
(1962) 07 CAL CK 0012
In the Calcutta High Court

Messrs. Tailors Priya, a firm	Vs	APPELLANT
Messrs. Gulabchand Danraj, a firm		RESPONDENT

Date of Decision : 25-07-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 8(1)
Negotiable Instruments Act, 1881 (NI) — Section 123, 124, 129, 13, 13(1)

Citation : (1962) 07 CAL CK 0012

Hon'ble Judges : R.S. Bachawat, J;P.N. Mookerjee, J;D.N. Sinha, J

Bench : Full Bench

Advocate : Sudhanshu Bhusan Sen and Gaganendra Krishna Dev, for the Appellant;Anil Kumar Sett, for the Respondent

Final Decision : Allowed

Judgement

R.S. Bachawat, J.—On August 30, 1961, the Plaintiff instituted a suit in the City Civil Court, Calcutta under Order XXXVII of the CPC claiming a decree on a dishonoured cheque dated 29th July, 1961 drawn by the Defendant and payable to the Plaintiff or order. The cheque is crossed generally and is marked with the words "a/c payee only". Those words are written within the transverse lines of the crossing. The writ of summons in the prescribed form was served on the Defendant on September 19. On September 25 the Defendant filed a petition praying for extension of the time to make an application for leave to appear and to defend the suit. The petition was rejected by the Registrar on September 28. On October 6, the Defendant filed another petition asking for leave to appear and to defend the suit. By an order dated October 7, 1961 the Judge dismissed this petition. The Defendant has moved this Court in revision against this order and has obtained a rule. The revision case has been referred to this Bench under Chapter II R. 1 proviso (ii) of the Appellate Side Rules.

2. Mr. Sen for the Defendant contended that the cheque dated the 29th July, 1961 is not a negotiable instrument within the meaning of Section 13 of the Negotiable Instruments Act, 1881 and that a suit on it under Order XXXVII, CPC

was not maintainable at all and in any event was not triable by the Judges of the City Civil Court.

3. Now Order XXXVII, CPC bears the heading "Summary Procedure on Negotiable Instruments:. Rule 2 of Order XXXVII, CPC however enables the Plaintiff to institute a suit under the summary procedure upon "bills of exchange hundies or promissory notes". The rule makes no distinction between negotiable and non-negotiable bills of exchange. The heading, cannot control the clear and express enacting words of the rule and limit its operation to negotiable instruments as defined in Section 13 of the Negotiable Instruments Act, 1881, see in this connection *Hammersmith and City Railway Co. v. Brand*, (1869) 4 HL 171. *Fletcher v. Birkenhead Corporation*, (1907) 1 KB 205 at p. 213, *R. v. Surrey (North Eastern Area) Assessment Committee*, (1947) 2 All ER 276 at p. 279.

4. The notification No. 9327 Judge dated December 14, 1958 published in the Calcutta Gazette on December 11, 1958 stated that "in exercise of the Power conferred by Cl. (b) of R. 1, XXXVII of the Code of Civil Procedure, 1908 (Act v. of 1908), the Governor is pleased to specially empower the Chief Judge and the Judges of the City Civil Court, Calcutta to try summarily suits on Negotiable Instruments". By R. 1(b) of O. XXXVII, the whole of the order is extended to Courts specially empowered in that behalf by the State Government. The clear intention of the notification is to extend the whole of the order of the Civil Court and to empower its Judges to try summarily all suits triable under the order. The expression "negotiable instruments" in the notification is borrowed from the heading of Order XXXVII, CPC In both places the expression indicates bills of exchange, hundies and promissory notes referred to in the body of Order XXXVII, CPC Even Act XXVI of 1881 though called the Negotiable Instruments Act, 1881 deals with instruments both negotiable and non-negotiable; by way of example see Sections 4 and 5 of the Act.

5. A cheque marked "a/c payee only" is a bill of exchange and consequently the Plaintiff is entitled to institute a suit on it under O. XXXVII, CPC and the Judges of the City Civil Court are empowered to try the suit. In this view of the matter the question whether such a cheque is a negotiable instrument within the meaning of Section 13 of the Negotiable Instruments Act, 1881 does not arise for decision in this case and consequently we ought not to express any opinion on the question. I notice that, according to English decisions, the marking "a/c payee" on a crossed cheque payable to order or bearer is no part of the crossing; the words do not restrict the transferability, not it seems the negotiability of the cheque, the words refer to the banker and not to the transferee and constitute a direction to the banker that the proceeds of the cheque collected by him are to be placed to the credit of the payee specified in the cheque see, *National Bank v. Silke*, 1891-1 QB 435; *Morison v. London County and Westminster Bank Ltd.*, (1914) 3 KB 356 at p. 373; *Underwood (A.L.) Ltd. v. Bank of Liverpool*, (1924) 1 KB 775 at pp. 793-4; *Akrokerri (Atlantic) Mines Ltd. v. Economic Bank*, (1904) 2 KB 465 at p. 472. The collecting banker may lose his statutory protection if he

disregards the direction, see *Bevan v. National Bank Ltd.*, (1906) 23 ILR 65, *House Property Co. of London Ltd. v. London County and Westminster Bank*, (1915) 84 LJ KB 1846; *Importers Co. v. Westminster Bank Ltd.* v. (1927) 2 KB 297. In practice the collecting banker usually declines to take a cheque so marked for an account officer than that of the payee and the marking therefore indirectly restrains the negotiability of the cheque. The position of the paying banker honouring the cheque with the knowledge that the proceeds of the cheque are going otherwise than to the specified payee is not quite clear, see *Chalmer's Bills of Exchange*, 12th Edition, pages 253-4, *Paget's Law of Banking*, a cheque marked "a/c payee only" has the same significance as a cheque marked "a/c payee", see *Sutter v. Briggs*, (1922) 1 AC 1, (1924) 1 KB 775 at pp. 793-4 (1927) 2 KB 297, at pp. 302, 307, 309, *British Bank of Middle East v. Almal Brothers*, 66 Cal WN 285 at p. 288.

6. Mr. Sen next contended that the trial Judge wrongly refused leave to defend the suit. There is no substance in this contention. By Article 159 of the Indian Limitation Act 1908 an application for leave to appear and to defend the suit must be made within 10 days from the date of the service of the writ of summons. No such application was made within the time prescribed. Consequently the trial Judge was bound to refuse the leave. The application for extension of time to make the application for leave to defend the suit was misconceived. The trial Judge had no power to extend the time. This application for extension of time ought to have been disposed of by the trial Judge and not by the Registrar but this irregularity does not affect the decision in the case.

7. I should refer to one another matter. R. 2 of Order XXXVII, CPC enables the Plaintiff to institute a suit by presenting a plaint in the form prescribed. As yet no form of the plaint under Order XXXVII, CPC has been prescribed by this Court. In the absence of a prescribed form of plaint the Plaintiff may maintain suit under Order XXXVII, CPC by presenting a plaint showing his cause of action on the instrument and indicating his intention to proceed under Order XXXVII, CPC We pass the following order:

The Rule be and is hereby discharged. Each party will pay and bear his own costs of the rule and of the reference.

Sinha, J.

8. This matter has come before us in the following circumstances. A suit was filed under the summary provisions of Order XXXVII of the Code of Civil Procedure, by the Plaintiff, Messrs. Gulabchand Dhanraj, against the Defendant firm of Messrs. Tailors Priya, based on two dishonoured cheques, which have been endorsed and crossed with the words "a/c payee only", for the recovery of a sum of Rs. 4393.60 nP. in the City Civil Court, Calcutta, which has been given jurisdiction to try summary suits on negotiable instruments, vide Notification No. 9327 Judge dated 14th December, 1958 (In exercise of the power conferred by Clause (b) of Rule 1 of Order XXXVII of the Code of Civil Procedure). The writ of summons was

served on the Defendant on 19.9.61. The Defendant appeared on 28.9.61 and filed a petition praying for ten days time to apply for leave to defend the suit. This petition was rejected by the Registrar of the City Civil Court, and the suit was fixed for hearing ex parte on 6.10.61. Thereupon, the Defendant made an application to Court for leave to defend the suit under Rule 2 of the Order XXXVII. Upon that the Court passed an order dated 7th October, 1961 referring the application. It appears from the judgment of the learned Judge that two points were taken before him. The first was that the Registration should not have dismissed the application for time in the manner he did, and the second point was that Order XXXVII of the CPC did not apply at all, as the cheques being crossed "a/c payee" ceased to be negotiable instruments and, therefore, were not governed by the provisions of Order XXXVII of the Code of Civil Procedure. On the first point, the learned Judge held that under Article 159 of the Limitation Act, leave had to be applied for within 10 days of the service of the writ of summons and the Court had no power to extend the time. Therefore, even if the application was made before the Court, instead of the Registrar, the same result would have ensued, and the application would have had to be dismissed. On the second point, the learned Judge held that the crossing of a cheque with the words "a/c payee only" did not restrain its negotiability, and the point accordingly failed. The learned Judge, therefore, directed the suit to be heard on 20.11.61. Thereupon, the Plaintiff made an application to this Court in its civil revisional jurisdiction and a rule was issued. This rule came up for hearing before a Division Bench presided over by P. N. Mookerjee, J. It was pointed out that the Chief Judge and the Judges of the City Civil Court have been empowered to try suits on negotiable instruments, and that a point arose as to whether cheques crossed with the words "a/c payee only", came within the meaning of the term "negotiable instruments". The learned Judges constituting the Division Bench were of the opinion that the matter was not free from difficulty. They point out that Rule 2 of Order XXXVII, may well be said to cover all documents mentioned therein. The Notification mentioned above has however extended the jurisdiction of the City Civil Court only to suits on "negotiable instruments". Therefore, one of the points that arose for determination was as to whether the City Civil Court had jurisdiction to entertain the suit. The case has now been referred under proviso (ii) of Rule 1 of Chapter II of the Appellate Side Rules and has come up before us for hearing. Coming now to the provisions of Order XXXVII, we find that it is headed "summary procedure on negotiable instruments". Under Rule 1, the order is made applicable to certain High Courts, including the High Court at Calcutta, or any other Court specially empowered in this behalf by the State Government. Although the heading of the order mentions the words "negotiable instruments" those words are not to be found in Rule 2. Under Rule 2(i), all suits upon bills of exchange, hundies or promissory notes may be instituted under Order XXXVII. In such cases the form of the plaint and the writ of summons are prescribed in Rule 2. There is, therefore, an apparent conflict between the heading of the Order and the provisions of Rule 2. That is the first difficulty. It is not disputed before us that a cheque is a "negotiable instrument" as defined in

the Negotiable Instruments Act. It is, however, argued that if it is crossed with the words "a/c payee only", it ceases to be negotiable, and therefore, ceases to be negotiable instrument. If this is so, then it might affect the matter in two ways: Firstly, if the heading of the order governs the rules contained therein, then the rules will only apply to negotiable instruments and will not apply to a cheque so indorsed. Secondly, the jurisdiction given to the City Civil Court, is merely to try suits under this Order on "negotiable instruments". Therefore, it is argued that the authority cannot extend to instruments which are not negotiable instruments. The heading of the order cannot however control the substantive provisions of Rule 2. Rule 2 deals generally with bills of exchange, hundies and promissory notes. It is not disputed that this would include a cheque. Assuming that such a cheque can be a bill of exchange which is at certain times negotiable and at others not; under Rule 2, both kinds of cheques are included within the scope of Order XXXVII. This cannot be controlled by the heading of the Order. Then again, under Rule 1, the State Government has the power to extend the authority to try suits under Order XXXVII, to various Courts. It cannot, however, extend it partially. Either it extends the provisions of Order XXXVII as a whole or it does not. In my opinion, if Rule 2 includes the case of a cheque which is not negotiable, even then the City Civil Court would have jurisdiction, because the clear intention of the State Government was to extend the provisions of Order XXXVII in its entirety to the City Civil Court, including the provisions of Rule 2. If this is so, then of course, it is not necessary to decide anything else and it should follow that the order made below was correct and the City Civil Court has jurisdiction to pass Order XXXVII. However, the other point raised, namely the nature of a cheque indorsed and/or crossed with the words "a/c payee only" is a very important question which constantly arises in the Courts, and it is necessary to deal with it. The position with regard to a cheque indorsed or crossed with the words "a/c payee" or "a/c payee only" under the English law, has been summarised by Sheldon in his "Practice and law of Banking" 6th Edn. page 78 as follows:

Account Payee" - These words and variants such as "Payee's a/c." "Account A.B." etc., are often added to the crossing of a cheque. Such expressions have no statutory significance, since they are not sanctioned by the Bills of Exchange Act, 1882: and if added, as they frequently are in practice, to order or bearer cheques, they do not in any way affect their negotiability.

With regard to the paying banker it is obvious that, after fulfilling his duty of paying the cheque in good faith and without negligence, his responsibility ceases and he cannot be expected to follow the money after it has reached the collecting banker, and insist upon the collecting banker paying it into the proper account. But the collecting banker is in a different position. These words are in the nature of a direction to him, and, if he places the money received to an account other than that of the specified payee, he stands to lose the protection of Section 82 on the ground of negligence. Hence the collecting banker should not collect cheques so marked except for the named payees.

9. This principle has also been stated by Chalmers in his "Bills of Exchange", 12th Edn. page 253, in the following manner:

Of recent years the practice has sprung up of marking cheques with the words "account payee". This is not an addition to the crossing, but a direction to the collecting banker that the proceeds of the cheque are to be placed to the credit of the payee specified in the cheque. (See (1914) 3 KB 356 at p. 373 Companies Act). It has been held (1) that the marking "a/c payee" does not restrict the negotiability of the cheque, (see (1891) 1 QB 435 Companies Act) and (2) that a cheque drawn payable to "T.C. and others or bearer", "a/c payee" is not payable to bearer, but should be credited to the account of "T.C. and others.

(3) Where a cheque is marked "a/c payee only, not negotiable" and the payee indorses it to his banker for collection, the banker is a holder and indorsee of the cheque.

If, then, the collecting banker pays a cheque marked "a/c payee" otherwise than to that account, he does so at his own risk; presumably if he does not keep the payee's account he may refuse to handle the cheque.

10. Upon this point, we find the following statement of law in Byles on Bills 20th Edn. p. 45:

The practice has arisen in recent times of adding to the crossing the words "account payee" or similar words. The addition of these words is not prohibited by Section 78, since they are a mere direction to the receiving banker (See (1904) 2 KB 465 at p. 472). Though the word "payee" means the person designated in the cheque as payee and not the owner of the cheque at the time when it is presented (See (1915) 84 LJ KB 1846), the words "account payee" are not sufficient, in the case of a cheque drawn to order or bearer, to make it non-transferable within the meaning of Section 8(1) of the Code. At the same time they operate as a caution to the collecting banker to put him on inquiry and disregard by him, in the absence of explanation, amounts to negligence on his part.

11. This is how the matter has been dealt with in Paget's Law of Banking 5th Edn. page 154:

Words such as "account payee", "account of A.B.", are frequently added to the crossing of a cheque. They are in no way authorised or recognised by the Bills of Exchange Act?. (1891) 1 QB 435 shows that such an addition to the crossing does not prevent the cheque from being transferable. In the judgments in that case the terms transferable and negotiable are, unfortunately, used somewhat indiscriminately, and no direct authority can be deduced from them as to the effect, if any, of such words as "account of A.B.", on the negotiability of the cheque. It may be noticed, however, that the defence was based on the allegation that the cheque had been obtained by false representations and that the Plaintiffs were not holders for value in due course. The Defendant, who, it is

to be assumed, proved the false representations, would have been entitled thereon to judgment equally whether the cheque was not transferable or only not fully negotiable; and from the fact that the Court of Appeal affirmed the judgment in favour of the Plaintiffs, it may be presumed that they did not consider the full negotiability of the cheque to have been in any way affected.

Another ground for holding this is to be the correct view is that, if such words had the effect of limiting the negotiability of the cheque, the result attained by their use would be precisely equivalent to that of the "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 has never, of recent years, been seriously contended that the words "account payee" have any effect on the negotiability of a cheque, and in (1924) 1 KB 775 Scrutton L.J., definitely adopts this view.

12. The law has been summarized thus in Halsbury's Laws of England" 3rd Edn. page 183 paras 3, 4, 7:

"Account payee". The marking to a particular account as "account payee" or "account of a.B." has no warrant or recognition in the Bills of Exchange Act, 1882. It does not affect the transferability of the cheque: See 1891 1 QB 435 (supra). Nor it is submitted, does it affect its negotiability See 1924 1 KB 775 (supra). This particular crossing has been in use too long for it to be disregarded, and it must be taken to convey an intimation to the collecting banker that the proceeds of the cheque are only to be placed to the specified account (1904 2 KB 465 and (1914) 3 KB 356 Companies Act). It is therefore, the custom of most banks to decline to take the cheque for any other account, and a disregard of the intimation would probably be deemed negligence (1906) 23 TLR 65).

13. Davar in his "Law and Practice of Banking" end Edn. page 57 states as follows:

Account Payee. Cheques are frequently crossed "account payee" but such a direction does may ignore same, though in actual practice the banker who collects such a cheque does see that the instruction is carried out. The banker who pays a cheque, of course, is not concerned with it.

14. Before I proceed further it would be necessary to deal with certain cases mentioned above, upon which these principles are based. The first case is the (1891) 1 QB 435. The facts in that case were as follows: The Defendant was a customer of the Alliance Bank of London, and he drew upon the Bank a cheque payable to the order of Moriarty. It was crossed with the words "Account of J.F. Moriarty, etc., National Bank, Dublin". Moriarty indorsed this cheque and sent it to the National Bank at Dublin. The Petitioner sent it to London for collection, where it was dishonoured. In the meantime, the amount had been carried to

Moriarty's credit in his account and drawn upon by him. When the cheque was returned dishonoured, the Bank wrote to Moriarty for funds to take it up. He failed to do so, and an action was commenced by the Bank against the Defendant Silke, who drew the cheque. In the Lower Court, judgment was recovered from which the Defendant appealed. Lindley, L.J. said as follows:

The Defendant first contends that by virtue of the Bill of Exchange Act, 1882 (45 and 46 Vic. (61), S. 8, the Plaintiffs cannot sue upon the cheque, and that nobody but Moriarty could acquire any right to sue upon it. I am not satisfied that under that Act a cheque payable to bearer or to order can be made not negotiable except under the provisions of Sections 76-82, as to crossed cheques. We need not now decide that point; for, assuring that it can, it is necessary in my opinion that very plain words to that effect should be used. It is most important that a cheque should not be an embarrassing document. I am not satisfied that any words other than the words "not negotiable", which are prescribed by the Act would be sufficient to make such a cheque not negotiable."

15. The learned Judge held that the crossing of the cheque did not indicate an intention that the cheque should not be transferable. It amounted to nothing more than a direction to the Plaintiff Bank to carry the amount of the cheque to Moriarty's account when they received it. There is in this judgment no distinction made between transferability and negotiability. The next case to be cited is a judgment of the Court of Appeal - (1924) 1 KB 775. The facts in that case were as follows: For some time, one Underwood, a merchant had a banking account with Barclay's Bank. In 1919, he converted himself into a limited company, (A.L.U. Ltd.) all the shares being allotted to himself, except one, which was held by his wife. He continued his personal account with the said Bank. The company's account was with another bank, but this was not known to his banker. Underwood, as sole director of the company, got hold of certain cheques, some crossed and others uncrossed, drawn in favour of the company. He indorsed them "A.L.U., Ltd., A.L.U., sole director" and paid them into his own account with the Defendant bank instead of the company's account. The Defendant bank, without inquiring whether the company had a separate banking account, collected the cheques and credited Underwood with the proceeds, which he misappropriated. It was held that the bank was put on inquiry, because of the endorsements and was guilty of negligence. Scrutton, L.J. said as follows:

A further item in the finding of negligence is that some of the cheques were crossed "Account of payee", one with the addition of the word "only". While this addition does not affect the negotiability of an order or bearer cheque, I agree with the view of Rowlat, J., in (1915) 84 LJ KB 1846, that when such a cheque is paid into the account of a person who is not the payee the bank is put on inquiry, especially when he is a servant of the payee.

16. I now come to the provisions of the Indian Negotiable Instruments Act (Act XXVI of 1881). Section 5 of the said Act defines a "Bill of Exchange as being an instrument in writing containing an unconditional order, signed by the maker

directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. Section 5 provides that a cheque is a bill of exchange drawn on a specified banker and not payable otherwise than on demand. Section 7 defines the word "payee" as being the person named in the instrument to be paid. Section 13 defines a "Negotiable Instrument" which includes a cheque payable either to order or bearer. A cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. Section 14 provides that when a cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated. Chapter XIV of the said Act deals with the subject of crossed cheques. Cheques may be crossed in two ways e.g. generally (Section 123) or specially (Section 124). Where a cheque bears across its face, the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally. Where a cheque bears across its face in addition the name of a banker, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker. Section 129 provides that any banker paying a cheque crossed generally, otherwise than to a banker or a cheque crossed specially otherwise than to the banker to whom the same orders crossed, or his agent for collection, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Section 130 lays down that a person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have, and shall not be capable of giving a better title to the cheque, than that which the person from whom he took it had. Under the Indian Law as it stood previously, and the English Law before the Bills of Exchange Act, a person could draw a non-transferable cheque by simply omitting the word "order or bearer". But now, both under the Indian law and the English Law, one way to restrain negotiation of a cheque is by crossing a cheque with the words "not negotiable". A cheque crossed "not negotiable", may be transferred, but the transfer is not attended by the same important consequences as in the negotiation of a negotiable instrument. If the transferor had a good title, the transferee is entitled to receive payment. But if the title of the transferor is defective, the transfer is affected by such defects, and is not immune to the same, as is a holder for value in due course of a negotiable instrument. In other words, a cheque endorsed as "Not Negotiable" is deprived of one of the two attributes of negotiability, viz., transferability free from defects; but is left with the other, namely transferability by delivery or endorsement. Thus, where a cheque is marked with the crossing "not negotiable", there cannot be "a holder in due course", but only a "holder". Next we come to Section 50 of the said Act, which deals with the effects of endorsement. It provides that the endorsement of a negotiable instrument followed by delivery, transfers to the endorsee the

property therein, with the right of further negotiation; but the endorsement may, by express words, restrict or exclude such right. Section 54 provides that, subject to the provisions contained in the said Act as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even though originally payable to order.

17. It is thus found that a cheque is a negotiable instrument and may be transferred or negotiated by endorsement and delivery, making the endorsee the holder in due course. But unlike other negotiable instruments, there are specific provisions with regard to crossed cheques. Those provisions have been mentioned above. If the words "not negotiable" are used with special crossing, then it is still transferable but not negotiable. The Negotiable Instruments Act does not provide specifically for a crossing, "a/c payee" or "a/c payee only". At one time it used to be thought in England that such endorsement had no legal effect and it was even thought that such endorsement invalidated a cheque. However, the practice of making such endorsements is so widespread and has been going on for such a length of time, that it can no longer be said that such a crossing would invalidate a cheque. But, there has really been no satisfactory decision with regard to the legal consequences of such crossing. The two cases mentioned above, which are always cited, do not specifically deal with such endorsements, except a passing observation of Lord Scrutton L.J. in (1924) 1 KB 775. However, it seems that the text books are unanimous in their opinion that an endorsement crossing containing the words "a/c payee" or "a/c payee only" does not restrict the negotiability of the cheque. It is only a direction on the collecting banker to put the money into the account of the person shown as the payee, on the face of the cheque. The result is this: Supposing A issues a cheque in favour of B and crosses it "a/c payee only". B may negotiate it in favour of C and C may negotiate it in favour of D and so on. The only result of such crossing is that when it is put into the hands of the collecting banker, the Banker is put on notice that the money must be put into the account of B only and not in any other account, and if it puts the money into some other account with notice of the crossing, it will be liable for negligence. I however fail to see the merits of this curious procedure. In the illustration given above, C may take the cheque from B and become the holder for value and yet if he goes to his banker and asks the banker to collect the money, the duty of the banker would be, not to put the money into C's account but into B's account, and if B has no account then the banker may refuse to accept the cheque at all. Under such circumstances, I do not see what benefit C has got by negotiation. It amounts to this, that he becomes a holder for value but without the right of getting his banker to collect the money.

18. This curious position in law is not known to the public at large. It is generally believed that by crossing a cheque with the words "a/c payee only", it is made non-negotiable. Indeed. Such endorsements are made in order to render it non-negotiable, and as a measure of safety. In my opinion, the law on the point should be reconsidered and there is no reason why we should blindly follow the

English law on the point. However, position seems to have been so uniformly accepted by text book writers, both in England and India, that I am unable to depart from that view on the strength of my own feelings about it. The matter should however be corrected by legislation. I therefore hold that according to the law as it stands at present, a cheque payable to order or bearer and crossed "a/c payee" or "a/c payee only" but without the endorsement, "not negotiable", is a negotiable instrument, and may be negotiated, but the collecting banker has a duty to put the money, when collected, into the account of the payee, indicated, and into no other account.

19. For the reasons aforesaid, this application and I agree with the order made by my Lord Bachawat, J.

P. N. Mookerjee, J.:

20. Three questions of importance arise in this Reference. The first is "whether a cheque, crossed "Account Payee only" is a negotiable instrument", the second "whether a suit, on such a cheque, is a suit within the scope of Order XXXVII of the Code of Civil Procedure" and the third, "whether such a suit is triable by the City Civil Court at Calcutta. On the resultant answer, depend fundamental procedural rights of the parties concerned, namely, whether the rights and liabilities in respect of the disputed cheque or cheques are to be determined and enforced in an ordinary suit or whether they may be determined and enforced also in the special summary suit, provided in Order XXXVII of the Code, and that, again, in the City Civil Court here.

21. The facts, leading to this Reference, stand as follows:

On August 30, 1961, M/S Gulabchand Dhanraj (the firm opposite party in the Civil Revision Case, out of which this Reference arises, and the Plaintiff firm in the corresponding suit in the Court below), claiming to be entitled to Rs. 4393/60 nP. from the Defendant firm Messrs tailors Priya which is the Petitioner in the above Civil Revision Case on account of principal and interest of two dishonoured cheques, instituted Money Suit No. 243 of 1961 in the local City Civil Court for recovery of the said amount. The suit was instituted under Order XXXVII of the CPC a "summary suit on negotiable instruments". Summons appears to have been served on September 19, 1961 and on the 28th following, the Defendant appeared and filed a petition for ten days' time to apply for leave to defend the suit. This was rejected by the learned Registrar of the City Civil Court and the suit was fixed for ex parte hearing on October 6, 1961. On this date, the Defendant applied to the Court for leave to defend the suit. In this application a point also appears to have been taken inter alia, to the effect that the cheques in question being "Account Payee" cheques, - or, to be more precise, cheques crossed "A/C payee only" and so not payable either to order or to bearer, - they were not negotiable instruments so as to permit a suit on them to be brought in the local City Civil Court in the summary manner under the special provisions of Order XXXVII of the Code. If this was a good point, the instant summary suit

under Order XXXVII of the Code would not be maintainable and no question of obtaining leave to defend the same would arise, and there would be no necessity or occasion for obtaining such leave.

22. The learned trial Judge rejected the Defendant's above plea upon the view that, notwithstanding the crossing "A/C Payee only", the cheques in suit remained negotiable in law or, in other words, "negotiable instruments", and further, that notwithstanding the apparently restricted heading "summary procedure on negotiable instruments", O. XXXVII of the Code of Civil Procedure, in view particularly of Rule 2(1) of the said Order, read in the light of the relevant provision (Sections 5, 6 and 13) of the Negotiable Instruments Act is not restricted in its application to suits on negotiable instruments, strictly so-called, but applies also to suits inter alia on non-negotiable bills of exchange (including cheques), and, accordingly, the instant suit on the disputed cheques is well covered by the said Order. Upon that view, he further held that, the Defendant's application for "leave to defend" being time barred under Article 159 of the Indian Limitation Act, he was not entitled to defend the suit and the same was to be tried ex parte for a decree according to and in terms, substantially, of the claim made in the plaint, subject, of course, to, inter alia, Sections 79 and 80 of the Negotiable Instruments Act, (vide Sub-rule (2) of Rule 2 of Order XXXVII). Fro this ex parte hearing, the date fixed was November 20, 1961 which was eventually shifted to December 5, 1961.

23. On November 27, 1961, the Defendant moved this Court and obtained the above Rule Nisi with ad interim stay and the said Rule came up for hearing on February 22, 1962, before a Bench presided over by myself, when the matter was referred to the learned Chief Justice for reference to a Special Bench in view inter alia of the importance of the question as to the applicability of Order XXXVII of the Code to suits like the present and, thereafter, this Reference was made.

24. At the outset, it may be observed that, if Order XXXVII applies to the instant suit, there can be no question that, in the facts and circumstances of this case, the application, filed on October 6, 1961, presumably under Rule 3 of Order XXXVII of the Code, for "leave to defend" the suit was rightly rejected as time-barred. The record shows that special summons, that is, summons in the special form (Vide Form No. 4, Appendix B, and Order XXXVII, Rule 2(1) of the Code), of the suit was served on the Defendant on September 19, 1961. Under the law, then, the "application for leave to defend the suit" had to be filed within 10 days (Vide Article 159 of the Indian Limitation Act) and, in view of the uniform decisions on the point (Vide Quazie Mahumdar Rahman v. Sarat Chundra Dutt, 55 Cal WN 259, at p. 262 Pulin Krishna Roy v. Susil Kumar Dey, 53 Cal WN 192 at p. 194 and James Manickam Vs. Jaya Narayan Daga, ; See also Madhub Lall Durgur v. Woopendra Narain Sen, ILR 23 Cal 573 (575), that time could not be extended. The last date for the application thus expired on September 29, 1961, and the application filed on October 6, 1961, and the application filed on October 6, 1961, was, obviously, filed too late for the purpose. No doubt, on the said

29th September, an application was filed by the Defendant but it was a mere application for time to apply for leave to defend the suit. That application, the Court had no power to grant, and, as it stands on the record, it could not be regarded in any view, as an application for leave to defend the suit under sub-r. (2) of Rule 2 of Order XXXVII. This, indeed, is conceded by Mr. Sen, who rests his whole case before us upon the other points, namely, whether Order XXXVII of the Code at all applies to the instant case and whether the instant summary suit is triable by or maintainable in the local City Civil Court.

25. The points, thus arising, are of some considerable difficulty, though, in the ultimate analysis, one aspect of the matter would not require a decision in the instant Reference. As we have seen above, the problem before us has three aspects, - first, whether a cheque, crossed "A/C Payee only", that is "Account Payee only", is a negotiable instrument; second, whether, even apart from that, a suit order such a cheque may be brought as a summary suit under Order XXXVII of the Code; and third whether such a suit is triable or entertainable by the local City Civil Court. As, in our view, whatever be the answer to the first part, the second and the third must be answered in the affirmative, the instant Rule is bound to fail. In the premises, the first part need not be answered in the instant Reference and I reserve my opinion on the same. I would, however, freely confess that, notwithstanding several decisions of high authority in the English Courts (Vide, (1891) 1 QB 435 at pp. 438-9, (1904) 2 KB 465 at p. 472; (1914) 3 KB 356 at pp. 373-4, (1922) AC 1, (1924) 1 KB 775 at pp. 793-4 and (1927) 2 KB 297 at p. 307), to the effect that a crossing "Account Payee" or "Account Payee only" would not make the cheque non-negotiable or non-transferable, which have apparently influenced judicial opinion on the point in this country, vide, 66 Cal WN 285, and certain broad passages on the subject in the leading treatises, purporting to summarise the law on the point (Vide Halsbury's Laws of England, 3rd Edition, Vol. 2 page 183 (Art. 347), Paget's Law of Banking, 5th Edition, pp. 154-5 and 156, Sheldon on "Practice and Law of Banking" 6th Edition, pp. 24 and 78-9, Chalmers on "Bill of Exchange" 12th Edition pp. 253-4, Byles on Bills, 20th Edn. p. 45 and Davar's Law and Practice of Banking. 2nd Edition, p. 57 and Bhashyam and Adiga - "The Negotiable Instruments Act" 10th Edition p. 546) to a similar effect, namely, that such a crossing ("Account Payee" or "Account Payee only") does not affect the transferability or negotiability of the cheque but only conveys an intimation to or represents a direction upon the collecting banker to place the proceeds of the cheque to the specified or particular Account, I cannot help feeling, in view, particularly, of the latter part of explanation (i) of Section 13(1) of the Indian Act and the analogous provisions (Sections 8(1) and 8(4) of the corresponding English statute (The Bills of Exchange Act, 1882) that the matter requires further and closer examination (see also in this connection Chalmers supra p. 254 and Paget supra p. 156). I would also add that the view that a cheque, crossed "Account Payee only", is a negotiable instrument, that is, that it does not indicate a prohibition of transfer, - the test of non-negotiable instruments under the above statutes, - smacks of

unreality and gives a rude shock to our practical common sense and sense of realities. It ignores the substance of the matter and even contradicts the form and the writing of the instrument and, accordingly, it should not be adopted or accepted unless the statute compels such adoption or acceptance.

26. Pertinently, I may point out here that the statutes (both Indian and English) make a distinction between transferability and negotiability and a cheque may not be negotiable and yet transferable. Thus a cheque, crossed generally or specially, bearing, in either case, the words "not negotiable" is still transferable. The crossing "not negotiable" only subjects it to the consequences or restrictions, mentioned in Section 130 of the Indian Act and the corresponding Section 81 of the English Statute. It does not, however, cease to be transferable, although its negotiability has certainly been affected in that its transfer will not be attended with one of or the same important consequences as in an ordinary negotiation of a negotiable instrument, it having, lost one of the two attributes of negotiability, namely, transferability free from equities. It, however, retains the other attribute, namely, transferability or delivery of endorsement. In spite of the above crossing, therefore, it remains transferable though it has ceased to be negotiable. This is because, as we have seen above, negotiability involves two elements, namely, transferability free from equities and transferability by delivery or endorsement and, while the first has been lost by reason of the crossing in question, the second is retained. Both the elements however, depend on transferability and so, if transferability is lost, negotiability no longer subsists, - but not vice versa, - and the cheque becomes a non-negotiable instrument. This, indeed, is the test of a non-negotiable instrument, adopted by the two statutes (Vide Section 13 of the Indian Act and Section 8 of the English Act). It has, however, been apparently held, - at any rate, broadly suggested, - that crossing "not negotiable" makes the cheque a non-negotiable instrument (Vide 1891 1 QB 435 (supra) and 66 Cal WN 285 (supra). Nay, more that such crossing is the only way to make a cheque a non-negotiable instrument (Vide, 66 Cal WN 285 at p. 289 (supra) and Bhasyam and Adiga "The Negotiable Instruments Act," 10th Edition, p. 553; vide also Paget supra, p. 155 and Durga Shah Mohan Lal Bankers Vs. Governor General in Council and Others, . This is perhaps on the footing that "not negotiable" is equivalent to "not transferable" and the two terms are interchangeable and synonymous. That, obviously implies a mixing up of the said two expression, - and, indeed, in some of the cases, the two expressions "negotiable" and "transferable" have been indiscriminately used, - and all this when the statutes strive to preserve a distinction between them (vide, also, in this connection Hibernian Bank Ltd. v. Gysin and Hanson, (1938) 2 KB 384) and notwithstanding the apparent statutory provisions to the contrary, which attributes only a limited effect to such crossings, to wit, crossing "not negotiable". If, however, in spite of the above context, the crossing "not negotiable" can make a cheque a non-negotiable instrument, I do not find any sufficient reason why crossing "A/C Payee" or "A/C Payee only" would not have that effect. It is not easy to understand why crossing "A/C Payee only" would not

have the same or a similar effect particularly when it is acknowledged on all hands that, on such crossing, the cheque cannot be cashed or credited except through or to the particular account (Vide, in this connection, Paget's Law of Banking, 5th Edition p. 222) that is, the account of the payee which term "payee" it must be noted carefully is particularly defined in the Indian Statute (Vide Section 7 of the Act; see also Chalmers supra, p. 13, on the English statute). If transfer of a cheque means transfer of money (Vide Great Western Rly. Co. v. London and County Banking Co., 1901 AC 414 at pp. 418 and 422) the test of transfer cannot be satisfied by such a cheque and so it would be non-transferable and thus not a negotiable instrument. More on this, however, on a more appropriate occasion and I would not express myself fully here on the above point, that not being required in the present instance.

27. Turning now to the instance case, I would proceed as follows:

On the main question, here, namely, whether the instant suit would come under Order XXXVII of the Code, even if the disputed cheques be held to be non-negotiable instrument in view of their crossing "A/C Payee only" the position stands thus:

28. Rule 2 of the order which prescribes the summary procedure, expressly includes all suit upon bills of exchange. A cheque is a bill of exchange (Vide Section 6 of the Negotiable Instruments Act). Section 13(1) of the said Act refers to bills of exchange, - negotiable (vide main part) and non-negotiable (Vide explanation (i)). Law thus contemplates both negotiable and non-negotiable bills of exchange (including cheques). Prima facie, then, Rule 2 of the Order XXXVII, which mentions inter alia suits on bills of exchange without any restriction or reservation, would cover also suits on non-negotiable bills of exchange. This, indeed, is not denied but, even then, it is argued by Mr. Sen, the instant suit would not be maintainable thereunder, - not, in any event, in the City Civil Court here. The first part of this argument is founded on two points or premises, namely (1) that a cheque crossed "Account Payee only", is not a negotiable instrument (which I have assumed for that purposes of this reference and which need not be answered here and need not be discussed further, although I have briefly, indicated above, in broad outlines some supporting reasons for the correctness of the said assumption) and (2) that Order XXXVII (including Rule 2 thereof and notwithstanding its wide language), in view of the heading of the Order "summary procedure on negotiable instruments" should be read as restricted to suits on negotiable instruments only, strictly so-called. The other part of the argument is founded on the Notification, published in the Calcutta Gazette, dated December 11, 1958, at p. 3977, extending the aforesaid Order to the City Civil Court here. That notification, as quoted hereinbelow:

No. 9327J - 4th December, 1958. In exercise of the power conferred by Clause (b) of Rule 1 of Order XXXVII of the Code of Civil Procedure, 1908 (Act v. of 1908) the Governor is pleased to specially empower the Chief Judge and the Judges of the City Civil Court Calcutta, to try summarily suits on Negotiable

Instruments.

Refers only to "suits on negotiable instruments", from which it is argued that, so far, at least, as the local City Civil Court is concerned, Order XXXVII is not available to it except for suits on "negotiable instruments", strictly so called.

29. Mr. Sen's above argument, though plausible, ingenious, and attractive at first sight, cannot bear ultimate scrutiny. Rule 2(1) is clear that it comprehends inter alia all suits on bills of exchange. There can be no mistake about it and there is no ambiguity in it. The language, indeed is plain; it is clear, specific and unequivocal. In the circumstances, according to well-settled rules of construction of statutes, (vide *Commissioner of Income Tax, Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay*, and *Bhinka and Others Vs. Charan Singh*, , citing *Maxwell on Interpretation of Statutes*, 10th Edition, p. 50, where the leading English cases on the point including (1869) 4 HL 161, (1907) 1 KB 205 at p. 218, *Penrhyn v. Robarts*, (1923) 1 Ch 143, *the King v. Hare*, (1934) 1 KB 354, *Rex v. Surrey (North Eastern Area) Assessment Committee*, Ex parte *Surrey County Valuation Committee*, (1948) 1 KB 29 at p. 32: (1947) 2 All ER 276 at p. 279 are cited), the heading cannot restrict its scope but must yield to it; or, in other words, the reference in the "heading" must be read in an extended way in the light of and in consonance with the enacting part. In the premises, it is fair to hold that the heading "summary procedure on negotiable instruments" is only a convenient mode of expressing the procedure in all suits, referred to in the enacting part, that is, Rule 2 of the above order, and should be so read. It is interesting to note here that the Negotiable Instruments Act itself deals also with non-negotiable instruments (Vide e.g. Sections 4 and 5 in the light of Section 13 and Section 98(1)(f)) and it cannot certain be contended that it does not (Vide *Subramanya Tevan v. Arunachala Tevan*, 18 Mad LJ 186). The decision of this Court in *Satya Priya Ghoshal v. Govinda Mohan Roy* 14 Cal WN 414, is not an authority to the contrary. It held, - and held only, - may be not quite correctly, - that the promissory note there was not one u/s 4 of the Act and, therefore, Section 28 did not apply. Nothing more should be read in or into this decision, so far as the above Act, is concerned. The scope of a statute is not necessarily restricted by its title or description. It depends upon its enacting parts. Similarly, the scope of a part of statute, also, is not necessarily, determined by its heading or description but depends on its enacting provisions. This confirms and reinforces the aforesaid construction of the scope of Order XXXVII of the Code. Incidentally speaking it may be stated here that a similar view of the scope of this Order was taken by P.B. Mukharji, J. in *Ambalal Purusottamdas and Co. Vs. Jawarlal Purusottam Dave and Others*, .

30. In the above view, Order XXXVII would cover, inter alia, all suits on bills of exchange, that is, suits on all bills of exchange, negotiable or non-negotiable. This is sufficient for the rejection of the first part of Mr. Sen's above argument.

31. The second part of Mr. Sen's said argument also fails for a similar reason. The description "suits on negotiable instruments" in the notification in question

is, obviously, referable to the heading of the Order, which as we have seen above, is only a convenient mode of expressing the procedure in suits, referred to in the enacting part (Rule 2(1)), including suits on all bills of exchange, - negotiable and non-negotiable. The context is plain and any other view would be unreasonable. Prima facie, also, - and there is nothing to indicate the contrary, - the Notification in question extended the whole of the Order (O. XXXVII) to the local City Civil Court. In the premises, it is not necessary for me to examine whether it is permissible for the State Government under Order XXXVII of the CPC to extend a part of the said order to certain Courts. I should not, however, be taken to subscribe to the view that such part-extension is not permissible. Upon the matter, I reserve my opinion for the present. As I have said, however, the phrase "suits on negotiable instruments" in the Notification in question should, in the context of the heading of the Order, receive the interpretation that, in view of the enacting part of the statute (Vide Rule 2), it should include suits on all bills of exchange, - negotiable or non-negotiable. Indeed, it seems to me that the words "negotiable instruments" in the above phrase in the said notification has been borrowed from the heading of the aforesaid Order XXXVII of the Code and the said phrase in question ("suits on negotiable instruments") in the aforesaid Notification, in the context of the reference to Order XXXVII of the Code therein, is only a convenient mode of expressing all suits, covered by the said order in terms of its enacting part (Rule 2), which is clear enough to comprehend all suits on all bills of exchange, irrespective of any element of negotiability as, obviously in law, bills of exchange may well be non-negotiable too (Vide Section 13(1) Explanation (i) of the Negotiable Instruments Act). The second part of Mr. Sen's above argument would also, therefore, fail and this Rule must be discharged.

32. In the premises, I agree that this Reference should be answered by discharging the Rule. I agree also that, in the circumstances before us, there should be no order for costs either in the Rule or in the Reference.

33. Before concluding, I deem it necessary to make two other observations. The first is that the rejection, by the Registrar of the City Civil Court, of the Defendant's application for time to apply for leave to defend the suit was not proper, as it seems to me that, under the rules of that Court (Vide, in particular, Chapter 3 of the said Rules, which is particularly relevant on this point), such applications cannot be disposed of by the Registrar but have to be placed before the Judge or the Court. That, however, is not material in the instant case, as the matter ultimately went to the Court and as, further, as I have held above, the Court had no power to grant the above application. In the second place, I must guard myself by saying that, although I have held above that, under the prevailing law, the Defendant's application for "leave" under Rule 3 of Order XXXVII, "to defend the suit" was rightly rejected by the Court below on the ground of limitation, nothing in this judgment will prejudice the Defendant in his rights, if any, under Rule 4 of the said Order (Vide, in this connection, Madhub Lal Durgur's case ILR 23 Cal 573, (supra), See also Quazie Mahumdar's case, 5

Cal WN 259 (supra) and 53 Cal WN 192, (supra).