1934 *Present:* **Macdonell C.J.**

MALALASEKERE *v.* MUNICIPAL COUNCIL, COLOMBO.

24—C. R. Colombo, 90,688

Municipal rates—Premises of art society—Art gallery not a school building—Annual value—Method of ascertaining—Value of building—Criterion of rent—Municipal Councils Ordinance, No. 6 of 1910, 115 (1).

Where premises occupied by the Ceylon Society of Arts, a voluntary association formed for the purpose of exhibiting pictures and promoting art, were housed in a building erected out of public subscriptions collected from the members of the society, and the building was assessed by the Colombo Municipal Council for rates,—

***Held,* that the annual value of the building should be determined by ascertaining what is a reasonable rent which the society would have to pay for the building if the society had to obtain it for displaying its pictures.**

The capital sum spent on the building would be a criterion by which the rent may be estimated.

The art gallery of the society is not a school building within the meaning of the proviso to section 115 (1) of the Ordinance.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

A. E. Keuneman (with him *E. F. N. Gratiaen*), for defendant, appellant.

H. V. Perera (with him *F. C. W. van Geyzel*), for plaintiff, respondent.

October 30, 1934. MACDONELL C.J.—

In this case the plaintiff is the Secretary of the Ceylon Society of Arts and the defendant is the Municipal Council of Colombo. The defendant, in accordance with the powers conferred upon it by the Municipal Councils Ordinance, 1910, assessed the annual value of the premises of the plaintiff society at Rs. 1,500 for the year 1933. The plaintiff society contended that this assessment was excessive and took action in the Court of Requests as provided by section 124 (1) of the Ordinance. The amount claimed as rates, Rs. 300, is within the jurisdiction of such a Court. In its action the plaintiff society asked for a declaration that its property was a "school building" within section 115 (1) of the Ordinance and should therefore be exempted from being rated. In the alternative it asked for a declaration that the true annual value of the building it occupies is Rs. 500 and not Rs. 1,500. Judgment passed for the plaintiff society on both these contentions, and from that judgment the Municipal Council, defendant, brings this appeal.

The facts seem to be that the plaintiff society is a voluntary association for the exhibiting of pictures and the promotion of art generally, in Colombo. It collected subscriptions from its members and erected a building about midway between the Municipal Council buildings and the Museum at a total cost of Rs. 58,273. It charges an entrance fee of 25 cents for each person, but this source of revenue is probably very small. It has a collection of pictures, including a number of copies of Old Masters, and the artificial lighting in the building is so arranged

that it would fall on the pictures so exhibited but would not light up the main body of the building. It is not connected with the electric main, so it can only be opened during daylight. We are specially told in evidence that it has no drainage. There is evidence that students study the pictures exhibited and copy them, and that, under the auspices of the society, lectures are given by people of authority on art but that they are not given in the art gallery building, but elsewhere. There is also evidence that professional artists and Technical College teachers take their pupils from time to time to study the pictures there.

I will deal first with the claim of the plaintiff society that its art gallery is a "school building" within section 115 (1) of the Ordinance. On the evidence given in this case it clearly has no claim to that title. The case of *Dr. Coudert v. Municipal Council of Colombo*[1] decided that only those buildings of a school are exempt from being rated which "are used as class rooms where the classes meet for tuition and private study". On the evidence in this case there are no classes which meet in the plaintiff society's building for tuition or private study. The definition of a school is given in the Concise Oxford Dictionary as "An institution for educating children or giving instruction usually of a more elementary or technical kind than that given in universities". On the evidence this is not "an institution for education or giving instruction"; so to hold, it would be necessary to strain these words beyond their normal meaning. I do not think that it can seriously be argued that the art gallery of the plaintiff society is a "school building" within section 115 (1) of the Ordinance, and the judgment below declaring the art gallery to be exempt under section 115 (1) of the Ordinance must be set aside.

The other question in this case is the annual value of these premises. Annual value is defined in section 3 of the Ordinance as follows:—

> "Annual value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for any house, building, land, or tenement if the tenant undertook to pay all public rates and taxes, and if the landlord undertook to bear the cost of repairs, maintenance, and upkeep, if any, necessary to maintain the house, building, land, or tenement in a state to command that rent.

It is argued that the plaintiff society, having spent on this building and the pictures it contains all the money that it has accumulated, would be unable to pay any rent at all or at most a very small one. The building it owns brings in no profit, consequently it is claimed that no tenant could be found who would be willing to pay as rent the annual value, Rs. 1,500, at which the defendant Council has assessed this property of the plaintiff society. The law requires us to find what rent a tenant would pay for the property to be rated and to consider the actual occupier of the property as himself a possible tenant; *per* Esher M. R. in *Regina v. School Board for London*[2]—"The directions given by the Act are equivalent to saying that we must look at all possible tenants, and the phraseology does not exclude an owner who himself occupies the premises"; and see *London County Council v. Erith*[3]. If we keep this in mind, that the actual occupier must

[1] *6 N. L. R. 338.* [2] *17 Q. B. D. 738.*

[3] *(1893) A. C. 562.*

be considered as a possible tenant, then the difficulties disappear. We must suppose that the plaintiff society is not the owner of this building but that somebody else is the owner of it, who therefore has put up and paid for the building. It is not disputed that what the building cost, namely Rs. 58,273, was a fair and reasonable price. The position of the plaintiff society, as hypothetical tenant, would be this. It needs an art gallery in which to house and show its pictures and, if there is in existence the present art gallery owned by someone else, it will then have to ask itself the question, what is a reasonable rent for it to pay to obtain this building wherein to house and display its pictures. In effect, the assessment at Rs. 1,500 asks it to pay a rent of a little more than 2½ per cent. on the cost of that building, and the plaintiff society, as possible tenant, has to consider whether an annual rent of a little over 2½ per cent. of the cost of putting up the building would be a reasonable rent for it to pay to obtain housing for its pictures in that building. The question answers itself. It would not only be a reasonable rent but a very small one. This short statement of the problem really disposes of the case. If the plaintiff society is a hypothetical tenant, then, by that hypothesis, not it but the owner would have paid for the building, the society would have its capital Rs. 58,273 intact and the rent it would pay would not exhaust the earning capacity of its capital, it would be able to get some income on that capital after payment of the rent for the building. The fact that the rent on the capital cost of the building is considerably less than what that capital would earn if it had been otherwise used, is strong evidence that the assessment complained of is neither unreasonable nor excessive. It may be added that the evidence in the case shows it to be a more indulgent assessment than that imposed on other neighbouring buildings.

The method adopted by the defendant Council in rating this building has been an application of what is known as the contractor's principle and the conditions under which it can be applied to a hypothetical tenant are authoritatively and clearly given by A. L. Smith L.J. in *Liverpool Corporation v. Llanfyllin Assessment Committee*[1]. "It is familiar law that, where a hereditament can be compared with other hereditaments of a like nature which are the subject of letting, its rateable value may be arrived at by showing what rent tenants from year to year will in fact give for such hereditaments; but a difficulty in rating law arises with regard to hereditaments which cannot be compared with other similar hereditaments so as to ascertain the rent which a tenant will actually give for them. Therefore, inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be a recognized position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way. In a case like the present, where no profits are earned in the parish by the use of the hereditament, a rough way of arriving at the rateable value by rule of thumb, there being no other way available, is to see what the site and the construction of the works cost, and take a percentage on the capital amount so expended as representing the rent which a tenant would give. The problem with regard to the mode of estimating the rateable value in a case of this kind has been simplified

[1] *(1809) 2 Q. B. at p. 20.*

by the introduction some years ago, in the case of *Reg. v. School Board for London*[1], of the principle that the occupying owner of the hereditament may be considered as a possible tenant. If a person buys a piece of land, and spends so much in erecting a building upon it, the amount so expended by him forms some criterion of the rent which he would give, if he had to rent the hereditament so created. I agree that a certain rate of interest on the capital expended in creating the hereditament is by no means to be taken as necessarily equivalent to the rent which a hypothetical tenant would give; but I think the amount of capital expended is admissible in evidence as a criterion by which to estimate that rent in the case of works like these which are incapable of being compared with other hereditaments which form the subject of letting." This passage is in point in reference to the present case.

There are no similar buildings available for comparison with the plaintiff society's building, and so nothing to ascertain what rent tenants do actually give for such a building, therefore is it impossible to apply that test. None the less it is a rateable building, so cannot escape being rated. It makes no profit, so it is impossible to rate it on what is known as the revenue or profits principle, then the only way— "there being no other way available"—is to see what the building cost and take a percentage on that cost "as representing the rent which a tenant would give". It is not a conclusive test but it is at any rate 'some criterion' of what rent a tenant would give, and here a very reasonable criterion, since there is no suggestion that the plaintiff society was overcharged or undercharged for having its building erected. The percentage actually taken has been a very low one.

It is part of the case of the plaintiff society that it makes no profits and has unfortunately small prospect of making any, and at one time the fact that the occupier of a building or other rateable subject made no profit by it was urged as an argument for its not being rateable at all. Such an argument would be unsound, for the question is not whether an occupier makes profit by what he occupies but whether he has beneficial occupation of it, that is, an occupation which is value to him. One of the best proofs that such an occupation is beneficial is that the occupier continues to occupy; the property must be of value to him or he would not continue to occupy it.

The passage from the judgment in the *Liverpool Corporation Case* quoted above says that "a rateable hereditament cannot be allowed to escape from being rated". The theory of a local rate is this. A certain sum is required each year and its payment must be divided among the occupiers of rateable property each according to the annual value of the bit of rateable property which he occupies; the sum required is fixed and the actual occupiers are ascertained persons. Then if one of these escapes paying his share, the burden of paying that share necessarily falls on those others who do not escape having to pay. It is claimed in the present case that since the plaintiff society earns, and can earn, little or nothing from its rateable property, then it should be rated at a very low figure if at all. To this the other occupiers paying rates can answer perfectly fairly and logically, 'Why must we suffer by paying more, namely your share, because you use your property in such a manner as to earn nothing by it? How

[1] *(1886) 17 Q. B. D. 738.*

you use your property, is your concern. But it is not right that you should be allowed that freedom and claim as a consequence of being allowed it, to put your burden on our shoulders'.

If it is right or advisable to exempt the plaintiff society from being rated, this is a matter for the legislature, which can alter the law if it thinks fit to do so.

For the reasons given above I am of opinion that the plaintiff society is not exempt under section 115 (1) of the Ordinance from being rated in respect of its building, and that it has not proved the defendant Council's assessment of the annual value of that building at Rs. 1,500 for the year 1933 to be unreasonable or excessive.

This appeal must be allowed with costs here and below and the plaintiff society's action must be dismissed.

Appeal allowed.