

(1890) 07 CAL CK 0004
In the Calcutta High Court

W.H. Kraal and Others

APPELLANT

Vs

H. J. Whymper

RESPONDENT

Date of Decision : 02-07-1890

Acts Referred:

Companies Act, 1882 — Section 4

Citation : (1890) ILR (Cal) 786

Hon'ble Judges : Wilson, J; Pigot, J

Bench : Division Bench

Judgement

Wilson and Pigot, JJ.—This matter comes before us in the form of a special case stated for the opinion of the Court u/s 527 of the Code of Civil Procedure. The first question submitted to us, and the only one which we propose to answer, is: "Whether the subscribers to the General Family Pension Fund are a company, association, or partnership formed for the purpose of carrying on business, other than that of banking, that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, within the meaning of Section 4 of the Indian Companies Act, 1882." If it does fall within that description, then the Companies Act requires that it should be registered as a Company under that Act, unless formed under some other Act of Parliament, or of the Indian Legislature, or by Royal Charter, or Letters Patent; and, not being so registered or formed, it is an illegal association. If the association does not fall within the above description, it is not an illegal association.

2. The facts concerning the Fund are given in full detail in the special case and the documents annexed to it; it will be sufficient for the present purpose to summarise them briefly. The Fund was founded in 1870, the object being, according to the rules to provide for the maintenance of the widows and children of those who subscribe to it. The scope was afterwards enlarged so as to include other relations of subscribers. The management is vested in a Board of Directors elected by the subscribers. Subscriptions were originally at fixed rates according

to published tables; but at a later period abatements of subscriptions were introduced, according to a graduated scale, for subscriptions of five, ten, fifteen, and twenty years" standing. These abatements the directors are empowered to grant or withhold, according to their opinion as to the condition of the fund from year to year. The subscriptions of a member are intended to secure an annuity to the nominee for whose benefit he subscribes. He is under no obligation to continue his subscriptions, but may stop them at pleasure, subject in certain contingencies to forfeiture of the benefit of past payments; and fines are provided for unpunctuality in payments. In the course of management a large reserve fund has been accumulated and invested. There is nothing to suggest that this reserve is larger than sound principles of management require.

3. In order to bring a company, association, or partnership within the section in question, first, it must be formed for the purpose of carrying on a business; secondly, that business must have for its object the acquisition of gain, but the acquisition of gain contemplated may be either by the association or by the individual members of the association. The language of the Act before us is the same as that of the Act in force in England, and we have therefore the advantage of the English decisions on that Act, as well as on some other Acts, to assist us in applying the law to the present case.

4. It may perhaps be assumed (it is not necessary to decide it) that the operations of this association constitute a business: the real question is whether that business has for its object the acquisition of gain either by the association or by its members. The primary object is certainly not to confer any benefit upon the association as a body, or its individual members, but to make provision for the nominees of members. And the means by which it is sought to attain that object is by the adoption of a scale of payments so calculated as to render the intended provision secure, without unnecessarily burdening the contributors. But it was argued that the process adopted for attaining these ends naturally, and indeed necessarily, involves the acquisition of gain, and that, as people must be taken to contemplate the ordinary consequences of their own acts, the acquisition of gain must be held to be among the objects of the association.

5. The sources of gain suggested were these: forfeitures on the part of members ceasing to subscribe, which it was said formed a gain to the association by increasing its resources and diminishing its liabilities, and to members by lightening in the long run their contributions; fines imposed upon members not paying their contributions punctually; and lastly the large and increasing reserve fund derived from the surplus of the contributions over current outlay and the general receipts of the fund. This reserve fund it was argued, was a gain to the association directly, and a gain to the members indirectly, by lightening their contributions. It was further suggested that the reserve fund might conceivably in time attain such dimensions as to exceed the liabilities charged upon it, and that the members for the time being might possibly be entitled to divide the surplus among themselves. This, however, would be to frustrate, not to carry

out, the objects of the association. As to these matters, two questions arise: first, are they gains of the business within the meaning of the section; secondly, if so, is the acquisition of such gains the object of the association.

6. With regard to the first of these questions, it is at least extremely doubtful whether any of these matters can be called gains of the business. The case of *The New York Life Insurance Company v. Styles* L.R. 14 App. Cas. 381 seems to us an authority for the proposition that they are not so within the meaning of another Act. In that case the House of Lords had to consider, with regard to a Mutual Life Insurance Society, whether the amount of premiums received from year to year, so far as it was in excess of the out goings for the year, and which excess was partly returned to the member in the form of reduction of future premiums, or added by way of bonus to the amounts insured, and partly carried to a reserve fund, constitutes profits or gains within the meaning of Schedule D of the income tax Act (16 and 17 Vic, Ch. 34). We take the statement of the facts from the judgment of Lord Herschell at pages 407 and 408. "The appellant-company has no shareholders and no shares. Each policy-holder is a member of the company, and is entitled to a share of the assets of the company and liable to all losses and expenses incurred by the company. A calculation is made by the company of the probable death-rate among the members of the company, and the amount claimed for premiums from the policy-holders is commensurate therewith. The chief part of the surplus shown by the accounts to which I have referred is paid, or, as the company alleges, is returned to the policy-holders (that is, to members of the company) as bonuses. The remainder of the surplus is carried forward as funds in hand to the credit of the general body of the members of the company. These bonuses are not paid in cash, but the amount of the same is deducted from the next premium due or is added to the policy." Thus in that case, as in this, there was a reserve fund. In that case, as in this, there was a forfeiture clause, which was embodied in the policies. All these circumstances were relied upon in argument, and the same considerations were urged which have been laid before us. But those arguments did not prevail, and the majority of the Lords held, that in the case of a mutual association, in which the members contribute to a fund intended to secure objects in which they are all interested, any excess of the year's contributions over the outgoings does not constitute profits or gains, whether the shares of the individual members in the excess payments be returned to them in the form of reduction of subsequent contributions, or be added by way of bonus to the sums ultimately secured, or whether the amount be carried into a reserve fund for the benefit of all those concerned. It is difficult to see any distinction in principle between that case and the present.

7. If any of the things relied upon could properly be called gains by the association or by its members, we do not think it could be held that the acquisition of such gains was the object of the business of the association. And for this there seems to us ample authority. The case of *The Queen v. Whitmarsh* 15 Q.B. 600 was decided upon the former Company's Act, 7 and 8 Vict., c. 116,

Section 2, which provided for the registration of associations "for any commercial purpose or for any purpose of profit," by which words it was held that the profit contemplated was profit to the association, not profit to the individual members. In that case a company claimed to be registered, the object of which was to acquire lands and make allotments to the subscribers, but there were powers of selling lands, from the exercise of which profits might accrue to the company. The judgment of the Queen's Bench, delivered by Lord CAMPBELL, C.J., dealt with the matter thus: "The governing purpose of the company, according to the provisions of the deed, is the purchase of land by funds raised by subscription, and the division of such land among the subscribers. Each subscriber or shareholder, to whom an allotment of such land might be made, would obtain the advantages and enjoyment arising from the ownership in severalty of land, with the buildings and other improvements placed thereon: but these advantages to individual shareholders do not fall within the description of a profit to the company arising from its funds, and were not relied on in the argument. With respect to the powers conferred upon the directors, of selling land that might have been purchased, they are not given for any purpose of profit by purchase and resale, but as subsidiary only to the governing purpose of providing allotments, in respect of which the sale or other transfer of parcels of land might occasionally become convenient. It would be accidental only if profits arose from the exercise of these powers; and the exercise of them was clearly not the purpose for which the company was established."

8. That decision was followed in two other cases which arose upon the same Act, *Bear v. Bromley* 18 Q.B. 271 and *Moore v. Rawlins* 6 C.B. (N.S.) 289. The latter case is a very instructive one. The society in question was one for the acquisition of land, the erection of houses thereon, and the allotment of them to the subscribers. This was held not to be a purpose of profit to the society. But the society was further empowered to make and sell bricks, to purchase and sell building materials, and to perform all kinds of work in the building business and in relation thereto. It was held on the construction of the deed of settlement that these latter powers did not authorize the carrying on of the trade of brick-making or building generally, but only on the lands to be acquired, and for the purpose of carrying out the substantial object of the association; and it was therefore decided that they did not render registration necessary. Several later cases have been decided with regard to societies of a like character under the subsequent Companies Act, 25 and 26 Viet., c. 82, Section 4, the words of which are the same as those of the Indian Act, and apply to profits whether acquired by the Company or by its members; *Wingfield v. Potter* 45 L.T. 612, *Crowther v. Thorley* 32 W.R. 330, *In re Siddail* L.R. 29 Ch. D. 1. In each of these cases it was held that the association did not require registration, though in each of them there were possibilities of incidental advantage, such as a possible resale of land at an advantage, or the benefit of forfeitures.

9. These authorities show that, where the substantial purpose of an association is not to carry on a business for gain, the fact that gain may accrue incidentally,

or may arise from merely subsidiary provisions, does not make registration necessary. And the same rule is expressly laid down by Brett, L.J. in *Smith v. Anderson* L.R. 15 Ch. D. 247

10. Some other cases were referred to in argument, which do not seem to us to bear very strongly upon the case now before us, for the decisions turned upon considerations which do not arise in it. Thus in *Smith v. Anderson* L.R. 15 Ch. D. 247, see p. 279 Jessel, M.R. considered that there was an association formed with the object of dealing in shares for profit, and accordingly he held the proceeding illegal for want of registration. The Court of appeal took a different view of the nature and objects of the undertaking, and hence came to a different conclusion as to the law applicable. In other cases registration has been held necessary, because it has been considered that associations have been formed to carry on business, the object of which has been to enable some of the members to acquire gain by their dealings with the rest. To this class belong the cases relating to Mutual Marine Insurance Societies; *In re Arthur Average Association, Ex parte Hargro* L.R. 10 Ch. App. 542, by Jessel, M.R.; *In re Padstow Total Loss and Collision Assurance Association* L.R. 20 Ch. D. 137; and those relating to Mutual Loan Societies, *Jennings v. Hammond* L.R. 9 Q.B.D. 225, *Shaw v. Benson* L.R. 11 Q.B.D. 563, *In re Thomas, Ex parte Poppleton* L.R. 14 Q.B.D. 379.

11. We think the subscribers to the General Family Pension Fund are not a company, association or partnership formed for the purpose of carrying on business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, within the meaning of Section 4 of the Indian Companies Act, 1882; and our decree will declare accordingly.