getting either better work from their servants, or with a view to attract customers to them, as in the case of an insurance company.

17. In *Henderson v. Australasia*, (1888) 40 Ch. D. 170 : (58 L.J. Ch. 197), a resolution by a meeting of proprietors of a bank authorising the director to pay a half-yearly pension for five years for the benefit of the family of a deceased officer was held by North J. as *intra vires*. It was so held because such payment "secures a better class of officials who are willing to take service with the company, an object of equal importance of course for carrying on its legitimate business."

18. The above principles so far applied to trading companies, were extended to an association not for profit by *Swinfen Eady J.*, in *Cyclists' Touring Club v. Hopkinson*, (1910) 1 Ch. 179 : (79 L.J. Ch. 82). Clause 4 of the memorandum of association of that club definitely provided that the income and property of the club should be applied solely towards the promotion of the objects of the club and no portion thereof should be paid by way of dividend, bonus or otherwise to the members. There was a proviso, however, that nothing in that clause should prevent the payment of remuneration to any officers or servants or members in return for services actually rendered to the club. It was held on a construction of this memorandum, that the grant of a pension by way of gratuity to a retired secretary was *intra vires*. *Swinfen Eady J.* at p. 187 concluded as follows:

In my opinion the payment to a retired servant of the club by way of an annuity or by way of pension or by way of gratuity is within the powers of the club as being a payment in furtherance of the best objects of the club. The fact that the payment is made by way of gratuity and not under any legal liability does not make it a payment outside the objects of the club.

19. In *Wimbledon & Putney Commons Conservators v. Tuelly*, (1931) 1 Ch. 190 : (100 L.J. Ch. 77). *Bennett J.* held that a corporation constituted by Act of Parliament, having power to levy rates and employ labour could make regulations enabling it to provide pensions &c. for employees retiring by reason of age, infirmity or otherwise, notwithstanding that it had no express power.

20. *Mr. Khaitan* relied on the case of *In re Lee, Behareem & Co. Ltd.*, (1932) 2 Ch. 46 : (101 L.J. Ch. 183). There the company had been incorporated as a private company in 1909. The memorandum of the company (cl. 3) contained an express power to provide for the welfare of employees and their widows and children. In 1923 the managing director of the company died. Five years later in 1928, the company by a deed granted a pension of ₹500 a year to his widow. In

1931 the company went into voluntary liquidation. The widow lodged a proof for the capitalised value of the annuity but the liquidator rejected it. Eve J. held that the transaction was not one for the benefit of the company or reasonably incidental to the company's business. He further held that the pension did not come within the terms of the company's memorandum as a managing or other director was not a person in the employment of the company. After referring to cl. 3 of the memorandum the learned Judge proceeded as follows:

But whether they be made under an express or implied power, all such grants involve an expenditure of the company's money and that money can only be spent for purposes reasonably incidental to the carrying on of the company's business and the validity of such grants is to be tested, as is shown in all the authorities by the answers to three pertinent questions: (i) Is the transaction reasonably incidental to the carrying on of the company's business? (ii) Is it a bona fide transaction? and (iii) Is it done for the benefit and to promote the prosperity of the company?

21. The same principles were applied to a municipal corporation by Simonds J. in *Armour v. Liverpool Corporation*, (1939) Ch. 422 : (108 L.J. Ch. 147). That the powers of a statutory body are not confined to what is expressly stated in the Act constituting it but extend to what is necessary and properly required for carrying into effect the undertakings and works which the Act has expressly sanctioned was also recognised by an appellate Bench of this Court in *Jessore District Board Vs. Surendra Nath Halder and Others*, .

22. It will be noticed from the above cases that in the matter of the application of the principles laid down therein it makes no difference whether the Corporation is a municipal corporation or a trading concern or an association not for profit, or whether such payment is made under an express or implied power of disposition of the assets of the company. In five out of those nine cases the corporation in question was a trading company and presumably it had power of disposal of its funds and properties as the defendant association has under cl. 3(h) of its memorandum. In none of those five cases was the decision put upon any such express or implied power of disposition of the assets of the company. As I have already said, the provision of cl. 3(h) of the memorandum of the defendant association, in my opinion, cannot be regarded as an object at all and certainly not as an independent object by itself without reference to the other objects set forth in the memorandum. If it were otherwise, it would authorise the defendant association and, therefore, the committee (subject to S. 86) to dispose of the bulk of its funds in any way and for any purpose they pleased. I cannot think that that could be the real meaning of it. I rather regard this provision as a power to be exercised in furtherance of the objects of the defendant association. Whether the disposal of property by the defendant association or by its committee in any particular instance was proper and valid would depend on the three tests deduced by Eve J. in *In re Lee Beharens & Co., Ltd.*, (1932) 2 Ch. 46 : (101 L.J. Ch. 183).

23. Now applying the first and last of those three tests, I cannot see how the payment over of the surplus proceeds of the sale of a forfeited share to an expelled member can be said to be reasonably incidental to the carrying on of the defendant association's business or for the benefit or prosperity of the defendant association. Ex hypothesi, the expelled member is an undesirable person, a person not considered safe or fit to be associated with as a member. How can a gratuitous payment or bounty to such a person further the best interests of the defendant association or of its members? The fear of forfeiture may have a deterrent influence on members but such bounty will operate only to undermine such influence and will surely be detrimental to the best interests of the defendant association. Further there is an express power under cl. 3(n) of the memorandum for making gratuitous payments only in certain cases. Such express power implies that the power is confined to the specified cases and cannot ordinarily be extended to a case which does not fall within the specified cases for the maxim is "expressio unius est exclusio alterius". (See Weston's case (1869) 4 Ch. 20 : (38 L.J. Ch. 49) and Oak Bank Oil Co. v. Crum, (1884) 8 A.C. 65 : (48 L.T. 537).) Payment over of the surplus sale proceeds of a forfeited share to the expelled member does not admittedly come within cl. 3(n) of the memorandum or cl. 90(17) of the Articles. Therefore, on a construction of the provisions of the memorandum and the articles in accordance with the several general principles of interpretation and in the light of the Judicial decisions mentioned above I have come to the conclusion and I hold that the alleged practice of paying the surplus sale proceeds to the expelled member pleaded in para. 16 of the plaint is ultra vires the defendant association and invalid. I, therefore, answer the third part of issue 1 in the affirmative.

24. Issue 2. - In para. 16 of the plaint which is quoted above, the plaintiff pleads the alleged practice of the defendant association and ends with a submission that it is binding on the defendant association. Practice is simply a succession of acts of a similar kind and is quite different from a custom. The practice as pleaded has none of the familiar features or elements which give a binding character and effect to a custom. In particular a custom implies an assertion of right, a denial thereof and an ultimate acquiescence therein. Payments which are made gratuitously and voluntarily without any assertion of right cannot, therefore, ripen into a customary right. Further I can perceive a clear distinction between the practice of an individual or firm or company and the general practice obtaining in any particular trade or community. The latter may ripen into a custom binding in law but the former can never confer a legal right except by a contract express or implied or by estoppel. These payments are not alleged to have been made for any consideration or under any contract express or implied, I do not see how voluntary payments by one person to another person or persons can give any right to the latter unless by contract or estoppel. Much less can such payments confer any right on a stranger. It is not alleged that the plaintiff is entitled to such payment under any contract express or implied. It is not alleged that the plaintiff became a member of the defendant association

relying on such alleged practice. No estoppel has been raised or pleaded at all. Apart from contract express or implied or estoppel I know of no legal principle whereby a person can insist on a voluntary payment on the ground that such payments have been made in the past to other persons. On the pleading as it stands this issue must be answered against the plaintiff.

25. As the plaintiff has failed on both the issues, he must pay the costs of this trial of issue.