

(1924) 02 CAL CK 0076
In the Calcutta High Court

**In Re: Alliance Bank of Simla, Ltd.
 Peter Donald Macpherson**

Date of Decision : 15-02-1924

Acts Referred:

Citation : AIR 1924 Cal 818 : 84 Ind. Cas. 1018

Hon'ble Judges : Sanderson, C.J;Richardson, J

Bench : Full Bench

Judgement

Sanderson, C.J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves which was given in respect of an application made by the Liquidators of the Alliance Bank of Simla, Ltd., which was filed on the 20th of August 1923.

2. It appears that on the 27th of April 1923 the Bank had suspended payment. It subsequently went into voluntary liquidation, and the Petitioners were appointed Liquidators.

3. The question in this case arises in connection with a claim of the employees of the Bank, who were members of a Provident Fund, established by the Bank in 1892 for the benefit of its employees. The Petitioners asked for the direction of the Court as to -

The manner in which they were to deal with claims made by such members, that is to say, whether such members were entitled to receive payment in full of the amounts of the said credit balances in priority to the unsecured creditors and the share-holders of the said Bank or whether such members were entitled only to rank *pari passu* with the said unsecured creditors.

4. The learned Judge's decision was given on the 28th of August 1923 and was as follows: -

The result is that I hold that the members of the Provident Fund have no priority over the unsecured creditors and they are only entitled to rank *pari passu* with them.

5. The appeal was filed on the 29th November 1923, and the Appellant is Mr. P.D.

Macpherson who was manager of the Calcutta Branch of the Bank and who was a member of the Provident Fund.

6. The first point raised by the learned Counsel for the Appellant was that the Bank was trustee of the amounts standing to the credit of the Provident Fund for the employees who were members of the Provident Fund or that, at any rate the Bank occupied a fiduciary relation towards the members. He relied upon the terms of the Rules and regulations of the Provident Fund and upon the method of dealing with the fund by the Bank.

7. Speaking generally, there is no doubt that a fiduciary relationship may be established without the use of the word "trust" and that a person may constitute himself a trustee and, without any actual transfer of the legal estate, he may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it in trust.

8. The question in this case, in the first instance, must be considered with reference to the rules and regulations and they must be read as a whole in order to obtain their true effect and meaning.

9. The material rules are: -

N.B. - Membership of the firm is required by the Company of all their employees who are eligible for membership.

R. 1 states the persons who are eligible for membership.

R. 3 deals with old employees and it is not necessary to consider that clause in detail.

4. Each member shall subscribe monthly a sum equal to 5 per cent, on the amount of the monthly salary, paid to him by the Company, and shall pay to the Company the amount of his subscription immediately on the receipt by him of his salary for the month preceding, and the Company may from time to time deduct from any sum payable by the Company to any member for Salary such sum as may be required to pay any subscription due by him to the fund.

5. The Company shall, on every 31st December and 30th June, contribute to the fund a sum equal to the aggregate amount of the sub-scriptions of the members during the preceding half year under Rule 4.

6. The sums from time to time subscribed by each member under Rules 3 and 4 shall forthwith on payment thereof be credited to his account in the books of the Company and all sums contributed by the Company under Rule 3 shall forthwith and all sums from time to time contributed by the Company under Rule 5 shall, as soon as may be after each 31st December and 30th June, be divided (by book entry) among the members in proportion to the amount of their respective subscriptions, and the Company shall thereupon credit the account of each member in the books of the Company with his share of such contribution.

7. The Company shall also contribute to the fund on every 31st December and 30th June interest upon the capital amount from time to time standing to the credit of each member, at the same rate (but not exceeding 5 per cent, per annum) as shall be from time to time paid by the Company on fixed deposits for periods of one year and upwards and such interest shall, as soon as may be after each 31st December and 30th June, be credited to the account of each member in the books of the Company,

8. The account of the fund shall be kept in the general books of the Company at their Head Office, where a subsidiary ledger shall also be maintained showing the amount from time to time standing to the credit of each member, and a pass book shall be supplied to each member which shall be made up and balanced half yearly.

10. It will be convenient to state now how the scheme contained in these clauses was carried out. By the consent of both parties certain books and documents which were Mot before the learned Judge, were put in before the hearing of the appeal. We were shown an account of the Provident Fund in the general ledger, in which the amounts subscribed by the employees were credited to the fund. Each half year the Bank's contribution was credited to the account of the fund. I take, as an instance the end of the half-year in December 1922 Rs. 51,472-13-8 was credited to the Provident Fund's account as the Bank's contribution. This amount was made up of two sums Rs. 35,272-2-1 and Rs. 16,200-11-7. The first was the Bank's contribution under Rule 5 and was the equivalent of the aggregate amount of the subscriptions of the members during the preceding half-year. This amount was debited in the Bank's books to the "charges account." The second sum was the interest contributed by the Bank under Rule 7 and this sum was debited in the Bank's books to the "interest accounts."

11. A rough balance-sheet, which was produced to us, showed the total amount standing to the credit of the Provident Fund as a liability of the Bank under the heading of "deposits." The sum was not specifically stated in the published balance-sheet, but was included with other sums on the liability side of the account. There was a "subsidiary ledger" kept in pursuance of Rule 8 which showed the amounts credited to the account of each member in respect of his own contribution, the Bank's contribution, and the interest as provided by Rules 6 and 7.

12. The remaining clauses to which reference should be made are: -

9. The Company shall have a first and paramount lien upon the amount from time to time standing to the credit of each member in respect of all losses, damages, costs, and expenses which the Company may, at any time, pay, sustain, or be put to, by reason of any act, embezzlement, mismanagement, neglect or default of or by such member, and the amount from time to time standing to the credit of each member in respect of his subscriptions to the fund and the interest thereon shall be deemed and treated as a deposit made by him

with the Company as security, for his fidelity, and may be disposed of accordingly, and in the event of any claim arising by the Company under this rule the member against whom such claim shall arise shall absolutely forfeit to the Company all right and interest to and in the moneys standing to his credit in respect of contributions made by the Company under Rules 3 and 5 and the interest thereon.

10. If any member shall be dismissed from the service of the Company for misconduct or incompetence, he shall (subject to any claim by the Company under Rule 9) be paid only the amount then standing to his credit in the books of the Company in respect of his own subscriptions to the fund and without any interest thereon, and the interest thereon and all moneys standing to his credit in respect of contributions made by the Company under Rule 3 and 5 and the interest thereon shall revert to and become the property of the Company.

11. On the retirement of any member from the service of the Company without the consent of the Directors, he shall (subject to any claim of the Company under Rule 9) be paid only the amount then standing to his credit in the books of the Company in respect of his own subscriptions to the fund and the interest thereon, and all moneys standing to his credit in respect of contributions made by the Company under Rule 3 and 5 and the interest thereon shall revert to and become the property of the Company.

12. On the retirement of any member from the service of the Company with the consent, of the Directors he shall (subject to any claim by the Company under Rule 9) be paid,

(a) if he shall have been in the service of the Company for less than 15 years, the amount then standing to his credit in the books of the Company in respect of his subscriptions to the fund and the interest thereon, and such portion of the moneys then standing to his credit in respect of contributions made by the Company under Rules 3 and 5 and the interest thereon as the Directors may, in their absolute discretion, think fit and the balance of such last mentioned moneys and interest thereon shall revert to and become the property of the Company;

(b) if he shall have been in the service of the Company for 15 years and upwards, the sum standing to his credit in the books of the Company on the 30th June or 31st December on which he shall retire if his retirement take place on either of the said days (including his share of the contribution by the Company and interest to be credited on that day) and otherwise the sum standing to his credit on the 30th June or 31st December immediately preceding his retirement, together with the amount of his paid up subscriptions for the current half year.

13. The learned Counsel for the Appellant placed much reliance upon the provision contained in Rule 9 that the Bank should have a lien upon the amount standing to the credit of each member in respect of the matters mentioned in Clause 9 and argued that this showed that the amounts thus standing to the credit of the members were their property; otherwise, he urged, the provision

that the Bank should have a lien upon such amounts would be meaningless as the Bank could not have a lien upon its own property.

14. Reliance was also placed by the learned Counsel upon the words occurring in Rules 10, 11 and 12 "shall revert to and become the property of the Company," the argument being that these words showed that the moneys therein referred to were the property of the members and would only revert to and become a property of the Bank when the contingencies therein referred to arose.

15. The learned Judge came to the conclusion that, in respect of the sums contributed by them, the employees were depositors with the Bank in the same manner as a customer who had opened an account with the Bank, and were merely creditors of the Bank ranking with those who had a current or deposit account with the Bank.

16. With much respect to the learned Judge, in my opinion, the provisions to which I have drawn attention are inconsistent with that position. When a customer in the ordinary course of business opens a deposit or current account with the Bank and deposits money, the relation of creditor and debtor arises and the money so deposited becomes the money of the Bank. The provision that the Bank was to have a lien upon the amount standing to the credit of the members, which represented the contributions of the members, seems to me inconsistent with the moneys belonging to the Bank as in the case of an ordinary deposit by a customer with the Bank.

17. In the same way, the provisions that in certain contingencies certain portions of the money standing to the credit of the members shall revert to and become the property of the Bank are, in my opinion, inconsistent with the position occupied by a customer who has deposited money with the Bank in the ordinary course.

18. The learned Counsel who appeared for the unsecured creditors relied on certain rules as being inconsistent with the existence of fiduciary relationship and, in particular, he referred to Rules 7 and 12(a).

19. Rule 7 deals with the liability of the Bank to contribute interest upon the amount standing to the credit of each member. The learned Counsel argued that it was inconsistent with the position of a trustee that the Bank should be allowed to use the funds for the purpose of the Bank, and should yearly have to pay interest at a specified rate which would mean that the Bank might thereby make a profit out of the fund.

20. This clause, taken by itself, might seem to be inconsistent with the existence of a fiduciary relationship between the Bank and the members; but the rules and regulations must be read as a whole.

21. Apart from this, the provision as to interest is not, in my opinion, wholly inconsistent with the existence of a fiduciary relationship. In *Gee v. Liddel* [1866] 35 Beav. 629, the testator directed his executor to stand possessed of ?2,000

upon trust to retain the same in his own hands at interest of 4 per cent, or to invest it and to pay the interest to his daughter for her separate use during her life. This provision permitted the trustee to retain the money in his own hands and pay interest at a specified rate to the beneficiary, the trustee presumably being entitled to make such use of the capital by way of investment or otherwise as he thought fit. Yet no question arose as to the direction creating a trust. I am not, therefore, convinced that the provision as to interest in the rules is so inconsistent with the existence of a fiduciary relationship that the Court should disregard the other provisions in the rules which, in my opinion, point to the existence of such a relationship. The other clause upon which the learned Counsel for the creditors mainly relied was Clause 12(a). This clause deals with the retirement with the consent of the directors of a member, who has been in the service of the Bank for less than 15 years. It provides that he should be paid the moneys therein specified and the interest thereon "as the Directors may in their absolute discretion, think fit." The learned Counsel argued that the discretion thus vested in the Directors was inconsistent with the existence of a fiduciary relationship. That taken by itself may be so; but this clause concludes by saying that "the balance of such last-mentioned moneys and the interest thereon shall revert to and become the property of the Company." This points to the conclusion that until such discretion was exercised the moneys were not the property of the Bank, but of the individual members.

22. This clause was no doubt inserted to discourage the employees from leaving the Bank service before they had served 15 years.

23. Reading the terms of the rules and regulations as a whole and having regard to the method in which the Bank dealt with the contributions of the members, the contributions of the Bank and the interest thereon, in my judgment, there was a fiduciary relationship between the Bank and the employees who were members of the Provident Fund.

24. The question still remains whether the Appellant is entitled to payment in full of the balance standing to his credit in priority to the unsecured creditors,

25. The learned Counsel for the unsecured creditors admitted that, if there was a fiduciary relationship between the Bank and the members of the Provident Fund, the appellant would be entitled to priority in respect of the contributions made by him which were credited to his account. This admission, in my judgment, was rightly made in view of the decision of *In re Halletts Estate* [1880] 13 Ch. D. 696.

26. The learned Counsel, however, argued that the Appellant would not be entitled to priority in respect of the contributions made by the Bank and the interest provided by the Bank.

27. Reference was made to the case, which I have cited, in *Ex parte Blane* [1894] 2 Q.B. 237; and at p. 244 Davey, L.J., says as follows:

There is nothing in our decision in the present case which is in conflict with the

decision in *re. Hallet's Estate* [1880] 13 Ch. D. 696. In order to follow trust money, there must be a specific property capable of being identified, into which the money has been converted, and in that case this doctrine was applied in this way; it was said that, where a trustee pays his own money and also trust money into his banking account, it is the same thing as though he had placed them in a box, and his drawing for his own purposes must be assumed to be out of his own money. That decision in no way qualifies the rule that there must be a specific thing capable of being followed.

28. Assuming as I do, that not only the contributions of the employees but also the contributions of the Bank in respect of capital and interest were moneys; I see no reason for drawing any distinction between the two classes of contributions.

29. It is true that the Bank did not allocate any particular monies or notes to the fund, but the two classes of contributions formed one trust fund and, if the moneys constituting this fund were mixed with the other moneys of the Bank, it was the same as if the moneys had been placed in a box as Lord Davey pointed out in the case to which I have referred.

30. There is no doubt that, at all, material times, the Bank had much larger sums at their disposal than the amount standing to the credit of the Provident Fund and the Bank must be assumed to have used their own unfettered funds for their own purpose rather than the trust fund.

31. In addition to this, it is difficult to see how, from the point of view of business, the Bank could have made a more effectual allocation of their contributions to the trust fund than, in fact, they did.

32. The contributions were, in the first place, credited to the fund in the general ledger. The amounts, to which each member was entitled, were then credited to the accounts of the individual members. The Bank could not operate upon or alter the accounts of the individual members except in the manner and under the conditions specified in the rules and regulations and when the contingencies therein mentioned arose.

33. In my judgment, therefore, the Appellants is entitled to priority not only in respect of the contributions made by him but also in respect of the contributions made by the Bank, which contributions will include the sums Equivalent to the aggregate amounts subscribed by the Appellant and the interest provided by the Bank.

34. In my judgment, therefore, the appeal must be allowed and the learned Judge's order set aside, with the exception of his discretion as to costs, will stand.

35. The direction of the Court will be that members of the Provident Fund are entitled to receive payment in full of the amounts standing to their credit in respect of the Fund in priority to the unsecured creditors and share-holders of

the Bank,

36. The costs of the parties appearing in this appeal will be paid by the Liquidators out of the assets, when taxed as between attorney and client, and the Liquidator's costs will be taxed as between attorney and client.

Richardson, J.

37. The Provident Fund to which the case relates is of a type which is now common enough. The nature of a fund must no doubt depend on its rules, but, as I conceive, the burden of proving that such a fund as this is a trust fund should not be unduly heavy.

38. The fund was created and controlled by the Alliance Bank of Simla, Ltd., which is now in course of liquidation. When the Bank suspended payment on the 27th April 1923 there stood to the credit of the fund the sum of Rs. 6,79,401.

39. Under the rules, those of the Bank's employees who fulfilled the conditions required for membership of the fund were compelled to subscribe thereto, and every half-year the Bank contributed a sum equal to the aggregate amount of the subscriptions of the members during the preceding half-year. Every half-year the Bank also contributed interest at a rate not exceeding the rate at which interest was paid on fixed deposits and not exceeding 5 per cent, per annum. The half-yearly contributions of capital were divided (by book entry) among the members in proportion to the amount of their sub-criptions, and the half-yearly interest was paid upon the capital amount from time to time standing to th9 credit of each member.

40. The account of the fund was kept in the general books of the Company at their head office where a subsidiary ledger was also maintained showing the amount from time to time standing to the credit of each member. Bach member was supplied with a Pass Book which was made up and balanced half-yearly.

41. In the case of a member who was also a customer of the Bank in the ordinary sense, his Provident Fund account was wholly distinct from his personal account.

42. As to the mode in which the subscriptions of members were collected, it appears that those who had no personal accounts received their salaries in full, and returned their subscriptions to an officer of the Bank whose duty it was to collect them. Members with personal accounts were credited in those accounts with their salaries in full and debited with their subscriptions. In the latter case, it is not correct, in my opinion, to say that the Bank never received the money. What the Bank did was to retain in their own possession moneys which would otherwise have been paid by way of salary.

43. I come then to the first point in the case, namely, that, as it appears to me the money in this fund so constituted never became the property of the Bank in the sense that the relationship between the Bank and the members was merely

that of debtor and creditor. On the contrary, I hold in accordance with the contention submitted by learned Counsel for the Appellant, that the amount standing to the credit of each member was his property in the possession and under the control of the Bank. I find confirmation of this view in those rules which provide that in certain events, the whole amount standing to a member's credit less his own subscriptions or the whole amount less his subscriptions and the interest thereon or the whole amount less his own subscriptions (with interest) and such portion of the Bank's contributions with interest as the Directors might, in their absolute discretion, think fit, should "revert to and become the property" of the Bank. These words necessarily imply that, before such reversion, the money was the property of the individual member whose title was to cease in favour of the Bank for a larger or a smaller proportion - as the case might be - of the amount at his credit.

44. A still larger power was given to the Bank by Rule 9 under which the Bank had a paramount lien on the amount from time to time at credit of each member in respect of any losses due to embezzlement, neglect or default on his part. For this purpose, a member's subscriptions with interest were to be treated as a deposit made by him as security for his fidelity with a liability on his part in the event of his default to forfeit all benefit in in the total amount at his credit. This condition does not, in my opinion, subtract from the force of the words to which I have already referred. The subject-matter of the lien was the property, not of the Bank, but of the member and it did not cease to be his property so long as he discharged his duties faithfully. The rule says that the moneys shall be treated as security deposits - that is, deposits belonging to the members. It does not say that the monies shall be treated as fixed deposits made by the members as if they were ordinary customers of the Bank. Nor does it appear to me to be material that the Provident Fund was included in the half-yearly balance-sheets of the Bank under the heading of fixed deposits. There is no evidence in my opinion on which it can be successfully contended that the members acquiesced in their fund balances being treated as fixed deposits. I might perhaps, if it were necessary, go further and say that it was a breach of duty on the part of the directors not to treat the fund as entirely separate and distinct from the fixed deposits made by ordinary customers.

45. Nor am I impressed by argument founded on the duty imposed on the Bank of paying interest on the capital amount at the credit of each member at a rate which might be less than the rate at which interest was Ramed by the Bank on their investments. The Bank or its Directors were substantial contributors to the fund and it was, open to them to fix the conditions on which their contributions should be made. The fact, if it be a fact, that the Directors derived a profit for the Bank by investing the fund does not alter the nature of the fund or convert it into a loan "made to the Bank by the members. The rule would not have been inconsistent with the investment of the fund as a separate fund.

46. It would doubtless have been more regular if the fund had been placed under

the control of trustees expressly appointed to administer it. but once the conclusion is arrived at that the moneys in the fund were the moneys of the members and not of the Bank, I think it follows that the Bank or the Directors occupied a fiduciary position in regard to it.

47. If I am right so far, the next question, the question perhaps on which the controversy has mainly centred, is whether there was ever any concrete sum of money which the members are entitled to follow. It is at this point I think that I part company with the learned Judge who tried the case. He says (p. 47) that the members are not entitled "to claim priority over the unsecured creditors as cestui que trusts as there is no specific property in respect of which they can claim this position." With great respect, it appears to me incorrect to say that the fund consisted merely of book entries and that book entries cannot be followed. The book entries were intended to represent, and, in my view of the matter, did represent, moneys in the actual possession and custody of the Bank. What the Bank did was to mix these moneys with their general balances, but it is not disputed that the general balances always exceeded, and no doubt Considerably exceeded, the whole amount at credit of the fund. The total was always there in the possession of the Bank. If proper steps had been taken, the fund so far as I can see might at any time had been invested. In fact the Directors by a resolution of 1st November 1915 did allocate certain investments to cover the whole amount at credit - though this resolution, for reasons which are not fully explained, was subsequently cancelled at a meeting held on 1st August 1916.

48. This view leads naturally to the conclusion that the members are now entitled to follow the fund on the principle laid down in the case of *In re Hallett's Estate* [1880] 13 Ch. D. 696.

49. The present case appears to me to be distinguishable from the case of *In re Hallett & Co., Ex parte Blane* [1894] 2 Q.B. 237 where no trust money was actually received by the trustee and none therefore was paid by him into his own account at the Bank. In the present case, if I am right, the moneys were received by the Bank and mixed with the general balances.

50. There remains the subsidiary question whether any distinction is to be drawn between the members' subscriptions on the one hand and on the other the Bank's contributions and the credits in respect of interest. It appears to me that this question should be answered in the negative. The contributions and interest may have been paid out of deposits received from customers, but as I see the matter the money was effectually transferred to the Provident Fund and was lost to the depositors just as much as if it had been spent on making bad investment. If A borrows money from B to pay C and does pay C, B has no claim against C, He has only a debt against A. There seems reason why the Bank's customers or depositors as creditors of the Bank should be paid out of moneys belonging not to the Bank but to the members of the Provident Fund, though they happen to have been mixed up with the Bank's general balances.

51. In concluding I desire to add that *In re Hallett's Estate* [1866] 35 Beav. 629 was discussed by Lord Haldane in *Sinclair v. Brougham* [1914] A.C. 398. I refer particularly to the passage at pp. 420 and 421 of the report, where Lord Haldane says this: - "But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrong-doer into his account with his Banker, who simply owes him a debt, so that no money was or could be, in the contemplation of a Court of law, ear-marked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrong-doer, that there was what it called a charge on the Banker's debt to the person whose money had been paid into the latter's Bank account in favour of the person whose money it really was. And, as Jessel, M.R., pointed out in *Hallett's case* [1894] 2 Q.B. 237, this equity was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was, as I think, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxilliary jurisdiction, wherever money was held to belong in equity to the Plaintiff."

52. So far as I can see, there is no difference between the case in which a trustee pays trust moneys into his account with a Bank, and the claim is made upon his balance and the case in which the Bank themselves mix trust moneys with the general mass of the moneys which they hold. In the one case, the charge is on the balance at credit of the trustee or person in a fiduciary capacity who has paid trust moneys into his own account. In the other the charge is on the general balances of the Bank.

53. The importance of the fact that the Bank's general balances at all times exceeded the amount standing to the credit of the Provident Fund is brought out by the decision of Sergeant J., in *James Roscoe (Bolton) Ltd. v. Winder* [1915] 1 Ch. 62.

54. These cases were not cited at the Bar yesterday, but I have ventured to refer to them as they appear to me to confirm the conclusion at which I had arrived.

55. For these reasons I agree with the learned Chief Justice that the appeal should be allowed.