

(1959) 08 CAL CK 0003
In the Calcutta High Court
Case No : Suit No. 3059 of 1956

British Bank of Middle East

APPELLANT

Vs

Almal Brothers

RESPONDENT

Date of Decision : 10-08-1959

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 131, 46, 47, 9

Citation : 66 CWN 285

Hon'ble Judges : Law, J

Bench : Single Bench

Advocate : A.C. Mitra, A. C. Bhabra, P. L. Khaitan and A. M. Paul, for the Appellant; S.C. Deb, for the Respondent

Final Decision : Dismissed

Judgement

Law, J.—This is an action by the plaintiff as holder in due course of a cheque drawn by the defendant in favour of Gunny Trading Company or bearer and duly negotiated by Gunny Trading Company in favour of the plaintiff. The plaintiff's case is that on June 20, 1956, the defendant drew the cheque No. 413642 for Rs. 5,14,937/8/-on the Hindusthan Mercantile Bank Ltd., in favour of Gunny Trading Company. The cheque was drawn "Pay Gunny Trading Company or bearer-Rupees Five lakhs fourteen thousand nine hundred and thirty seven and annas eight only" and was crossed by the drawer "Account payee only." It is stated that on June 20, 1956, Gunny Trading Company negotiated the cheques in favour of the plaintiff for valuable consideration and that they are the holders in due course of the cheque. The cheque was duly presented for payment but was dishonoured. Further the defendant countermanded payment of the cheque. It is also stated that due notice of dishonour was served upon the defendant, but in any event, the defendant having countermanded payment was not entitled to any notice. The defendant did not pay inspite of demands and thus the plaintiff claimed Rs. 5,14,937/8/-with interest at 6 per cent per annum and costs. In the written statement the defendant admits the drawing of the cheque in favour of

Gunny Trading Company but states that the cheque was made over to Gunny Trading Company in connection with proposal for a loan, Gunny Trading Company agreed to pay interest and commission and to offer as security certain negotiable Pucca Delivery Orders in respect of jute goods. Gunny Trading Company further agreed to hand over pucca Delivery Orders of the requisite value to the defendant's representative who would call on them with the cheque and that the cheque would not be presented until the defendant confirmed in writing that the Pucca Delivery Orders were acceptable. Upon these terms the said cheque was made over to Gunny Trading Company. It is further stated that the pucca Delivery Orders offered by Gunny Trading Company were found to be not acceptable and the defendant thereupon requested them to submit fresh Delivery Orders in exchange thereof immediately, to enable them to arrange for passing cheque for payment. Gunny Trading Company did not comply, so the defendant did not arrange for payment and thereafter countermanded payment of the cheque. Gunny Trading Company had no right to present the cheque or to cause the same to be presented for payment. The rest of the defence is complete denial. It is denied that the cheque is a bearer cheque. It is crossed and marked "account payee". Negotiation and consideration are denied and it is also denied that the plaintiff is the holder of the cheque or the holder in due course. It is further stated that the Gunny Trading Company did not endorse in favour of the plaintiff but merely paid in the cheque to the credit of their account with the plaintiff. It is denied that the plaintiff presented the cheque for payment. The plaintiff merely acted as the Agent for collection and had no right or title to the cheque. Dishonour of the cheque is denied and it is further denied that due notice of dishonour was served. Next the defendant denies liability for any sum to the plaintiff and lastly states that without prejudice to any of the contentions aforesaid, in any event, the plaintiff is bound by the equities which were binding on Gunny Trading Company. It is stated that the suit is collusive as between the plaintiff and Gunny Trading Company and should be dismissed.

2. Upon the pleadings the following issues were raised:

1. (a) Was the cheque dated June 20, 1956 referred to in paragraphs 1 and 2 of the plaint a bearer cheque as alleged?

(b) Was the said cheque crossed and marked "A/c payee?"

2. (a) Did Messrs. Gunny Trading Co. negotiate the said cheque on June 21, 1956 in favour of the plaintiff?

(b) If so, was such negotiation for valuable consideration?

3. (a) Is the plaintiff the holder of the said cheque?

(b) If so, is the plaintiff a holder in due course?

(c) Did the plaintiff merely act as the agent of the said firm Messrs. Gunny Trading Co. for collection?

4. (a) Was there any agreement between Gunny Trading Co. and the defendant as alleged in paragraphs 2 and 3 of the written statement?

(b) If so, did the said firm of Gunny Trading Co. present the said cheque for payment through the plaintiff wrongfully and in breach of agreement?

5. (a) Was the said cheque presented for payment?

(b) Was there any dishonour as alleged?

(c) Was due notice of dishonour served upon the defendant?

(d) Was the defendant not entitled to any notice in view of countermand of payment?

6. Is the plaintiff entitled to sue in respect of the said cheque?

7. (a) Is the plaintiff bound by the equities which were binding on the said firm of Messrs. Gunny Trading Co.

(b) Is the plaintiff entitled to recover on the said cheque?

8. To what reliefs, if any, is the plaintiff entitled?

Issues No. 1(a) and 1(b).

3. The cheque in suit is on the face of it, a bearer cheque. It is a bearer cheque as it is expressed to be so payable. It is also crossed "Account payee only." Does this crossing alter the position? Sections 46 and 47 of the Negotiable Instruments Act provide, "a cheque payable to bearer is negotiable by delivery thereof." It is well settled that crossing of a cheque does not restrain its negotiability, so that a crossed bearer cheque may pass from hand to hand without any endorsement, while a crossed cheque payable to order may be negotiated by endorsement as in the case of cheques uncrossed. Now the question is, does an addition to the crossing of the words "Account payee only" prevent negotiability? I am not satisfied that under the Negotiable Instruments Act a cheque payable to bearer or order can be made not negotiable except under the provisions contained in sections 123-131 as to crossed cheques.

4. *National Bank v. Silke* (1) (1891) 1 Q.B. 435 held that such an addition to crossing did not prevent cheques from being transferable. According to this decision there must be plain words prohibiting transfer or showing an intention that the bill shall not be transferable. In this case the Court of Appeal in effect held that they did not consider the full negotiability of the cheque to have been in any way affected. In other words, to prevent negotiability the words "not negotiable" must be there.

5. In *Underwood (A.L.) Ltd. v. Bank of Liverpool* (2) (1924) 1 K.B. 775 at 793 bottom, Scrutton L.J. was definitely of the view that cheques crossed "Account payee only" did not affect the negotiability of an order or a bearer cheque.

6. In Paget's Law of Banking, Fifth Edition, at page 155 it is stated:

Another ground for holding this to be correct view is that, if such words, namely, "account payee only," had the effect of limiting the negotiability of the cheques the result attained by their use would be precisely equivalent to that of "not negotiable" crossing; and it is not permissible to attribute to one set of words the effect exclusively attached by statute to another set. Again, if the cheque be negotiable in its origin, that is, payable to order or bearer, words prohibiting transfer or indicating an intention that the cheque shall not be transferred, are ineffectual to restrain either its transferability or negotiability. As a matter of fact it is never, of recent years, being seriously contended that the words "account payee," have any effect on the negotiability of a cheque..... The words only constitute a direction to the collecting banker signifying the account to which the proceeds of the cheque when received are to be placed, which he disregards at its peril.

In view of the above authorities I answer the issues in the affirmative and hold that "account payee only" crossing, did not prevent the cheque from being negotiable. No words other than the words "Not negotiable" which are prescribed by our Act will be sufficient to make such a cheque not negotiable.

Issues Nos. 2(a) (b) and 3(a) (b) (c):

The fate of this case really depends upon the decision of these two issues over which the parties have fought very hard indeed. I must at once say that the learned counsel appearing for the parties very fully and ably argued this case before me and rendered invaluable assistance.

It appears that the defendant, a customer of the Hindusthan Mercantile Bank Ltd., drew upon that bank a cheque for Rs. 5,14,937/8/- dated June 20, 1956 payable to Gunny Trading Company or bearer. It was crossed by the defendant "A/c payee only."

On June 21, 1956 Gunny Trading Company sent the cheque to the plaintiff bank to be credited to their account and it was duly presented to the clearing. It appears from the ledger account (Ex. B1), as it is made out, that the amount of the cheque had been carried to Gunny Trading Company's account with the plaintiff and drawn upon by them before the cheque was returned dishonoured by the Clearing House. After dishonour the amount of the cheque was debited in the account thus reversing the original credit to their customer in respect of this very cheque.

7. The plaintiff's case is that they are the holders in due course of Ext. E and as such the onus is on them to prove that they are. In order to discharge this onus the plaintiff examined one Mr. Adya who was. at the material time, the Commercial Assistant to the Manager of the plaintiff Bank. The plaintiff also relied on Ex. B1 (being the bank's ledger account of Gunny Trading Company), Ex. E and also the Manager's letter dated June 26, 1956 (Ex. 1).

8. Mr. Adya, in his evidence, admitted that the plaintiff initially received Ex. E as an agent for collection but later on became a holder for value for having negotiated the cheque. He further admitted that soon after Ex. E was paid in for collection in the usual manner with the paying-in-slip, a credit entry was made in the bank's ledger account of Gunny Trading Company in the normal course. He also admitted that this credit entry actually meant that it would be credited upon receipt of the proceeds. He stated that it was his duty to attend to those cheques of the customer which were not passed out of the clearing balance of the account against which special facility was to be allowed. His duty was to- report to the Manager whether those cheques should be passed and to recommend to him. According to him on June 21, 1956 Mr. More, the proprietor of Gunny Trading Company, whom he personally knew, was present at the office of the plaintiff bank between 1 and 2 p.m. From 1 p.m. a number of cheques, drawn by Mr. More, started coming into the plaintiff bank for payment through the clearing house. He told Mr. More that there was no sufficient balance in his account and had some discussion over this with him. As a result of this discussion he, at the request of Mr. More recommended to the Manager Mr. Goadby, who also at the request of Mr. More agreed to give him credit for this cheque for Rs. 5,14,937/8/- as also two other cheques amounting to Rs. 2,61,000/- which were deposited in his account. This agreement according to Mr. Adya, took place between 1 and 2 p.m. on June 21, and thereafter the plaintiff bank passed the cheques drawn by Mr. More on the plaintiff bank that were presented in the clearing.

9. Thus, it will be noticed that the plaintiff's case is that they first began as an agent for collection and subsequently became the holder in due course by reason of having agreed to discount the cheque Ex. E. Mr. Adya also stated that all the cheques issued by Mr. More in favour of different parties upon the plaintiff bank amounting to over Rs. 9.08,000/- were paid against the cheques deposited as aforesaid before 2-30 p.m. and it was only at 3-30 p.m. when the cheque Ex. E was returned, that the plaintiff bank came to know that it had been dishonoured. He proved Ex. E and also the cheque returning memo dated June 21, 1956 (Ex. C) showing that the cheque was dishonoured as it exceeded the arrangement. He further stated that Ex. E" was again presented on June 25, 1956 but was returned through the clearing with the remark "payments stopped by the drawer" and on June 26, the plaintiff wrote to the defendant for the first time claiming that they were the holders for value of Ex. E. Thereafter the plaintiff made demands from the defendant and claimed Rs. 5,14,937/8/- but the defendant did not pay. At the time he left the services of the plaintiff the amount claimed from the defendant was Rs. 5,14,937/8/-. In cross-examination however he admitted that he did not know the present position of the plaintiff's claim.

10. The defendant objected to this new case made at the hearing.

11. It was contended that the whole basis of the plaintiff's case as appears in the plaint is that the cheque was negotiated for valuable consideration and not that the plaintiff started as an agent for collection and subsequently became the

holder in-due-course. The learned counsel submitted that I should reject the entire evidence relating to the alleged subsequent arrangement as not having been pleaded in the plaint. It was argued that it was a material part of the cause of action of which there was no indication in the plaint and that the defendant had not come to meet this case and thus the plaintiff should not be allowed to make this new case. I am unable to accept this contention. This surely is not a suit on an agreement. It is a suit on a negotiable instrument of which the plaintiff claims to be the holder in-due-course. In my opinion, it is sufficient to plead in such a case that the plaintiff is the holder in-due-course. The pleading on negotiable instrument is somewhat special and stands on a different footing. The standard forms of statements of claim given in Bullen & Leak's Precedence of Pleading, shows it beyond any doubt. The plaint in this case clearly states that the cheque is a bearer cheque of which a photostatic copy is annexed. It is further stated that on June 21, 1956 Gunny Trading Co. duly negotiated the cheque in favour of the plaintiff for valuable consideration; and that the plaintiff is the holder in-due-course of the negotiable instrument. All other necessary averments are also pleaded in the plaint. The defendant could always ask for particulars as to the alleged negotiation if he chose to do so. In this case, however, the defendant did not ask for any particulars. How can he complain now? Where the negotiation, consideration and the fact that the plaintiff is the holder in-due-course are specifically denied in the written statement, the plaintiff surely is entitled to adduce evidence to show when and how he became a holder in-due-course. This is purely a matter of evidence and need not have to be pleaded in the plaint.

12. The learned counsel for the defendant next contended that I should reject Mr. Adya's evidence and should find as a fact that there was no agreement between the bank and Mr. More as has been spoken of by Mr. Adya. He has given several reasons:- (1) That Mr. Goadby, the Manager, with whom the alleged agreement is supposed to have been entered into has not been called as a witness although he is still in the service of the bank and is the best person to say what actually took place on June 21, 1956 but has been withheld; (2) Letter of June 26, 1956 (Ex. 1) written by Mr. Goadby to the defendant is inconsistent with the case for agreement, for that letter did not mention of any agreement between the plaintiff bank and Mr. More but only spoke of some practice in the city; (3) There is no reason as to why Mr. More should be present at the bank premises on June 21, 1956 between 1 and 2 P.M. and (4) Mr. Adya's evidence has not been corroborated either by oral or documentary evidence and should be rejected.

13. As regards the learned Counsel's reason (1)-I find that there is ample evidence on record that since November 1956 Mr. Goadby has been working in Amman Jordan and is still working there. Mr. Adya has in his evidence stated that "the conditions in this part are really difficult." I am satisfied that journey from Amman Jordan to India either way is very difficult at about the time of the hearing of this suit. In my opinion, under these circumstances it cannot be reasonably said that Mr. Goadby has deliberately been withheld from the witness

box. It is true that Mr. Goadby would have been of great assistance to me and, perhaps, he could have been brought here for his examination *de bene esse* sometime before the actual hearing but I do not think I would be justified in drawing any adverse inference from his absence in the circumstances hereinbefore stated. In my view, there is at least some justifiable reason for Mr. Goadby's absence in this case. I have, however, his letter of June 26, 1956 before me which is of great importance and upon which both parties have relied. I shall now deal with this letter.

14. Reason (2) of the learned Counsel relates to this letter of June 26. Question arises as to whether this letter is inconsistent with the case founded on agreement as spoken of by Mr. Adya. It is contended that this letter goes against any agreement between Mr. Goadby and Mr. More. It is further contended that Mr. Goadby in this letter spoke about the normal practice in this city of paying customer's cheques drawn against cheques deposited, when no advice of non-payment is received by 2-30 p.m. The learned counsel's contention was that inasmuch as the bank did not receive any advice of nonpayment of this cheque from the Clearing House upto 2-30 p.m. they paid the customer's cheque on the assumption that the cheques deposited by the customers had been honoured. Thus it was argued that this letter was inconsistent with any agreement as alleged. The learned counsel further contended, that, had there been any question of any agreement between Gunny Trading Co. and the plaintiff bank there would have been some correspondence on the subject. No such correspondence had been disclosed by the plaintiff, although Mr. Adya had admitted the existence of such correspondence and so he contended that was the reason why Mr. Goadby had not been called because he would have supported his letter of June 26. It was further submitted that this case did not fit in with the plaint or with the contemporaneous documents and particularly did not fit in with the first paragraph of the letter of June 26, where Mr. Goadby stated that the cheques were passed when no intimation of dishonour of the cheque was received by the bank upto 2-30 P.M. which was an admission directly inconsistent with the case now made. Further it was argued that if the bank had been a holder in-due-course, the first reaction of the bank would have been to send a notice of dishonour to the defendant on June 21, or at the latest, June 22, which was not done in this case. The learned counsel hence asked me to reject the evidence of Mr. Adya and to hold that there was no such agreement between the bank and Mr. More.

15. Question is, should I accept the evidence of Mr. Adya? Apart from the oral evidence of Mr. Adya there is no other evidence of any agreement as alleged. It is true, that the fact, that Mr. Adya was the Commercial Assistant to the Manager of the plaintiff bank at the material time and that it was his duty to attend to those cheques of the customer, which were not passed out of the clearing balance of the account against which special facility was to be allowed, has not been challenged in cross-examination. It has further not been challenged that it was Mr. Adya's duty also to report to the Manager whether those cheques should

be passed and to recommend to him. Therefore whoever wanted facility in his account relating to the passing of any of his cheques had first to see Mr. Adya in the bank who would initially recommend his case and report to the Manager and thereafter the final sanction of the Manager be given. In such a case, therefore, Mr. Adya would necessarily be the first person to know whether the bank at all agreed or not. Mr. Adya has stated that the agreement took place between 1 and 2-00 p.m. on June 21 at the bank premises, when Mr. More, the proprietor of Gunny Trading Co. came to him and had discussion and then he took him to Mr. Goadby who at the request of Mr. More agreed to purchase those cheques. The presence of Mr. More at the bank at about that time is in my opinion not absolutely unlikely. Mr. Adya, however, did not agree with the first paragraph of the letter of June 26, because he did not know under what practice by 2-30 p.m. the cheque is passed or not. He could not give any better explanation of the letter of June 26, which is rather significant but he agreed that Mr. Goadby, the writer of the letter, dealt with the matter and knew more than him. He was however definite that Mr. More's cheques were passed against the cheque deposited (Ex. E) and that was specially authorised by Mr. Goadby who agreed to give credit for it. Thus, it will be noticed that the plaintiff's case is that there was an express agreement between the plaintiff bank and Mr. More.

16. At this stage I would like to observe and it should not be overlooked also, that there are clear indications in the evidence of Mr. Adya that he had fully considered this case and the law on the subject before he came to the witness box. It is also clear that he fully appreciated the importance of an express agreement in this case and realised the difficulty caused by the letter of June 26, 1956.

17. Turning now to the letter of June 26, it is clear that the cheque (Ex. E) was paid in for the credit of the payee's (Gunny Trading Company's) account on June 21. In this letter Md. Goadby referred to certain practice obtaining in the city by virtue whereof the customers' cheques drawn against cheques deposited, were paid when no advice of non-payment was received by 2-30 p.m. No such practice has been proved in evidence. Mr. Adya was not able to explain this paragraph satisfactorily nor could he say as to why Mr. Goadby was speaking about any practice in the city but he admitted that Mr. Goadby who dealt with this case knew more than him. In the second paragraph of this letter Mr. Goadby stated that at 2-50 p.m. the bank received a telephone message to the effect that Ex. E had been dishonoured and that it was then too late to return any of the cheques which had been drawn against it. In the third paragraph of the letter he stated that Ex. E was again presented on June 25, but was returned for reason "payments stopped by the drawer." It may be mentioned here that this cheque was dishonoured on June 21, but no notice of dishonour was admittedly served on the defendant either on June 21 or June 22. In the last paragraph the plaintiff claimed to be the holder for value and asked for an explanation as to why the drawee bank delayed in returning the cheque and why payment was stopped. But it is curious that even in this letter Mr. Goadby did not make any demand or

say that they would hold the defendant liable for payment of the cheque (Ex. E) which is very essential.

18. Now if the agreement, as spoken of by Mr. Adya, was in fact arrived at between 1 and 2 p.m. why should the manager write to say that when no advice of non-payment was received by 2-30 p.m., customers' cheques were paid according to the normal practice of this city? Why should the bank further say that it was too late to return the customers' cheques when the information of dishonour reached the bank. This certainly is not consistent with the conduct of a holder in-due-course.

19. I have very carefully considered this evidence of Mr. Adya who appears now to be completely independent of the plaintiff bank as he has been working with the Punjab National Bank since May 1958. Yet I am not inclined to accept his uncorroborated evidence for the simple reason that his evidence cannot be reconciled with the conduct of the plaintiff bank immediately after the cheque (Ex. E) was dishonoured on June 21; nor can his evidence be reconciled with the manner in which the plaintiff subsequently dealt with Ex. E. His evidence, in particular is inconsistent with the letter of June 26, which clearly negatives any agreement. Mr. Goadby is not here to explain this letter. Mr. Adya has not been able to satisfactorily explain it either but this letter of June 26, speaks for itself and is admittedly the only contemporaneous document recording as to what happened on June 21, and immediately thereafter. If it is true that Mr. Goadby agreed with Mr. More to purchase the cheque (Ex. E) on June 21, as stated by Mr. Adya, Mr. Goadby would certainly know that the plaintiff bank immediately became the holder in-due-course of Ex. E. and would also know the rights and obligations of the plaintiff in regard to it. Why then did the bank quietly sit upon Ex. E for 3 or 4 days after it was returned to them dishonoured through the clearing house with the cheque returning memo dated June 21, (Ex. C) ? Why did not the plaintiff immediately or the next day, that is June 22, serve a notice of dishonour upon the defendant stating that they were the holders in-due-course of Ex. E and that it had been dishonoured by non-payment and the defendant would be held liable therefor? That would have been the normal reaction from a bank which claimed to be the holder in-due-course and particularly when the amount involved was over Rs. 5,14,000/-. Further why did the bank at all write the letter of June 26, to say that the customers' cheques were paid against the cheque (Ex. E) as no intimation was received of non-payment by 2-30 p.m. This letter, in my opinion, negatives the plaintiff's case and falsifies Mr. Adya's evidence.

20. The next question that arises is as to why did the plaintiff again present the cheque through the clearing on June 25, for payment after it was dishonoured on June 21, when they could immediately proceed against the defendant if they were, in fact, holders in-due-course. I am not deciding the question as to whether on the facts and circumstances of this case there could be a second presentment of the cheques (Ex. E), on June 25 or at all; but in my opinion, the

very fact that this dishonoured cheque Ex. E was again presented for payment on June 25, when admittedly no previous notice of dishonour was served on the defendant, clearly indicates that the plaintiff did not consider themselves as holders in-due-course on June 21, 1956, and the second presentment was not on their own behalf. Further, in my opinion, on the facts and circumstances of this case and on the evidence on record it would not be unreasonable to infer that the second presentment was made by the plaintiff as agent for collection on behalf of Gunny Trading Co.

21. My finding is further supported by Ex. E and the debit entry made in the customer's account (Ex. B1) reversing the original credit for Ex. E. Looking at the back of Ex. E it appears that a rubber stamp containing the words "Payees account credited" has been put twice. Admittedly one of them was put there on June 21 when the cheque was sent to the clearing and later returned dishonoured. The other stamp was put again on June 25 when it was presented for the second time in the clearing. Now on June 21 when the cheque Ex. E was returned dishonoured the plaintiff reversed the credit in Gunny Trading Co.'s account in respect of this very cheque Ex. E which in my opinion can only be consistent with their having received the cheque as agents for collection and with the fact that the plaintiff never placed any money to their customer's credit to draw upon (3) (40 C.L.J. 223). Thus on June 21 at the end of the day there was no credit for Ex. E in Gunny Trading Co.'s account. Further, the second rubber stamp on Ex. E states that on June 25 Gunny Trading Co.'s account was again credited (or would be credited) with the amount of the cheque, which in my opinion clearly indicates that the plaintiff never considered themselves as holders for value on June 21. The account of June 25 has not been disclosed although it is very relevant now for the purpose of determination of this case. Nor has the account of Gunny Trading Co. subsequent to June 21 been disclosed to prove that the sum of Rs. 5,14,937/8/-for which Gunny Trading Co. were the debtors to the plaintiff on June 21, has not been paid up and is still due and owing to them. In fact there is no evidence on record to show that Gunny Trading Co. has not paid the amount. Further, there is no evidence that the plaintiff has at all proceeded against Gunny Trading Co. for recovery of this amount during these months. On February 2, 1956 this suit was filed only against Almal Brothers but Gunny Trading Co. was not made a party.

22. In the light of what is hereinbefore stated I am not prepared to accept the evidence of Mr. Adya that there was an express agreement between Mr. Goadby and Mr. More or that Mr. More was present in the bank on June 21 as stated by him. I have no hesitation in saying that Mr. Adya was not telling us the truth and as such I reject his evidence. I have come to a clear finding as a fact that there was no express agreement on June 21, 1956 between the plaintiff and Gunny Trading Co. as spoken of by Mr. Adya.

23. Next it is contended on behalf of the defendant that to constitute the bank a holder in-due-course, there must be an agreement, express or implied, that the

bank would, before receipt of the proceeds, honour cheques of the customer drawn against the cheque deposited. The learned counsel for the defendant has strongly relied on the passage in Halsbury, Third Edition, Vol. II, para 349 at page 184 and para 350 at page 185. He has particularly drawn my attention to the words occurring in para 349, namely, "who, pursuant to a contract, express or implied so to do, credits the customer forthwith the amount of the cheque before that amount has been received

He argued that the important thing is, pursuant to a contract express or implied, that is to say, there must be a contract. He then contended that the banker may become a transferee if the cheque is paid in on the footing that it may be drawn against at once but in the instant case, he argued that, the cheque (Ex. E) was simply paid into the bank for the purpose of collection initially. Next the learned counsel referred to *A. L. Underwood Ltd. v. Barclays Bank (2)* (1924) 1 K.B. 775, 799 at 805, 806. He particularly relied on the passage at 805, where Atkin, L.J. observed as follows:

I think it sufficient to say that the mere fact that the bank in their books enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection does not without more constitute the bank a holder for value. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will before receipt of the proceeds honour cheques of the customer drawn against the cheques. Such a contract can be established by course of business and may be established by entry in the customer's pass book, communicated to the customer and acted upon by him.

24. He further relied on the following passage appearing at page 806:

But neither that decision (Gordon's case) nor the statutes lay down the rule judicial or statutory that if a bank credits a cheque at once in its books that fact without more makes the bank a holder for value.

25. The learned counsel submitted that this case as also other cases have rightly explained the judgment in Gordon's case (4) reported in 1903 A.C. 240 H.L. and the law stated in 1924 1 K.B. at p. 805, 806 is not the correct law.

26. The learned standing counsel appearing for the plaintiff submitted that no express agreement is necessary to constitute the bank a holder in-due course. He referred to Gordon's case but he did not put his case as high as that. His point was that mere credit to the customer's account with the amount of the cheque without allowing the customer to draw against it or without giving him factual and not mere book credit would not make the banker a holder in-due-course. In this case he contended that the bank not only gave credit for the cheque (Ex. E) in the customer's account before it was cleared but also allowed him to draw upon the credit so increased. He relied for this purpose on the statement of account (Ex. B1). Mr. Deb objected to this account but his objection cannot be sustained as he himself has cross-examined Mr. Adya upon it and I

have allowed it to be marked as an Exhibit.

27. The learned Standing Counsel then formulated his propositions thus:

(1) Whenever a banker honours cheques drawn by its customer against another cheque which he has deposited in the bank for collection and on the basis of credit immediately given in respect of that cheque which has been so deposited the bank allows cheques drawn by the customer to be honoured or pays the cheques, he travels beyond his duties as a mere agent for collection and becomes a holder in-due-course of the cheques so deposited.

(2) The above proposition can also be supported on the basis that when cheques which are drawn by the customer come to the bank in the usual cheques form which is to the effect "please pay" it is in effect a request by the customer that the bank should honour those cheques against the cheques deposited by him and when the banker does accede to the request of the customer to pay the amount of those cheques after the cheques had been deposited and before they are cleared, it amounts to an implied agreement by the banker to discount the cheques so deposited before they are honoured.

(3) That after a cheque or any negotiable instrument has been deposited and the banker makes an advance on the strength of the instrument so deposited it has a lien on that instrument and the existence of such lien makes the banker a holder in-due-course.

28. The third proposition of the Counsel was not argued or pressed and it can be disposed of at once by merely observing that it is well settled that where a banker holds as transferee, lien is excluded. In the instant case the plaintiff's suit is as transferee, that is to say, as holder in-due-course. Therefore the question of lien on the cheque does not arise and which might be said to have been waived by the plaintiff. Further I am not satisfied from the evidence that the customer's cheques in the instant case were paid on the strength of the cheque Ex. E deposited by the customer, as I shall explain presently.

29. With regard to his other proposition the learned Standing Counsel first drew my attention to Section 9 of the Negotiable Instruments Act and submitted that the section did not say anything about any agreement express or implied. According to him for the purpose of being a holder in-due-course all that is necessary is that one must be in possession of the instrument if it is a cheque payable to bearer and must pay consideration therefor. His case is that originally the plaintiff, when the cheque (Ex. E) was handed over to it, was referable as an agent for collection but the moment the plaintiff paid consideration for the cheque (Ex. E) it became transformed from an agent for collection to that of a holder in-due-course. The learned Standing Counsel did not put his case as high as Gordon's case but argued that if a customer of a bank deposited a cheque into his account and also drew cheques upon the bank, the banker being a mere agent for collection need not honour his cheques if there was no fund but if he did, he became a holder in-due-course. In support of his contention he strongly

relied on the bank's ledger account (Ex. B1) to show that without credit of Ex. E the cheques drawn by Mr. More upon the plaintiff bank could not have been paid but as the bank honoured those cheques of Mr. More it became a holder in-due-course of Ex. E.

30. I am not prepared to accept this contention for, in my view, such conclusion appears impossible; as for instance if a customer had to his credit only Rs. 500/- and thereafter he deposited a cheque for Rs. 1,000/- for collection and also drew a cheque upon the bank for Rs. 510/- in favour of a third party which the bank paid on presentation before the cheque for Rs. 1,000/- was cleared, could it be said that, in the circumstances, the bank became a holder in-due-course of the cheque for Rs. 1,000/- in case it was dishonoured. I think not. The bank could just have in such a case, trusted the customer with Rs. 10/- it overpaid for other considerations. In my opinion, the bank's unilateral act alone without the customer's consent will not convert it from an agent for collection to that of a holder for value.

31. The House of Lords' decision in *M'Lean v. Clydesdale Banking Company* (5) (1893) 9 A.C. 95 at page 115 shows that the question in what character a bank holds a cheque which has been given to them by their customer is a question of fact.

32. It is also well settled that where bills, notes or cheques passed from a customer to a banker a question of fact arises whether the banker takes them for collection subject to the lien or as transferee so as to become absolute holder for value. In order to ascertain the facts it is necessary to find out in each case what the parties intended. The customer may pay in a cheque into his account without intending to transfer the property in it to the banker but merely for collection, in such a case the bank may have a lien on the cheque deposited for monies due to it but cannot be a holder in-due-course unless the customer agreed to it either expressly or by implication.

33. I shall now turn to Ex. B1, the bank's ledger account of Gunny Trading Company. This account, Ex. B1, is written on a loose-leaf such being the system followed by the plaintiff bank in maintaining their accounts and has been taken out of a big book for the purpose of tendering in evidence, This loose-leaf contains many entries, both previous and subsequent to June 21, 1956, but only the entries of June 21, have been exhibited, the rest being covered with slips of paper pinned on to it so as not to be visible. The account of June 21, opens with a credit of Rs. 28,248-14-3 pies. Thereafter, it appears, several amounts have been entered on the credit side including the amount of the cheque (Ex. E) for Rs. 5,14,937/8/- making a total credit of Rs. 8,62,092-6-3. Then it appears that several amounts have been entered on the debit side which represent Gunny Trading Company's cheques which were paid by the bank aggregating Rs. 9,08,484-15-0. Looking at these two figures alone it is obvious that this Ex. B1 contains internal evidence to show that Mr. More had drawn much beyond the total value of the cheques deposited on the credit side of his account in the

bank's ledger on June 21. This, undoubtedly, clearly indicates that the customers' withdrawal was not against the cheques deposited on that day only. It may be observed here that the plaintiff has only picked out the account of June 21, to show that Gunny Trading Company's cheques could not have been paid unless the credit was given for the cheques deposited on that day. I do not think the plaintiff is entitled to do that. The mere fact that the amount of a cheque is entered on the credit side of the customer's account on a day and several other cheques of the customers are entered on the debit side on the same day cannot by itself necessarily mean or is conclusive that the customer's cheques were paid as against the cheques entered on the credit side. This is a question of fact to be established on evidence and can only be ascertained by examining the entire account of the customer. It may well be that the customer is a very substantial customer and has valuable securities with the bank and as such his cheques were paid. In such a case also the ledger account of the customer would be made up in the same way as in the instant case. In the present case however there is ample evidence on record that Gunny Trading Co. was a very substantial customer with several accounts with the plaintiff and had also valuable securities with the bank. That the account to which this suit relates is a very big account is manifest from the amount brought forward at the last page of Ex. B1 showing a debit total of over one crore sixty two lacs and a credit total of over one crore seventy one lacs of rupees up to the month of June. There is one other interesting fact to be found in Ex. B1 to which unfortunately the learned counsel, appearing in this case, did not draw my attention. At the top right hand corner of Ex. B1 is mentioned Debit interest 6 per cent. Ex. B1 also contains a column with the heading "Debit products". The amount carried over up to June 21 in this column is over 12 lacs to which at the end of the day Rs. 541329 has been added. This column unmistakably show that this account is either a loan or overdraft account. In my opinion, this mention of debit interest at 6 per cent. per annum and "the Debit product column" clearly establish that this account of Gunny Trading Co., with the plaintiff bank was either a loan account or an overdraft account. There is evidence also that Mr. More had valuable securities with the bank. This also clearly falsifies the evidence of Mr. Adya, because as Commercial Assistant to the Manager of the plaintiff bank he must have known that this was an overdraft account or loan account of Gunny Trading Company but he deliberately suppressed this fact from the Court. This Ex. B1 further shows that the cheque (Ex. E) was debited on June 21, after it was returned to the bank dishonoured, thus reversing the original credit to their customer's account in respect of this very cheque Ex. E which clearly indicates that the plaintiff was acting merely as an agent for collection and never placed any money to their customer's credit to draw upon. The plaintiff has failed to prove that they paid any consideration for Ex. E. For these reasons also I am not satisfied that the customers' cheques were paid against the cheque Ex. E deposited on June 21, 1956. The plaintiff has failed to establish the case made. In my opinion the plaintiff was merely an agent for collection and never became a holder in due course of cheque Ex. E.

34. But then it is lastly contended on behalf of the plaintiff that when a customer pays in a cheque into his account for credit and soon thereafter draws cheques upon the bank in the usual cheque forms "Please pay", it is in effect a request by the customer to the bank to honour his cheques so issued by him against the cheques deposited by him and if the banker passes the customer's cheques so drawn upon it, it amounts to an implied agreement by the banker to discount the cheque deposited by the customer in his account for credit before it is honoured.

35. I am unable to accept this contention as I fail to see any substance in it. I cannot see how in the instance given by the Standing Counsel it could ever amount to an implied agreement by the banker to cash customer's cheque before the proceeds of cheque deposited are realised. I have already rejected Mr. Adya's evidence on express agreement. An express agreement would exclude an implied agreement also. In any event, even if I were to assume that there could be an implied agreement as contended by counsel, I do not think it would be of any help to the plaintiff's case. I say so, because the reasons for which I have rejected the case of express agreement would equally produce the same result with regard to an implied agreement. If there was an implied agreement as it is said, such agreement would be on June 21 to the knowledge of Mr. Goadby who would know at once that the bank became a holder in due course. In that event again the immediate conduct and dealing by the bank with Ex. E after its dishonour would be equally inconsistent with that of a holder in due course. The letter of June 26 would also not be reconcilable as in the case of an express agreement. For these reasons I hold that there was no implied agreement between the plaintiff bank and Mr. More on June 21 that the plaintiff would honour Gunny Trading Co.'s cheques against the cheque deposited (Ex. E).

36. The only other material question that remains to be considered is the question of law which was discussed at great length by counsel on both sides in this case. But in view of the case made by the plaintiff at the hearing and in view of my finding as hereinbefore stated, it is not necessary for me to discuss the law on the subject in details. I shall however only express my views on the authorities cited before me as shortly as I can.

37. Apart from *Capital and Counties Bank v. Gordon* (4) (1903) A.C. 240 H.L. all the other cases cited before me support the view that the cases where an agent for collection becomes a holder for value must turn on an express or implied agreement between bank and customer, that the latter may draw against the cheques before they are cleared.

38. In *Re: Palmer Ex. Parte Richdale* (6) 19 Ch. D. 409 and *Royal Bank of Scotland v. Tottenham* (7) (1894) 2 Q.B. 715 the Court of Appeal held that where a cheque is paid into a bank with the intention that it shall at once be placed to credit and it is so placed, the banker becomes holder for value.

39. *McLean v. Clydesdale Banking Co.* (5) (1884) 9 A.C. 95 and *National Bank v. Silka* (1) (1891) 1 Q.B. 435, at 439 also support the same view.

40. Akrikeri (Atlantic) Mines Ltd. v. Economic. Bank (8) (1904) 2 K.B. 465.

41. Re Furruws Bank Ltd. (1923) 1 Ch. 41:

42. Underwood (A.L.) Ltd. v. Barclays Bank (3) (1924) 1 K.B. 775, 799 at p. 805, 806 have explained the meaning of the judgment in Gordon's case.

43. In Re Furrows Bank Ltd. (9) (1923) 1 Ch. 41 Astbury J, explained Gordon's case at p. 47 thus:

But it seems to me that the expression relied upon in the judgment must be read and only can be read with reference to the facts of that case. The most relevant fact for the present purpose was that as between the customer and the bank, there was an arrangement or course of practice under which the bank allowed the customer to draw against the amounts of the cheques paid in and credited before they were cleared." With these facts before him Lord McNaughten said: "It is well settled that if a bank before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and mere agent for collection when he receives payment of a cheque of which he is the holder for value.

44. Therefore, it seems that Gordon's case can be reconciled with the view expressed in (8) (1904) 2 K.B. 465. (9) (1923) 1 Ch. 41 and (10) (1924) 1 K.B. 805, 806 referred to above.

45. In Underwood's case, Atkin, L.J. expressed the same view which is the correct statement of law but Gordon's decision was not strictly interpreted.

46. Halasbury in Laws of England, Third Edition, Vol. 2 at pp. 184 185, Paragraphs 349 and 350 also supports this view. There it is stated at p. 184 "A banker who is asked by a customer to collect a crossed cheque and who pursuant to a contract express or implied so to do, credits the customer forthwith with the amount of the cheque before that amount has been received, in fact receives the sum of himself and not for the customer."

47. At p. 185, para 350 - it is stated "Crediting the customer's account does not of itself alter the position of the banker from that of agent for collection to that of holder for value. It is a question of fact in each case. In order to constitute the banker a holder for value there must be a contract express or implied, that the customer should be entitled to draw against the amount of the cheque before it is cleared."

48. I also incline to this view, and follow the authorities cited above. The above finding disposes of this case and it is no longer necessary for me to consider the other issues.

49. Now, I proceed to answer the issues as follows:

Issue No. 1-Answered hereinbefore.

Issue No. 2(a)-Negative.

Issue No. 2(b)-Does not arise in view of my answer to Issue No. 2(a).

Issue No. 3(a)-Does not arise in view of my answer to Issue No. 3(b).

Issue No. 3(b)-Negative.

Issue No. 3(c)-Affirmative.

Issue No. 4(a) (b)-Do not arise in view of my findings of fact as hereinbefore stated. Not necessary also for the purpose of deciding this case.

Issue Nos. 5fa), (b) (c) and (d)-Do not arise.

Issue No. 6-Negative. Issue No. 7(a)-Does not arise. Issue No. 7(b)-Negative. Issue No. 8-Negative.

50. In the result, the suit is bound to fail and is dismissed with costs including reserved costs, if any. Certified that it is a fit case for engaging two counsel.