MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. ORIENTAL LIFE ASSURANCE COMPANY.

either apply it for the purpose for which it was sent, or else return it" and of North, J., to the same effect in *Gibert* v. *Gonard*(1) correctly express the equitable rule as now enforced in England and the rule being founded on broad considerations of justice should be followed by this Court. For these reasons I hold that the learned Commissioner's order is right in this case and would dismiss the appeal with costs.

Messrs. *King & Josselyn*—attorneys for appellants.

Messrs. *Short & Bewes*—attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. August 17. September 28.

THE OFFICIAL ASSIGNEE OF MADRAS AND AS SUCH THE ASSIGNEE OF THE ESTATE AND EFFECTS OF MESSRS. ARBUTHNOT & Co. (RESPONDENT),

v.

KRISHNASWAMI NAIDU AND OTHERS (PETITIONERS), RESPONDENTS.*

Trustee, powers of investment of—Investment by trustees, who are members of a firm, in the firm under the direction of cestui que trust—*Firm does not hold the money in a fiduciary capacity—Indian Trusts Act, s.* 51.

Where the settlor appoints the members of a banking firm as trustees and directs them to invest the trust funds with the firm in deposit account without any directions which would constitute the firm a trustee, such funds are, when invested, held by the firm as its own property and the relation between the firm on the one hand and the trustees and settlor on the other is merely that of debtor and creditor. On the bankruptcy of the firm such amount cannot be recovered in full, but can only be proved as a debt.

The doctrine embodied in section 51 of the Trusts Act that a trustee cannot use trust funds for his own profit does not apply where the settlor directs such use.

In re Beale Ex-parte Corbridge, [(1876) 4 Ch.D., 246)], referred to.

APPEAL from the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the relief of insolvent debtors at Madras in Petition No. 181 of 1906.

The facts for the purpose of this case are set out in the judgment.

---

(1) 54 L.J.Ch., 439. * Original Side Appeal No. 54 of 1908.

D. M. C. Downing for appellant.

C. F. Napier for first respondent.

The Hon. Mr. *V. Krishnaswami Ayyar* and *I. V. Ramanuja Rau* for second and third respondents.

JUDGMENT (MUNRO, J.).—This is an appeal by the Official Assignee from an order of the learned Chief Justice sitting as Commissioner in Insolvency.

On the 2nd June 1892, the ex-Raja of Venkatagiri executed a deed of trust with a view to making provisions for his daughters. The trustees appointed were the five persons who were at the time carrying on business under the style or firm of Arbuthnot & Co. The deed provided that the terms "trustees or trustee" should be taken to include not only the then members of the firm of Arbuthnot & Co., but also the members or member for the time being constituting the firm of Arbuthnot & Co. The deed, however, went on to say that if a trustee died, or left British India permanently or ceased to be a member of the firm of Arbuthnot & Co. or desired to be discharged, or refused or became incapable to act, then the settlor, or after his death, the surviving trustees, or continuing trustees, in which class retiring trustees are included, might appoint a new trustee in place of the trustee who had died, etc. It is thus clear that, although the settlor was desirous that the trustees should, if possible, be the persons who were for the time being the members of the firm of Arbuthnot & Co., it was recognised that it might not always be possible to secure this, and that eventually all the trustees might be persons in no way connected with Arbuthnot & Co. The deed further recited that the settlor had paid to the five persons named as trustees the sum of Rs. 62,957-8-6 to be held by them in trust for certain purposes, and directed that the trustees should invest the amount in their names in deposit with the firm of Arbuthnot & Co. bearing interest at the rate of 5 per cent. per annum and in no other manner.

Arbuthnot & Co. suspended payment on the 22nd October 1906. At the date of the insolvency only two persons constituted the firm and they were two of the five persons named as trustees in the deed. In March 1907, these two persons appointed three other persons as trustees in their place, in accordance with the powers given by the deed. The new trustees applied for payment in full of the trust-money out of the assets of the insolvents

MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. KRISHNASWAMI NAIDU.

and the learned Commissioner granted their application. He was of opinion "that the members of the firm at the date of the insolvency must be fixed with knowledge of the fact that the monies held by them in deposit account were monies which they as individuals held in trust." He further observed "In law a firm is not recognised as distinct from the members comprising it. On the facts I am not prepared to hold that the firm as a separate legal entity held the money as bankers for the trustees."

Now, I think it is clear from the terms of the trust-deed that the settlor regarded the body of trustees and the banking firm of Arbuthnot & Co. as two distinct and separate entities. At first no doubt the persons named as trustees were the then members of the firm. But the deed contemplated the possibility that at any moment all the members of the firm might cease to be trustees and appoint persons entirely unconnected with the firm as trustees in their place, an event which has actually happened, and this possibility itself made it necessary to distinguish between the body of trustees and the members of the firm. The distinction is emphasized by the fact that the settlor thought it necessary to direct the trustees to invest the trust-money paid to them with the firm of Arbuthnot & Co. The settlor clearly regarded his payment to the trustees and their investment with Arbuthnot & Co. as two distinct transactions just as much as if he had directed the investment to be made with a bank with which the trustees were in no way connected. It seems to me, therefore, that the simplest way to arrive at a correct conclusion is to regard the case from what was clearly the settlor's point of view. I will therefore for the present deal with the case on the assumption that the trustees were unconnected with Arbuthnot & Co. The trustees were directed by the deed to invest the money entrusted to them in a particular way. They did so, and when they had done so their only liability under the trust deed was to renew the deposit from time to time and apply the interest as directed. If the investment turned out badly and the money invested was lost owing to the failure of the bank, the money could not be recovered from the trustees. The only fund from which it could be recovered in whole or in part would be the assets of the insolvent bank. We have then to consider what claim the trustees would have upon those assets in respect of the

trust-money. Now all we have in this case is that the money was deposited with the bank at interest. The settlor did not stipulate that the trustees when investing the money should give any direction which would have the effect of causing the bank to hold the money as trustees or in any fiduciary capacity. It follows that the money became the money of the bank which it was entitled to use as its own, that the relationship between the bank and the trustees was merely that of debtor and creditor, and that on the failure of the bank the trustees would rank with the general body of creditors and be entitled to no preference—*vide Official Assignee of Madras* v. *Smith*(1) and my judgment in *Official Assignee of Madras* v. *Ramachandra Aiyar*(2). The matter is made still clearer by the fact that the bank was to pay interest at 5 per cent. per annum on the money deposited. This it would certainly never have agreed to do unless it was to be allowed to use the money and make as much profit as it could. But if the bank held the money as trust-money, it could not have lawfully used the money for its own benefit. Section 51 of the Indian Trusts Act prohibits a trustee from dealing with the trust property for his own profit, and it is pointed out in *Official Assignee of Madras* v. *Smith*(1) on the authority of two English cases, that if a banker were a trustee, he could not use the trust property as his own without a breach of trust, and that it is an indelible principle of trust property that a trustee can never make use of it for his own benefit. On the assumption I have made therefore the application must fail. But the facts that the trustees at the time of the insolvency were the persons who were at the time partners in Arbuthnot & Co. can make no difference in principle. When, as trustees under the deed, they, as directed, invested the money in their own firm, their liability in their capacity as trustees appointed by the deed was reduced in the same manner as if they had not been members of the firm. When the money was invested with them as bankers, the same result must, there being no reason to the contrary, have followed as would have followed had the money been invested with another bank with which they had no connection. I therefore, with great respect, am clearly of opinion that the order of the learned Commissioner is wrong. I would set aside his order and dismiss the application with taxed costs throughout.

(1) (1909) I.L.R., 32 Mad., 68. (2) (1910) I.L.R., 33 Mad., 134.

MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. KRISHNASWAMI NAIDU.

The appeal is allowed accordingly.

ABDUR RAHIM, J.—I agree with my learned brother that the order of the learned Commissioner in Insolvency is wrong; but, I think, I ought to state my reasons for so holding. The simple question is whether a sum of money invested in deposit account with the banking firm of Arbuthnot & Co. by the express direction of the settlor as contained in the deed of settlement itself can be recovered or whether the trustees of the settlement have only a right of proof against the general assets of the bank like any other creditors. It seems to me all the subtle discussion as to whether Arbuthnot & Co. as a banking firm should be treated as a distinct legal entity from the partners of that bank who were appointed first trustees of the settlement is altogether beside the question in the present enquiry. Such discussion may be relevant when the question is whether a trading firm is to be fixed with notice of a trust as, for instance, when one member of a firm who is a trustee of a settlement has contrary to, or in breach of, the terms of the trust, used trust-money in the business of the firm. Here there is no dispute as to the knowledge of Arbuthnot & Co. that the Rs. 62,957 was trust-money, but does such knowledge of Arbuthnot & Co. make any difference in determining the question whether the money formed part of the general assets of the bank, when the settlor himself directed the money to be invested in deposit account with Arbuthnot & Co.'s bank, the bank agreeing to pay 5 per cent. on the amount as interest? It seems to me, with the utmost deference, that the learned Commissioner in thinking that it does, has failed altogether to give effect to the directions of the settlor. The effect of those directions clearly is that Arbuthnot & Co. who, I shall take it were also trustees, were authorized to use the money as their own and to that extent they became debtors to the beneficiaries or the trustees whoever they may be at the time. If Arbuthnot & Co. were not so authorized, the Official Assignee would have been liable to make good the amount as I have already pointed out in my judgments *in the previous cases*. Mr. Napier, who appeared to support the learned Commissioner's order, has dwelt a great deal on the general duties of trustees as to investing trust-monies, and so forth; but the obvious answer to all such arguments is that the first and foremost duty of a trustee is to carry out the directions of the creator of the trust. If Arbuthnot

& Co. in this case did not obey the instructions of the settlor, they would be guilty of breach of trust and would have to make good any loss that might accrue to the trust from such derilection. If, therefore, the settlor chose to make it a term of his settlement that the money should be lent to the trustees themselves hoping to get a profitable return, then it is the misfortune of the beneficiaries if the trustees become bankrupts and they must be content to rank as ordinary creditors. I think the words of Bacon, C.J., *in re Beale Ex-parte Corbridge*(1) where he says " No proof can be admitted in respect of a trust which is inconsistent with the application of the money which the lender has pointed out " are applicable to the present case. This appeal should therefore be allowed and the application of B. Krishnaswami Naidu and others dimissed with costs.

Messrs. *Short* & *Bewes*—attorneys for appellant.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

GANAPATHY MOODELLY AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MUNISAWMI MOODELLY (PLAINTIFF), RESPONDENT.*

1909. August 27. September 2.

Contract Act IX of 1872, *s.* 25, *cl.* (3)—*Not necessary that the agreement should in terms refer to the barred debt.*

A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt, the recovery of which was barred by the Statute of Limitations:

Held, that the promissory note was a contract enforceable under section 25, clause (3) of the Indian Contract Act.

A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within section 25, clause (3) of the Indian Contract Act is no exception to this rule. The agreement will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt.

---

(1) (1876) 4 Ch.D., 246. * City Civil Court Appeal No. 2 of 1907.