MUNRO AND ABDUR RAHIM, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. LUPPRIAN.

purpose the payer cannot recover the money paid and I shall have something more to say hereafter regarding that case. But I am distinctly of opinion that to hold that Arbuthnot & Co. ever assumed any fiduciary character in respect of the money sought to be recovered would be going much further than what these authorities warrant or the principles of equity would justify.

I hold therefore that Luppriam has only a right of proof as a creditor of Arbuthnot & Co. and the appeal ought to be allowed with costs.

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

Messrs. *Grant & Greatorex*—attorneys for respondent.

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## 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 ARBUTHNOT & Co. AND SIR GEORGE GOUGH ARBUTHNOT AND JOHN MONTGOMORY YOUNG, PARTNERS IN THE SAID FIRM OF ARBUTHNOT & Co., INSOLVENTS (RESPONDENTS), APPELLANTS,

*v.*

THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED (PETITIONERS), RESPONDENTS.*

*Fiduciary relationship—When banker holds money as agent—Banker holding money as agent not a debtor.*

*O*, who owed certain money to *M.C.*, sent a cheque to Bank *A* for the amount, asking *A* to place the amount to the credit of *M.C.*, who at the time had no account with *A*. *M.C.* was informed by *A* that the amount was placed to her credit. *M.C.*, on the 5th October, asked *A* to send her the amount and *A* sent *M.C.*, a form of receipt to be signed by her. *M.C.* signed the receipt and sent it to *A*, who received it before the 20th when *A* suspended payment. *A* applied to the Court for the relief of insolvent debtors and the estate of *A* was vested in the Official Assignee. On a motion by *M.C.* claiming payment:

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* Original Side Appeal No. 56 of 1908.

*Held*, that the relationship of debtor and creditor did not exist between *A* and *M.C.* and that the former held the money as agent of the latter when payment was suspended.

*Per* MUNRO, J.—As the receipt and demand for payment reached *A* before payment was suspended, the result was the same as if *M.C.* attended in person and demanded payment. On *A's* failure to remit the money, which it was *A's* duty to do, *A* held the money in a fiduciary capacity.

*Per* ABDUR RAHIM, J.—As *A* received the money for a particular purpose and, as there was no account between *A* and *M. C.*, *A* had no right to appropriate the money and did not purport to do so.

Even supposing the case were otherwise, the subsequent communication by *A* to *M. C.* that he held the money for *M. C.* in accordance with the instructions received was an act of appropriation, sufficient to show *A's* consent to hold the money in a fiduciary capacity.

*In re Hallett's Estate* [(1879) 13 Ch.D., 696], referred to.

APPEAL from the order and judgment, dated 21st September 1908, of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of this Court for the relief of insolvent debtors, in Petition No. 181 of 1906.

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

*D. M. C. Downing* for appellants.

*K. Ramanath Shenai* for 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. The material facts are not in dispute and may be briefly stated. A sum of Rs. 970 was due to one Mariam Chandy by the Oriental Government Life Assurance Company, Limited, the respondents; Mariam Chandy asked the respondents to remit the money direct to her by a cheque drawn on Arbuthnot & Co. By an oversight the respondents sent to Arbuthnot & Co. a cheque for Rs. 970 drawn on the National Bank of India, and asked them to place the amount to the credit of Mariam Chandy. The latter had at the time no account with Arbuthnot & Co. Arbuthnot & Co. informed Mariam Chandy that the amount was at her credit. She then on the 5th October 1906 asked Arbuthnot & Co. to remit the money. Arbuthnot & Co. sent her a form of receipt for signature. This receipt she duly signed and returned and the receipt reached Arbuthnot & Co. before they suspended payment. The respondents took from Mariam Chandy an assignment of her rights against Arbuthnot & Co.

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On these facts the learned Commissioner held that from the 5th October 1906. Arbuthnot & Co. held the money as Mariam Chandy's agent to remit the money and that they did not hold it as her bankers. He therefore directed the Official Assignee to pay the whole amount to the respondents.

I think the order of the learned Commissioner is right. As the receipt and demand for payment reached Arbuthnot & Co. before they suspended payment, the result was the same as if Mariam Chandy had attended in person at the bank, handed over the receipt and asked for payment. In that case Arbuthnot & Co. would have been bound to pay her at once. But as she did not attend in person it was their duty to remit the money at once as requested, and failing to do so they thereafter held the money in a fiduciary capacity—*vide* my judgments in *Official Assignee of Madras* v. *Ramachandra Aiyar*(1), *Official Assignee of Madras* v. *Lupprian*(2). I would therefore dismiss the appeal with taxed costs to be paid out of the estate.

The appeal is dismissed accordingly.

ABDUR RAHIM, J.—The facts of this case to my mind come within the rule of *In re Hallett's Estate*(3). What happened was that the Oriental Life Assurance Company which owed Rs. 970 to one Mariam Chandy sent on the 20th September 1906 to Arbuthnot & Co. a cheque for that amount drawn on the National Bank of India in favour of Arbuthnot & Co. requesting the latter to place the sum at the credit of Mariam Chandy, at the same time informing Mariam Chandy of the fact. On the 24th September Arbuthnot & Co. wrote to Mariam Chandy advising her of the receipt of the remittance and that it would be placed to her credit in due course. On the 5th October Mariam Chandy asked Arbuthnot & Co. to remit the amount to her suggesting to them several modes of transmission. In reply Arbuthnot & Co. on the 9th October wrote to her that they held the money in her account and enclosed a form of a receipt for her signature informing her that they would remit the amount by postal money order less $\frac{1}{2}$ per cent. commission on receipts and $\frac{1}{2}$ per cent. on payments. Mariam Chandy, it appears, took objection to the amount charged for commission which she considered to be excessive, but, as she was

(1) (1910) I.L.R., 33 Mad., 134. (2) (1910) I.L.R., 33 Mad., 145.
(3) (1879) 13 Ch.D., 696.

willing to leave this matter to Arbuthnot & Co.'s sense of justice, she sent them on the 17th October the receipt form duly filled up and signed requesting them to remit the money in the manner mentioned in their letter of the 9th October. The money was not, however, remitted before Arbuthnot & Co. stopped payment. Mariam Chandy subsequently assigned her claim to the Oriental Life Assurance Company. It should be borne in mind that neither the Oriental Life Assurance Company nor Mariam Chandy had an account with Arbuthnot & Co. at the time of the above transaction.

On these facts it seems to me that Arbuthnot & Co. received the money from the Oriental Life Assurance Company for the purpose of paying the amount to Mariam Chandy. Arbuthnot & Co. were not entitled therefore to appropiate the money to their own use nor did they purport to do so and the fact that they charged commission for their services strengthens this inference. Nor can it be said that they had any authority afterwards from Mariam Chandy to treat the money as their own and the correspondence clearly shows that they held the money to the use of Mariam Chandy. The learned Counsel for the Official Assignee, however, relies upon Lord Romilly M.R.'s ruling in *In re Barned's Banking Company (Ltd.) Massey's Case*(1). Even if that decision lays down the law correctly, I think that, when Arbuthnot & Co. wrote to Mariam Chandy that they held the money on her account in accordance with the instructions which they had received, that was sufficient as an act of appropriation to bring the case within that rule. But it must be borne in mind that *Massey's Case* was decided before the case of *In re Hallett's Estate*(2) in which the equitable rule as to following trust money was for the first time clearly recognised in all its modern developments and it seems to me, as remarked in Mr. Heber Hart's 'Law of Banking' (see p. 146 foot-note) that the decision in *Massey's Case* must be held to be of very doubtful authority at the present day. I think the words of Mellish, L.J., in *Vaughan* v. *Halliday*(3), "Then the rule of law is applicable, that if a remittance is sent for a particular purpose, whether it be a remittance by bill or a remittance in money, the person who receives the remittance must,

(1) (1870) (39) L.J.Ch., 635. (2) (1879) 13 Ch.D., 696.
(3) (1874) 9 Ch., App., 561 at p. 568.

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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.

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## 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.

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