## APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice and Mr. Justice Cornish.*

1931, October 30.

A. M. M. MURUGAPPA CHETTIAR (FIRST DEFENDANT), APPELLANT,

*v.*

ARANGARAJA KUMARANANDASWAMI AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

*Banker and customer—Customer—Moneys of third party held in fiduciary capacity by—Deposit by him with bank of—Third party's suit to recover money from banker—Maintainability of—Party to suit—Customer, if a necessary party.*

Where K. endorsed over certain hundies drawn in his name in favour of R. with instructions to collect the hundies and invest the proceeds in his (K.'s) name with a banker and R. collected the hundies but contrary to the instructions invested the same in his own name in a separate account with M., a banker in Madras,

*held*, that R. stood to K. in a fiduciary relationship and that K. could follow the proceeds of the hundies in the hands of M.

*Burdick* v. *Garrick*, (1870) 5 Ch.App. 233; *In re Hallett's Estate, Knatchbull* v. *Hallett*, (1879) 13 Ch.D. 696; and *Sinclair* v. *Brougham*, [1914] A.C. 398, followed.

*Held further*, that in the suit by K. against M. to recover the proceeds of the hundies, neither R. nor his representatives were necessary parties.

APPEALS against the judgment of KUMARASWAMI SASTRI J., dated 21st December 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 608 of 1927.

*Advocate-General* (*A. Krishnaswamy Ayyar*), with him *S. Parthasarathy* and *V. K. Thiruvengadachari*, for appellant.—There is no privity of contract between appellant and first respondent. The hundies were given by Ramanathan

* Original Side Appeals Nos. 7 and 8 of 1929.

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Chetty as his property and, when they were realized, they were treated as his property and dealt with as such. The appellant is a banker. He will have no defence to a suit by Ramanathan or his heirs for the recovery of the proceeds of the hundies unless the matter is adjudicated upon in the presence of Ramanathan or his heirs; see *Tassell* v. *Cooper*(1), *Pinto* v. *Santos*(2) and Grant's Law of Banking, 6th Edition, page 190.

*M. Patanjali Sastri*, with him *R. Narasimhachari*, for second respondent.—The first respondent had to prove his title to the fund as against the second respondent as a preliminary step to his getting a declaration against the appellant. The Court was concerned in a dispute really between the respondents and had no jurisdiction to decide such dispute since no part of the cause of action arose in Madras. There is no submission to jurisdiction and, in a case of total want of jurisdiction, neither submission nor consent nor waiver could confer jurisdiction on the Courts; see *Provas Chandra Sinha* v. *Ashutosh Mukherji*(3). Even if part of the cause of action could be said to have arisen in Madras, since the plaintiff had not obtained leave to sue the second respondent, the Court had no jurisdiction; see clause 12 of the Letters Patent. *Ram Partab Samrathrai* v. *Foolibai and Goolibai*(4) is in point. The defect could not be cured by obtaining leave later. Even if the suit had been properly laid against the appellant, the addition of the second respondent is not a mere matter of procedure but one of substance and deals with the power of the Court to try the suit against the second respondent also. The second respondent was at first added as a *pro forma* defendant. If that had continued, the matter in issue would not be *res judicata* between him and the other parties to the suit; see *Ramdas* v. *Vazirsaheb*(5) and *Malhi Kunwar* v. *Imam-ud-din*(6).

*S. Doraiswami Ayyar*, with him *K. S. Rajagopala Ayyangar*, for first respondent.—In the circumstances that have happened, the second respondent need not be on the record to enable the first respondent to get a declaration against the second respondent who stands to the first respondent in a fiduciary relationship; *Burdick* v. *Garrick*(7). If such money could be

(1) (1850) 9 C.B. 509; 137 E.R. 990.
(2) (1814) 5 Taunt. 447; 128 E.R. 763.
(3) (1929) I.L.R. 56 Calc. 979.
(4) (1896) I.L.R. 20 Bom. 767.
(5) (1901) I.L.R. 25 Bom. 589.
(6) (1904) I.L.R. 27 All. 59.
(7) (1870) 5 Ch. App. 233.

traced to the hands of the appellant, he could be sued ; *In re Hallett's Estate, Knatchbull* v. *Hallett*(1). The true principle of the above decision was explained in *Sinclair* v. *Brougham*(2).

*Advocate-General* replied.

*Cur. adv. vult.*

## JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—These are appeals from a judgment of KUMARASWAMI SASTRI J., decreeing the suit under appeal in favour of the plaintiff. The plaintiff is a *pandaram*, the first defendant is a banker carrying on business in Madras, and the second defendant is a minor defending by his mother and guardian and the son of one S. M. R. M. Ramanathan Chettiar of Pallathur who died some years ago. The plaintiff is the founder and head of a mutt at Karaikal, known as the Sriman Swami Mutt. With a view to create an endowment for that mutt, the plaintiff collected subscriptions from several persons, and the amounts so collected were paid to the makers of four hundies in favour of the plaintiff. The aggregate sum of those four hundies is Rs. 11,996-7-6. In December, 1925, the plaintiff endorsed those four hundies to the second defendant's father, Ramanathan Chetty, with instructions to him to realize the amount thereof and invest the amount so collected on the plaintiff's behalf and account with a respectable Nattukottai Chetty firm in Madras for interest according to the Madras *Nadappu* rate for six months' *tavanai*. Ramanathan Chetty, it is alleged in the plaint, acting on behalf of the plaintiff endorsed the hundies in favour of the first defendant who agreed to collect the amounts of the hundies for the benefit of the plaintiff. The plaintiff, accordingly, having

(1) (1879) 13 Ch.D. 696.

(2) [1914] A.C. 398.

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without success made demands upon the first defendant for payment of the money so collected and thought by him to be standing in his account with the first defendant, sued the first defendant for that amount.

The first defendant filed a written statement in which he set up the case that Ramanathan Chetty delivered the hundies to him with instructions to collect the amounts thereof and credit them to his own account and that accordingly he collected the amounts and duly credited them to the account of Ramanathan Chetty. He contended that the hundies in question were delivered to him as the property of Ramanathan Chetty and that according to his instructions they were dealt with on the footing that they were his property. He pleaded that there was no privity of contract between him and the plaintiff and contended that the plaintiff's remedy, if any, was against Ramanathan Chetty or his heirs. In consequence of this written statement, the second defendant by his guardian was brought upon the record as a defendant, and in the second defendant's written statement the case put forward was that the plaintiff did not collect the money represented by the hundies as a trustee of the mutt but that he did so at the request of Ramanathan Chetty who gave him letters of recommendation to his friends and that the money collected was collected for Ramanathan Chetty who was the trustee of the money to be applied by him for the purposes of the mutt, though the case was subsequently developed at the trial that he was the trustee of the mutt. The second defendant's case, therefore, was that Ramanathan Chetty was the trustee of the money and that the plaintiff had no right whatever to the funds beyond merely the collection of them on Ramanathan Chetty's behalf. It was admitted that the

money realized on the hundies was credited to Ramanathan Chetty's account with the first defendant. The second defendant also denied that the plaintiff was the founder or head of any mutt or charities in the name of Sriman Swami in Karaikal. In the last paragraph of his written statement the second defendant pleaded that the Court had no jurisdiction to entertain the suit as no part of the cause of action as against the second defendant arose in Madras, and that, even if a part of the cause of action had arisen in Madras, no leave of the Court to sue in Madras had been obtained.

The learned trial Judge after a very careful trial of the suit gave judgment in favour of the plaintiff holding that he had collected the money in question as the head of the mutt and on behalf of the mutt, that the second defendant's contentions that Ramanathan Chetty was the trustee for the money and that the plaintiff was making collections on his behalf and under his directions were untrue, and that the first defendant was liable to have the suit decreed against him because Ramanathan Chetty was in a position of trust to the plaintiff and enjoying that fiduciary relationship and in breach of his trust had paid the money into his own account, and the plaintiff was therefore entitled to follow it and get it from the first defendant. It is not clear from the very careful judgment of the trial Judge whether he intended to do more than make the second defendant liable as a *pro forma* defendant. The second defendant, it is quite clear, was made a party only because of the defence raised by the first defendant in his written statement. It seems to have been thought necessary by the plaintiff's legal advisers to make the second defendant a party to the suit so that the rights of all the parties could be properly determined; and the right of the plaintiff, even in the absence on the

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record of the second defendant, to follow the money into the hands of the first defendant under the circumstances of the case appears not to have been appreciated by the plaintiff's legal advisers. Consequently, both in the trial Court and before us, a great deal of time was taken up by a discussion of the question of the jurisdiction of the Court to entertain a suit against the second defendant. Mr. S. Doraiswamy Ayyar, however, did not take up the position that it was necessary to have the second defendant before the Court; his contention being, firstly, that on the evidence the relationship between the plaintiff and Ramanathan Chetty was a fiduciary one, and secondly, that Ramanathan Chetty was guilty of a breach of trust in putting the money realized on the hundies into his own account, and therefore the legal position was that the plaintiff was entitled to get that money back from the first defendant. Accordingly we think it quite unnecessary to decide the point as to jurisdiction. That was decided in the lower Court in favour of the plaintiff; but in view of the fact that Mr. Doraiswamy Ayyar did not support that finding, it only remains for this Court to say that it would appear that the lower Court had no jurisdiction to entertain the suit as against the second defendant. Therefore, so far as the second defendant's appeal is concerned, it must be allowed though it must be observed that the second defendant took no steps whatever to have the decree, when drawn up, posted "to be spoken to on minutes" before the learned Judge, and set right any errors or doubt therein but has come straight here instead. In view of the fact that most of the time in the Court below was taken up in a consideration of the case set up by the second defendant which was found to be untrue, in my opinion, the second defendant is not entitled to his costs either

here or in the Court below. Since, however, the decree as it stands makes the second defendant liable to pay costs, that part of it will be amended and the order substituted that the second defendant will bear his own costs.

It is now necessary to consider the first defendant's appeal and whether the learned trial Judge was right in coming to the conclusion that the relationship between the plaintiff and Ramanathan Chetty was a fiduciary one. The learned trial Judge has obviously given the most careful consideration to this aspect of the case, as indeed he has to the case in its other aspects, and, in my opinion, it would be impossible to come to a different conclusion.

[His Lordship discussed the evidence and proceeded:]

It is sufficient to say, as I have already stated, that it is impossible to differ from the learned trial Judge's conclusions on this part of the case and to add that the second defendant's case is obviously a false one. It is clear, therefore, that the plaintiff was collecting money for the mutt at Karaikal, that having collected this large amount he got four hundies in which he was named the payee and endorsed them over to Ramanathan Chetty, not so as to give Ramanathan Chetty any right to the money but because Ramanathan Chetty was to negotiate the hundies for the plaintiff and pay the money into the plaintiff's account which Ramanathan Chetty was to open with some respectable firm in Madras. The money was entrusted to Ramanathan Chetty for that purpose, and in putting the money into his own account he was guilty of a breach of trust, and any difficulty there might have been in identifying this money after it got into the hands of the first defendant is removed by reason of the fact that

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Ramanathan Chetty had two accounts with the first defendant, namely a *tavanai* account and a *tanathu* account. The latter was an account of Ramanathan Chetty's own dealings. The former account was opened in order to pay into it the realizations from the hundies and there the money remained. The legal position is perfectly clear. The first case to which reference must be made is *Burdick* v. *Garrick* (1). There an agent, who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account. The Statute of Limitations was pleaded, but it was held that the agent held the money in trust for his principal, and therefore the Statute of Limitations was no bar to the suit. On page 240 Lord HATHERLEY L.C. says:

> "In the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

It is clear from this decision that Ramanathan Chetty stood to the plaintiff in a fiduciary relationship. Next it has to be seen whether money placed by a person in fiduciary relationship in breach of that trust in the hands of another can be got back from that other person; and here we have the authority of the

(1) (1870) 5 Ch. App. 233.

well-known case of *In re Hallett's Estate, Knatchbull* v. *Hallett*(1) where it was held that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands. In a later case, *Sinclair* v. *Brougham*(2), the principle in *In re Hallet's Estate*(1) was applied. It is quite clear that the plaintiff was entitled in the lower Court to succeed in his claim against the first defendant and therefore the first defendant's appeal must be dismissed with costs.

CORNISH J.—I concur.

G.R.

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## APPELLATE CIVIL.

*Before Sir Owen Beasley,* Kt., *Chief Justice and Mr. Justice Cornish.*

HASARIMULL CHANDUKCHAND AND ANOTHER (SECOND DEFENDANT AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

*v.*

N. R. VEDACHALA CHETTIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1931, October 27.

*Madras Hindu Religious Endowments Act II of* 1927 (*as amended by Act I of* 1928), *sec.* 73 (2)—*Wrongful alienation of trust property by trustee—Suit by other trustees to recover property from alienees—Jurisdiction of Civil Courts.*

Section 73 (2) of the Madras Hindu Religious Endowments Act II of 1927 (as amended by Act I of 1928) is not a bar to the institution of a suit by a trustee of a temple against strangers

(1) (1879) 13 Ch.D. 696. (2) [1914] A.C. 398.
* Original Side Appeal No. 27 of 1930.