
(1960) 02 GAU CK 0002
In the Gauhati High Court
Case No : First Appeal No. 15 of 1955

Mohanlal Malpani	Vs	APPELLANT
The Loan Company of Assam Ltd.		RESPONDENT

Date of Decision : 26-02-1960

Acts Referred:

Banking Companies Act, 1949 — Section 37, 37(1), 56
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6
Companies Act, 1913 — Section 153, 153(1), 153(5), 168, 186
Contract Act, 1872 — Section 50
Negotiable Instruments Act, 1881 (NI) — Section 13, 14, 31, 74, 84
Provincial Insolvency Act, 1920 — Section 46
Transfer of Property Act, 1882 — Section 130, 130(1)

Citation : (1960) 02 GAU CK 0002

Hon'ble Judges : C.P. Sinha, C.J;G. Mehtrotra, J

Bench : Division Bench

Advocate : S.M. Lahiri, General, G.R. Barua, H. Goswami and B.M. Goswami, for the Appellant; S.K. Ghose and P. Choudhuri, for the Respondent

Final Decision : Allowed

Judgement

G. Mehtrotra, J.—This is Defendant's appeal arising out of a suit for recovery of Rs. 22,711/10/- . Originally the suit was filed by the Bank of Assam limited but subsequently the plaint was amended by an order dated 25-7-1954 and in place of the Bank of Assam Ltd., the Loan Company of Assam Ltd. was substituted. The Defendant had an account with the Plaintiff bank. The account commenced on 24-2-1943 with a loan of Rs. 1,500/- taken by the Defendant from the Plaintiff bank. From time to time the Plaintiff took the amount and had been depositing money in the account. The Defendant had transaction with the Plaintiff till 15-9-1950, on which date there was a balance of Rs. 20,265/2/- in favour of the bank.

The present suit had been brought by the Plaintiff for recovery of the aforesaid amount with interest till 31-5-1952. In the plaint it was alleged that the interest

was calculated at six per cent per annum with monthly rests. The Defendant on 31-12-1949 acknowledged and confirmed his liability. The Plaintiff by a registered notice in May 1952 demanded the amount of balance from the Defendant. In paragraph 6 of the plaint it is alleged that the Plaintiff bank was functioning under a scheme sanctioned by the Hon''ble High Court and had to meet the demand under the said scheme.

2. In the written statement the Defendant took up the plea that nothing was due to the Plaintiff from the Defendant. The Defendant had to his credit a sum of Rs. 3,746/3/9 in his account in the Calcutta Branch of the said Bank and it was urged by the Defendant that the Plaintiff failed to credit his account with the aforesaid sum. He further alleged that he holds fixed deposit of Rs. 920/7/3 in savings bank account, a cash certificate of Rs. 100/- and a Provident Fund deposit of Rs. 350/- in the name of minor son Gobinda with the Plaintiff bank, which he had asked the Plaintiff to adjust, but the Plaintiff failed to credit the aforesaid amounts to his overdraft account.

The Defendant further contended that he had an account in the name of Tararam Hitram with the Plaintiff bank operated upon by him and a sum of Rs. 319/14/9 remained to the credit of the said account. A cheque was issued by the Defendant dated 12-8-1950 in favour of the Plaintiff for the aforesaid amount. There was another account in the name of Ramkishan Ramgopal which was also operated upon by the Defendant and on the 13th August 1950 the Defendant issued a cheque for Rs. 62/- in favour of the Plaintiff bank in respect of the aforesaid amount, which the Plaintiff failed to credit in his overdraft account. The Defendant further states that he sent a number of cheques mentioned in the schedule attached to the written statement valued at Rs. 18,181/14/9 to the Plaintiff to adjust his overdraft account and the Managing Director agreed to adjust the said amount but subsequently it was refused.

He further stated that Sri Goda Thakuria had a fixed deposit of Rs. 12,000/- with the Plaintiff bank. This deposit was transferred for consideration to the Defendant and the Defendant with the fixed deposit receipt sent a letter of request to the Plaintiff bank to adjust the said amount to the Defendant's overdraft account. Sri Goda Thakuria also intimated the bank about the assignment and asked the bank to adjust the said amount against the overdraft account of the Defendant. The fixed deposit had matured and Sri Goda Thakuria had also sent a discharge receipt to the Plaintiff through the Defendant. The amount of interest charged was also challenged.

In the schedule the Defendant showed six items of payment," namely, a cheque on Calcutta Branch for Rs. 130/-, a cheque on Calcutta Branch for Rs. 1,070/-, a cheque on Calcutta Branch for Rs. 3,100/- a cheque on Calcutta Branch for Rs. 1500/-, two cheques on Jorhat Branch for Rs. 319-14-9 and Rs. 62/- respectively and fixed deposit amount of Rs. 12,000/-, which, the Defendant alleged, were not credited to his overdraft account.

3. The trial Court allowed set off to the Defendant to the extent of Rs. 3,746-3-9, the amount standing to his credit in the Calcutta Branch and the sum of Rs. 920-7-3 of the savings bank account in his name, but refused to grant him credit of Rs. 100/ -, the amount of the cash certificate and the other amounts claimed in the written statement. The main ground on which the set-off was refused was that the bank functioned regularly till 23-6-1950 and thereafter the scheme of arrangement between the creditors and the bank was proposed. An application "was filed before this Court u/s 153 of the Indian Companies Act, 1913.

The scheme was sanctioned on 19-4-1951 and according to the Court below the Defendant could only get credit in respect of the amounts due to him from the bank till 23-6-1950 and for any amount in respect of which he could claim to be a creditor after 23-6-1950 he was not entitled to get a set off, as granting of such a set off will amount to the payment in full of some of the creditors in preference over the other creditors. The other contentions raised by the Defendant with respect to the interest and the proof of the account were repelled by the Court below and a decree to the extent of Rs. 18,044/15/4 was granted with full costs. Future interest at rupees four per cent per annum was granted on the decretal amount including the cost of the suit from the date of the decree till realisation.

4. The points urged by the Defendant before the Court below have been reiterated before us. I shall first take up the question of the set off claimed by the Defendant in respect of a sum of Rs. 12,000/ -, the amount of the fixed deposit of Sri Gadadhar Thakuria with the Plaintiff bank. On 25-4-1949 the bank received a sum of Rs. 12,000/- from Sri Gadadhar Thakuria for being kept in fixed deposit and on the same date a receipt was issued acknowledging the receipt of the aforesaid amount and specifying that the deposit was repayable after twelve months with interest at the rate of three and half per cent per annum.

This deposit matured on 25-4-1950. On 19-6-1950 Sri Gadadhar Thakuria wrote a letter to the Plaintiff bank directing the bank to put the amount of the fixed deposit with interest to the credit of the current account of the Defendant under advice to him. This letter is marked Ext. 1. On the same date Sri Thakuria sent another letter to the bank stating therein that for valuable consideration received he authorised Sri Mohanlal Malpani, the Defendant, to receive payment of his fixed deposit receipt for Rs. 12,000/- due on 25-4-1950 with interest. He further stated therein that he fully discharged the fixed deposit receipt in his favour and asked the bank to make payment of the said amount to the Defendant. A due discharge was given to the bank by writing on the back of the fixed deposit receipt. Both, these letters along with the receipt appear to have been sent to the bank by the Defendant on 12-8-1950 and the bank was asked to adjust this amount towards the overdraft account of the Defendant.

This will appear from the letter of the agent sent to the Defendant on 21-9-1954 after the present suit had been filed, which is marked Ext. B. By this covering

letter the fixed deposit receipt was returned to the Defendant along with some other cheques from the Managing Director. In this letter it is stated that the deposit receipt was sent to the bank by the Defendant by the letter dated 12-8-1950 for adjustment. The Defendant's case is that the two letters written by Sri Thakuria to the bank along with the discharge given by him of the fixed deposit amounted to the assignment of his claim as against the bank to the Defendant and on 12-8-1950 when the Defendant sent the two letters and the receipt duly discharged to the bank, the bank was paid Rs. 12,000/- towards the discharge of the Defendant's liability under the overdraft account and it is not open to the bank now to refuse to recognise the said payment. There was no bar on 12-8-1950 to the bank making an adjustment in the Defendant's overdraft account of a sum of Rs. 12,000/ -.

5. The argument of the bank before the Court below and before this Court is that on the 12-8-1950 there was an order of this Court u/s 37 of the Indian Banking Companies Act under which the bank was prohibited from making payment to any creditor and if the bank had accepted the assignment and credited Defendant's account to the extent of Rs. 12,000/- it would have virtually amounted to payment to Sri Thakuria, who was on that date a creditor of the bank. Such a payment would have been in violation of the order of this Court and the bank thus was right in not crediting the Defendant's Overdraft account with the sum of Rs. 12,000/ -

It is further contended that subsequently an application was made u/s 153 of the Companies Act to this Court by which a meeting was asked to be called of the creditors and shareholders to approve of a scheme of arrangement of payment to the creditors, The scheme was subsequently sanctioned by this Court on 19-4-1951 and thus the rights of the creditors and the bank could thereafter be regulated by the scheme. The Defendant therefore, even today cannot ask this Court to be paid the sum of Rs. 12,000/- as that would be making payment to a creditor against the provisions of the scheme.

6. The question has to be examined from two different standpoints, -- firstly as to what were the rights and liabilities of the parties with regard to this amount on 12-8-1950 and what was the effect of the order passed by this Court which was in force on 12-8-1950 granting a moratorium to the bank; and secondly what is the relation of the parties on the date of the suit and if the Defendant is a creditor on the date of the suit in respect of the sum of Rs. 12,000/ -, what will be the effect on his right to claim a set off in respect of the aforesaid amount of the scheme sanctioned by this Court on 19-4-1951.

The Plaintiff bank has produced the extracts from the ledger account of Sri Gadadhar Thakuria dated 6-3-1954 to show that the sum of Rs. 12,000/- is still shown in the credit side in his account. This entry has been filed by the Plaintiff to show that Gadadhar Thakuria still remains a creditor to the bank to the extent of Rs. 12,000/- and he still has got a right to proceed under the scheme and to claim payment in accordance with the terms of the scheme. It is contended that

the Defendant even assuming that he is an assignee, cannot claim a higher right than that of Sri Thakuria and the Defendant's right if any, is to proceed as a creditor under the scheme. Defendant is as much bound by the scheme as his assignor Sri Thakuria. It is also contended though not very seriously, that there had been no assignment of the right to recover the amount by Sri Thakuria in favour of the Defendant.

7. Section 130(1) of the Transfer of Property Act provides as follows:

130. (1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save when; the debtor or other person is a party to the transfer or has received express notice, thereof as hereinafter provided) be valid as against such transfer.

This section clearly lays down that no particular form of writing is required for an assignment and that the assignment becomes effective as soon as the document is signed. The effect of the proviso only is that till the debtor has notice of such an assignment, any dealing between him and the assignor will be valid as against the transfer. If therefore the two letters sent by Sri Thakuria to the bank constitute an instrument in writing, the assignment became effective from 19-6-1950. Till the copy of these letters had been sent to the bank on 12-8-1950 if the bank had made any payment to the assignor, such payment could not have been defeated by the assignment.

But after the bank had been intimated that the right to collect the amount had been transferred to the Defendant, the bank could not say that the assignment was not effective. The bank also in view of the two letters sent by Sri Thakuria, cannot say that these writings do not constitute an assignment within the meaning of Section 130 of the Transfer of Property Act. The Defendant therefore, in our opinion was substituted by the assignment in place of Sri Thakuria. The question therefore, to be considered is whether the Defendant on 12-8-1950 could have asked for the adjustment of the said amount in his overdraft account.

8-9. In order to appreciate the points it is necessary to refer to certain provisions of the Indian Companies Act, the Banking Companies Act and the various orders passed by this Court. It should be pointed out at the very outset that the case does not appear to have been fought in the Court below properly. All the relevant materials were neither placed before the Court below nor the Court below

appears to have appreciated all the points arising in the case. The Plaintiff besides making a brief reference to the scheme sanctioned by this Court in paragraph 6 of the plaint, has nowhere mentioned the fact that any order had been passed by the High Court u/s 37 of the Indian Banking Companies Act, What is the nature of the scheme sanctioned by; the High Court has also not been set out in the plaint.

The Plaintiff had full knowledge of the fact that the documents relating to the, fixed deposit amount and various other cheques had been received by the bank on 12-8-1950 for being adjusted in the Defendant's account. By a letter dated 21-9-1954 these were returned. On the date of the suit therefore the Plaintiff had full knowledge of the fact that these documents had been with the bank. But in the plaint there is no reference made to the fact that the Defendant had in fact sent these documents with a request that the amount be adjusted towards his overdraft account. If the Plaintiff was debarred under any orders of this Court or the scheme to credit those amounts in the Defendant's overdraft account, he should have mentioned this fact in his plaint. The Defendant also in his written statement has not clearly stated the grounds on which he claimed a set off in respect of these amounts.

It was contended by the counsel for the Plaintiff Respondent that the parties accepted the position, that there was an order by this Court granting moratorium to the bank followed by a scheme. But when the Defendant is sought to be deprived of his right to claim set off on the basis of the scheme, it was necessary that the scheme as sanctioned by this Court should have been placed before the Court; below so that it could interpret the document properly. The orders of this Court and the scheme have however, with the consent of the parties, been placed before us and although we very much deprecated the manner in which the case was fought in the Court below and the approach of the Court below, we have accepted the documents as a part of the record.

10. The Court below observed that "the bank functioned its regular transactions till 23-6-1950; so this scheme was sanctioned by the High Court on, 19-4-1951. So the Defendant is entitled to set off his amounts for which he is a creditor to the bank against his dues to the bank in all the accounts with the bank till the date of 23-6-1950." It is difficult to appreciate what the Court below means by saying that the bank stopped functioning regularly from 23-6-1950.

Iqbal Jahan P.W.1 who was an agent of the bank at Jorhat branch during the period from 1941 till 23-6-1950, has stated that the present Loan Company Plaintiff was previously styled as the Bank of Assam, the Bank of Assam was from 1941 till 23-6-1950 and it functioned during this period. The bank closed its regular business since 23-6-1950. What he meant by this statement was that when the bank was converted into the "Loan Company" on 23-6-1950, it stopped carrying on its regular banking business. In June 1950 an application was filed in this Court u/s 277-N of the Indian Companies Act read with Section 37 of the Banking Companies Act (X of 1949) which was disposed of by an order

of this Court dated 26-6-1950. Section 37(1) of the Banking Companies Act provides as follows:

37(1) The High Court may on the application of a banking company which is temporarily unable to meet its obligations make an order (a copy of which it shall cause to be forwarded to the Reserve Bank) staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it shall think fit and proper, and may from time to time extend the period so however that the total period of moratorium shall not exceed six months." Section 277-N of the Indian Companies Act is in the same terms. By Section 56 of the Banking Companies Act read with Second Schedule, the whole of part XA of the Indian Companies Act 1913 was repealed and thus Section 277-N stood repealed by the coming in force of the Indian Banking Companies Act. It was therefore not necessary to refer to Section 277-N in the application. this Court on 26-6-1950 passed an order granting an interim moratorium and ordered that the commencement and continuance of all actions and proceedings against the company shall be stayed till 24-8-1950 on the following terms and conditions. Condition 3 on which the "commencement and continuance" of the actions was stayed is as follows:

The Company shall not make any payment to any depositor during the period of the interim moratorium exceeding 25 per cent of the amount lying to his credit in his account or Rs. 2500/- whichever is greater provided that in the case of depositors whose dues do not exceed Rs. 100/- the amount may be paid in full.

The case was fixed for hearing on 24-8-1950 and it appears from the subsequent order of this Court dated 31-8-1950 that it was heard on that date. There is, however, nothing in the order sheet to indicate that the operation of the order [passe] on 26-8-1950 was to continue even after 24-8-1950 till the final disposal of the application. In the order of 26-6-1950 it was expressly mentioned that the actions and proceedings were stayed till 24-8-1950. On 31-8-1950 the interim order was rescinded and the application was dismissed.

11. The contention raised on behalf of the Defendant is that there was nothing in the order of 26-6-1950 which debarred the bank from giving credit to the amount of Rs. 12,000/- in the overdraft account of the Defendant. The order of this Court only stayed the commencement or continuance of all actions and proceedings against the company, but there was no bar to the bank making book adjustments and to receive payments from their debtors. It is contended that if the Defendant had gone on 12-8-1950 with a cash amount of Rs. 12,000/-, there was no bar to the bank accepting that amount in liquidation of Defendant's debt under the orders of this Court.

As against this the contention of the counsel for the Plaintiff is that no doubt expressly there was no bar to the bank receiving any amount paid by its debtor, but condition 3 would have been violated if the amount had been accepted on 12-8-1950. Condition 3 which I have already referred to, prohibited the bank

from making payment to any of its depositors exceeding 25 per cent of the amount lying to his credit. It is contended that if this sum of Rs. 12,000/- was accepted and credited to the account of the Defendants it would have amounted to the payment of the entire debt of Sri Thakuria, the assignor of the Defendant, which could not be done under the aforesaid condition.

12. To my mind there are two obvious fallacies in the argument of the counsel for the Plaintiff. Clause 3 only granted protection to the bank against any action on condition that it did not pay anything more than 25 per cent of the debt but there was no bar to any payment up to 25 per cent of its debts. The effect of Clause 3 was not to convert the obligation of the bank to pay its creditors into a discretion. Clause 3 to my mind, only prohibited the bank from making payment beyond 25 per cent of its liability, but within 25 per cent the obligation to pay its creditors on demand existed. It cannot be argued that beyond 25 per cent there was a complete prohibition and upto 25 per cent the order left it to the discretion of the bank to make payment or not to make payment.

. The bank on 12-8-1950 on demand by its creditor was bound to pay up the money to the creditor and if there had been no order of this Court, there was an obligation on the bank on demand to pay up his creditor in full on 12-8-1950. The effect of Clause 3 to my mind, is only to restrict the obligation of payment to 25 per cent of the debt. Besides this there was no bar to the bank recognising the assignment. By only recognising the assignment, the bank would have accepted the Defendant as its creditor in place of Sri Thakuria. The debt of the bank would have remained intact, only the creditor would have been changed and in this view of the matter it could not be said that the recognition by the bank of the assignment would have amounted to payment to Sri Thakuria.

It would have only amounted if at all, to a substitution of the Defendant in place of Sri Thakuria. I do not think that it could be seriously urged that the effect of the order of this Court was that any transfer by the creditor of the bank would be void. Any creditor of the bank had a right to transfer his rights to a third party and if the transfer was other wise a valid transfer, it would be effective irrespective of the fact whether it was, or was not, recognised by the bank. The Defendant became under the valid assignment the creditor of the bank to the extent of Rs. 12,000/- and from the date of the notice of "assignment to the bank, the assignee could enforce his rights against the bank to the extent of Rs. 12,000/ -.

The liability of the bank to the assignor stood discharged and substituted by its liability to the assignee. The liability of the bank remained and it cannot be said that the assignment was illegal or ineffective because of condition 8 imposed by this Court under its order dated 26-6-1950. If the Defendant became a creditor of the bank under the assignment, the relationship of creditor and debtor came into existence between the Defendant and the Plaintiff in respect of this amount of Rs. 12,000/ -.

In this view of the matter the Defendant could claim a set off in respect of this amount at least between 24th and 31st August 1950, the period during which the stay order by this Court was not operative. On 12-8-1950 the Defendant had sent instructions to, the bank to, credit this amount in his overdraft account. If the amount had been credited in the overdraft account of the Defendant on 12-8-1950 it may have amounted to payment of the entire debt of the Defendant himself who had stepped into the shoes of the assignor but there was no bar to giving credit to the Defendant in respect of tin's amount after 24-8-1950 when the order of this Court was vacated.

13. The contention of the counsel for the Plaintiff is that the application u/s 153 of the Indian Companies Act was filed on 31-8-1950 and although in the order of 26-6-1950 this Court had expressly said that the stay order was to be in operation till 24-8-1950, in the order of 31-8-1950 it is stated that the interim order is rescinded which means that till 31st August the stay order remained operative. Thereafter the application u/s 153 of the Indian Companies Act was filed in this Court and the rights and liabilities of the creditors of the bank could thereafter be regulated by the scheme.

On 31-8-1950 the applicant prayed for a direction that the meeting of the creditors and the shareholders be held to consider the proposed scheme of arrangement between the creditors and the bank. By its order dated 31-8-1950 the Petitioner bank was directed to convene separate meetings of the creditors and share-holders on 30-10-1950 at its branch office at Gauhati to consider and to approve with or without modification the scheme of arrangement. Directions were then given in the order as regards the appointment of the President of the meeting.

The notice of the meeting was directed to be sent to the creditors and shareholders of the company at their respective addresses as recorded in the books of the company under certificate of posting. By Clause (h) of the order it was directed that the commencement and continuance of all suits or proceedings, against the company were stayed till the disposal of the application, subject to the proviso that any party feeling aggrieved by the order had a right to move this Court. There is nothing in the order to the effect that this stay order was granted on condition that the bank undertook not to pay its creditors during the pendency of this application. The scheme was, ultimately sanctioned on 19-4-1951.

14. The actual scheme approved by the High Court on 19-4-1951 is not before us. But the scheme which was approved in the meeting of the creditors and share-holders is before us and the relevant clauses of the scheme which may have to be referred to are as follows:

Clause 10 provides that all other deposits with the bank except those mentioned in Clauses 8 and 9 shall be payable in the following manner commencing one year after the date of the sanction of the scheme:

- (a) 10% in the first year of the payment.
- (b) 10% in the second year of the payment.
- (c) 15% in the third year of the payment.
- (d) 20% in the fourth year of the payment.
- (e) 20% in the fifth year of the payment. Clause 11 lays down that "interest on fixed deposits accrued and unpaid upto 30-6-1950, shall be paid within one year from the date of sanction of the scheme. Thereafter, no deposit will carry interest."

Clause 13 provides that "all the assets of the Bank on the date of sanction of the Scheme shall be kept in a separate fund named as "Closed Fund" for the purpose of meeting the liabilities to the creditors as specified above. All realisations, of advances, investments and Book Debts shall be credited to the "Closed Fund".

Clause 15 provides that "the Bank shall start its normal business of all descriptions from the date of the sanction of the Scheme by the Hon"ble Assam High Court. For this purpose the accounts of the Bank in respect of the new business transacted thereafter shall be kept separate from the "Closed Fund" as stated above.

15. From the above discussion it is clear that there was an assignment of the sum of Rs. 1.2,000/- in favour of the Defendant on 19-6-1950, which was notified to the bank on 12-8-1950. The Defendant therefore, became a creditor of the bank in respect of this amount on 12-8-1950, that relationship, continued right up to the date of the suit. It also cannot be disputed that at any rate after the order of 26-6-1950 granting moratorium to the bank had been rescinded on 31-8-1950, there was no bar to the Defendant putting up a claim of set off if the bank had brought a suit for recovery of its dues as against the Defendant. I have already quoted the order of this Court dated 31-8-1950 passed on the application u/s 153 of the Indian Companies Act.

The order will indicate that there was no prohibition on the bank to make any payment. It had only stayed actions and proceedings against the bank. If the bank therefore had brought a suit for recovery of its dues against the Defendant after 31-8-1950, the Defendant had an unanswerable claim of set off in respect of the sum of Rs. 12,000/-. The only question in these circumstances to be examined will be as to what will be the effect of the scheme which was sanctioned by this Court on 19-4-1951 on the right of the Defendant to claim a set off which he could have validly claimed on 31-8-1950 against the bank. Before we take that question it is pertinent to examine some of the authorities as to the rights of a Defendant to claim the set off against the Plaintiff.

16. Under Order 8 Rule 6 of the CPC in a suit for the recovery of money any Defendant who holds the position of a creditor as against the Plaintiff, can claim a set off in respect of his dues as against the claim of the Plaintiff. If the parties

have mutual relationship of creditor and debtor in respect of two items, it is open to the Defendant to claim a set off in respect of his credit in a suit under Order 8 Rule 6, CPC On 31-8-1950 if therefore, under the assignment the Defendant was a creditor of the bank to the tune of Rs. 12,000/-, he could claim a set off under Order 8 Rule 6 of the CPC as against the dues of the bank. In the case of *Mehr Chand v. Amritsar Bank* reported in 28 Ind Cas 975 : AIR 1915 Lah 204 the bank which was being wound up under the orders of the District Judge, brought a suit through its official liquidators for the recovery of a sum of Rs. 1,087/- due from the Defendant.

The Defendant claimed a set off under Order 8 Rule 6, CPC in respect of a sum due to him from the bank. The Defendant had prior to the winding up in fixed deposit with the Company a sum of money which more than covered the amount of his debt to the company. But at the date of the winding up this deposit had not matured. Before the suit the deposit, however matured and in the ordinary course thus the amount would have been payable to the Defendant by the bank. The lower appellate Court had held" that the Defendant was not entitled to claim a set off in respect of his fixed deposit amount. On second appeal it was held by the Punjab Chief Court that the Defendant was entitled to claim a set off. It was observed that the rule in England is well established that in actions by the company on the one hand and non-members on the other, the ordinary rules of set off are applicable. In Russel's Indian Companies Act, 3rd Edition, at page 469, the following passage occurs:

There is nothing in the Act which expressly relates to set-off between a Company and non-contributories, but it has long been established that when a Company is being wound up, whether an action is brought by the Company or a proof is carried in by a creditor of the Company in the winding-up, a set-off of a liquidated sum is admissible." Dealing with the argument that this rule amounts to an undue preference of a debtor-creditor over mere creditors, it was observed by the Punjab Chief Court in 28 Ind Cas 975 : AIR 1915 Lah 204 (*ibid*) as follows:

It is urged, however, that this rule is inequitable and in effect amounts to an undue preference of a debtor-creditor over mere creditors, inasmuch as the former by means of this rule practically succeeds, or may in certain cases succeed, in getting the full value of the debt owed to him by the Company, whereas ordinary creditors of the same Company can get payment only *pro rata*. But there is a distinction between the case of a creditor demanding his money from a Company in liquidation and the case of a debtor-creditor resisting a claim made upon him for payment of his debt to such Company, and in this connection we would refer to the judgments of Lord Esher, M.R. and Bowen, L.J. in *Sovereign Life Assurance Co. v. Dodd* (1892) 2 Q.B. 573.

17. In the case of *Mersey Steel and Iron Co. v. Naylor, Benzon, and Co.* reported in (1882) 9 Q. 15. 648, it was hold that in an action by a liquidator for a debt, the Defendant may set off a claim for unliquidated damages, and may without, leave of the Court in the winding-up raise the defence by counter-claim.

18. In the case of *In re In Re: Benares Bank Ltd. Benares Shri Nath Shah Official Liquidator*, the question arose in a different manner. An application was made u/s 186 of the Companies Act by the Liquidator before the High Court for obtaining a payment order as against one Sri Nath Sah who was a contributory in respect of unpaid call money of the share. The Liquidator had claimed payment order in respect of the overdraft account of Sri Nath. Sri Nath stated that he had deposited a sum of Rs. 5,000/- in fixed deposit.

The total amount due by the bank to him upon his deposit was Rs. 5,117/- and this amount was given as a security for his overdraft account. He claimed a set off as against his overdraft account. If credit was given to him in respect of this amount, nothing would be found due to the company and it was urged by Sri Nath that in these circumstances the Liquidator was not entitled to any payment order u/s 186 of the Companies Act. It was contended by the Liquidator in this case that Sri Nath being a contributory, he was not entitled to claim a set off except in accordance with the proviso to Section 186(2) which is in the following terms:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

It was contended by the contributory that Section 186(1) of the Indian Companies Act which gave power to the Court to grant a payment order in favour of the liquidator against the contributory, was not mandatory and if the Court found that the contributory could claim a set off in a suit in respect of a certain amount, the Court can refuse to grant a payment order u/s 186(1). This contention was accepted by the Full Bench of the Allahabad High Court. The contention of the liquidator was that by refusing to grant an order u/s 186 of the Companies Act the Court would be defeating the intention of the legislature which is to deprive a contributory of the right to claim a set off. This contention however, was also repelled. Dealing with this argument it was observed at page 834 of the report as follows:

We would observe at this stage that the right of set-off is a valuable right recognised by the provisions of the Civil Procedure Code. A creditor's right of set-off in bankruptcy proceedings is preserved by Section 46 of the Provincial Insolvency Act and in Liquidation Proceeding by Section 229 of the Indian Companies Act which is in terms identical with Section 262 of the English Companies Act. Now if, as was contended by learned Counsel for the liquidator, the intention of the legislature had been to deprive a contributory of the right of set-off, the legislature would without doubt, in our judgment, have enacted such a far-reaching provision in clear and specific terms. There is nothing in Section 186 of the Companies Act, in our view, which can reasonably be construed as a general deprivation of contributories to companies in liquidation of the right of set-off. That is our view upon a consideration of the general principles of set-off

and of the statutory provisions to which we have referred,

This passage may be relevant when construing the terms of the scheme.

19. In the case of *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 their Lordships of the Privy Council dealing with the scope of Section 186 of the Indian Companies Act had observed as follows:

A, debtor who is not a contributory is untouched by it. Moneys due from him are recoverable only by suit in the company's name. It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. The power of the Court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the Respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys.

This passage also indicates that the right of a debtor to claim set-off of any moneys due to him from the bank in a suit brought by the bank under the provisions of the CPC was never affected by the provisions of the Indian Companies Act. There is nothing in Section 153 of the Indian Companies Act which indicates that by merely making an application under that section the right of a debtor to claim set-off is wiped off.

20. Mr. Ghose who appears for the Respondent, contended that the fixed deposit receipt is not negotiable and any endorsement on the receipt to the effect that the amount should be paid to the Defendant will not constitute an assignment. Reliance is placed in support of this proposition on the case of *Manoel Joao Dias v. Hongkong and Shanghai Banking Corporation* reported in ILR 14 Bom 498. In this case the Plaintiff had deposited certain sum with the Defendant bank at Bombay as a loan for a year, to bear interest at the rate of four and a half per cent. He was given a receipt for the said sum which stated that the money was "repayable here on production of this receipt". It was held that the receipt contained the terms of the contract of loan between the Plaintiff and the Defendant, and that the production of the receipt was a condition precedent to the repayment of the money. This case, to my mind, does not lay down that there cannot be an assignment of the amount due under the fixed deposit receipt.

21. The next case referred to is *K. Anantaraman v. James Voice Pirrie and Cyril Gill* reported in 1939 CWN 1096 : AIR 1940 Mad 157. It was held in this case that "a debt although not presently payable can be set off against moneys owing to a company in liquidation. If a debtor of the bank takes a valid assignment of a debt due by the Bank to a third party, then he is entitled to set off. Allowing such set off "would "not amount to a fraudulent preference." It was, however, held on the facts of that case that there was no valid assignment. The application claiming set off was opposed on two grounds, firstly that there was no valid assignment and secondly that if there was, to allow set off to the Defendant

amounted to a fraudulent preference. Gentle J. held that if he had found the assignment to be valid a set off would have been allowed in that case.

The endorsement on the fixed deposit receipt and the letters sent along with it were held not to constitute an assignment in writing within the meaning of Section 130 of the Transfer of Property Act. The letter which was sent in that case by the assignor to the bank was to the effect that the depositor had assigned her rights in the fixed deposit receipt to the applicant and authorised the company to apply the amount towards the applicant's loan account. In the present case the letter sent by the assignor to the bank was in the following term:

For valuable consideration received I hereby authorise Shri Mohanlal Malpani, Jorhat to receive payment of my fixed deposit receipt No. 0773 for Rs. 12,000/- (rupees twelve thousand) only due on 25-4-1950 with interest.

I have duly discharged the fixed deposit receipt in his favour. Please make payment of the same to him and oblige.

The first paragraph of this letter constitutes an assignment itself in writing of the deposit.

22. The next case referred to is Kisen Gopal Bogree Vs. L.J. Bavin, This case to my mind supports the contention of the Appellant. Some article was sold by the Eastern Machinery and Engineering Company Limited to M/s. Kilburn and Company, and the Engineering Company had to get Rs. 1,800/- from M/s. Kilburn and Company as the price of the article. The Company was alleged to have assigned the claim of Rs. 1,800/- to one Kisen Gopal Bogree who claimed the amount from the liquidator. The liquidator contended that even if an assignment was made it was a fraudulent preference On the part of the company and therefore invalid and secondly there was no valid assignment. There was an endorsement at the back of the bill against M/s. Kilburn and Company in the following terms: "Messrs. Kilburn and Co., kindly remit to Babu Kissen Gopal Bogree, who will collect on our behalf for and on behalf of the Eastern Machinery and Engineering Co., Ltd. Metcalf and Co., Securities". It was held that the endorsement did not constitute a proper assignment. It was observed as follows:

An assignment of a chose in action must be made by writing under the Indian Law, signed by either the transferor or his duly authorised agent, but, as stated above, no particular form of words seems to be necessary provided that the words used are sufficiently indicative of the transferor's intention to assign the chose in action. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person: Brandt's (William) Sons and Co. v. Dunlop Rubber Co. (1905) ACC 454, Foll.

An order for payment of money is not the same thing as an assignment of the debt, but a direction in writing to pay the amount due on instrument endorsed on such instrument by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment is directed is a valid assignment within the meaning of Section 130: *Rama Iyer v. Veukatachellam Pallor* ILR 30 Mad 75, Foll.

Section 153(1) of the Indian Companies Act under which the application, was made before this Court provides that "where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs." Sub-section (5) of Section 153 provides that "the Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of."

The interim order was passed by this Court in accordance with Sub-section (5) of Section 153 of the Indian Companies Act on 31-8-1950. This order as I have already pointed out, does not prohibit the bank from making any payments to its depositors. It only stops the commencement or continuation of an, action. There was no bar to the recognition by the bank of the assignment. It is not stated that the notice of the meeting was given to the Defendant. The bank's own case is that the assignor's account was never debited by the sum of Rs. 12,000/- and he was shown all along as the creditor of the bank in respect of this sum.

The question therefore, of giving any notice to the Defendant- of the meeting as a creditor of the bank in respect of Rs. 12,000/- could not have arisen. Defendant, therefore, could not be bound by the scheme; nor could he be confined to the realisation of his amount under the scheme. The Defendant in support of his contention that he was not bound by the scheme as by an assignment dated 19-6-1950 he was substituted in place of Sri Thakuria as a creditor and he was entitled to a notice of the meeting which was not given to him, relies upon the case of *Chhunnu Lal v. The Bank of Upper India Ltd.* Delhi reported in 40 Ind Cas 904 : AIR 1917 Lah 586.

The facts of this case were that one Chhunnu Lal had a deposit of Rs. 4,000/- in the Bank of Upper India payable on 10-10-1914. On 3-9-1914 he borrowed a sum of Rs. 2,000/- on the security of the above deposit. On 8th October the bank suspended payment and on the 12th and 13th October the Plaintiff wrote to the bank to pay him the balance of his deposit amount after deducting Rs. 2,000/- borrowed by him. The bank replied to him that it had stopped business and no action could be taken in pursuance of that direction.

On 14-7-1915 the bank re-started business under a scheme sanctioned on the 2nd June by the High Court u/s 153 of the Indian Companies Act, by which debentures and preference shares were to be issued to all "fixed depositors" in lieu of their deposits, Chhunnu Lal brought a suit for a declaration that his liability on the pro-note had come to an end and for an injunction that the bank be directed to make entries in the books accordingly. The Defendant bank contended that the Plaintiff was only a creditor in respect of the entire amount of Rs. 4,000/- and the loan taken by him could not be discharged. He was liable to pay the entire amount of loan with interest thereon. In this case the contention of the bank was not accepted by the Punjab Chief Court. It was observed as follows:

Upon the merits there can be no manner of doubt that on 10-10-1914, when the deposit matured, the Defendant Bank was not entitled to call upon the Plaintiff to pay the debt due on the pronote considering that it had already in its possession Rs. 4,000/- belonging to the Plaintiff and payable to him at once.... Whether we apply the rule of set-off which finds expression in the C.P.C., of which the application to companies in liquidation has been recognised in a Division Bench judgment of this Court reported as 28, Ind Cas 975 : AIR 1915 Lah 204 or treat the case as one of payment, it is manifest and indeed it is not contested by the Defendant, that apart from the scheme sanctioned by the High Court in June 1915, the Bank could not have successfully maintained a suit for the recovery of Rs. 2,000....

The question then arises whether the scheme or arrangement sanctioned by the High Court altered the jural relations of the parties in such a way as to revive the debt due by the Defendant, which debt had to all intents and purposes ceased to exist. It is to be observed that the scheme applies only to the creditors and shareholders of the Bank, and this is clear from Section 153 of the Indian Companies Act, which enacts that if a majority in number, representing three-fourths in value of the creditors, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court be binding on all the creditors and also on the company.

Now, it seems to us that the arrangement could affect only those persons who were creditors at the time when the sanction was accorded by the Court, or at the time when the application u/s 153: was presented to the Court (if we apply the analogy of Section 168 relating to the date of the commencement of the winding up by the Court). At the latter date the Plaintiff's debt had come to an end, and he was a creditor to the extent of only Rs. 2,000, and the arrangement must be confined in its operation to his position as a creditor to that extent. We cannot accept the view that the operation of the scheme dates back to the time when the bank suspended payment.

On 12-8-1950, when the assignment was notified to the bank the debt of the Defendant to the extent of Rs. 12,000/- in the present case, stood discharged. The assignor ceased to be the creditor and there was nothing in the scheme

which gives a right to the bank to claim the revival of the debt of Rs. 12,000/- of the Defendant which stood discharged by the assignment.

23 The next case referred to is reported in (1892) 2 QB 573. The Defendant in that case had effected two policies of the insurance for 1000 l, each upon his own life with the Sovereign Life Assurance Company. The policies were to be effective till 7-5-1888. In April and June 1887 the Defendant obtained two 1 and of 570 l and 600 l, from the Plaintiffs upon the mortgage of the policies. In August 1887 a petition was presented for winding-up of the Plaintiff company and a provisional liquidator was appointed. The premiums were however paid by the Defendant on the policies up to May 1888, but the money was never paid to him. In July 1889 a winding-up order was made.

In April 1890 an arrangement under the Joint Stock Companies Act, 1870 was entered into between the Plaintiff company and the Sun Life Assurance Company when by it was provided that the policies of the Plaintiff company should be transferred to the Sun Company and that the holders of the policies in the Plaintiff company should be transferred to the Sun Company and that the holders of policies in the Plaintiff company should, in full satisfaction of all claims upon the Plaintiffs, accept certain reduced payments from the Sun Company. A meeting was called of the policy-holders and the arrangement was agreed to by the majority, but the Defendant did not give his assent. In June 1890 the Court sanctioned the scheme and in December 1890 the Sovereign Life Assurance Company brought a suit against the Defendant to recover the amount of the loan. The Defendant sought to set-off against the Plaintiff's claim the sums which, but for the winding-up, would have been payable to him on the policies.

It was held by the Court of appeal that the Defendant was entitled to the set-off. It was further held that the persons summoned to the meeting were the policy-holders of the company and no separate meeting was summoned of those whose policies had, as distinct from those whose policies had not, matured; that the insured persons whose policies had matured formed a distinct class of creditors from those whose policies had not matured; that a separate meeting of such class ought to have been: held under the Act in order to make the arrangement binding upon the members of that class; and that the arrangement did not, therefore, operate as a release by the Defendant of his claim against the Plaintiffs.

This case supports the contention of the Defendant in two ways, -- firstly that the Defendant as the creditor of the bank was entitled to a notice of the meeting before the scheme could be binding on him and secondly that the Defendant as the assignee of a fixed deposit which had, matured, was a creditor of a distinct, class from the other creditors of the bank. He was thus entitled to sit in a different meeting.

24. In the case of *Re T.H. Downing and Co., Ltd.*, reported in 1940-1 All ER 333, by, Court of Appeal it was held that a scheme of arrangement and reconstruction

must be construed as not altering existing rights unless the language of the scheme and the new articles of association giving effect to it are such as to compel that interpretation. There is nothing in the scheme which in any manner affects the right of the Defendant to claim a set-off.

25. Reference may be made to the case of Anukul Chandra Sen Gupta v. Serajganj Loan Office Co., Ltd. reported in 43 CWN 1181. In this case the suit had been brought by Serajganj Loan Office Company which was working under a scheme for recovery of certain money due on a mortgage bond executed by the Defendants. This bond was executed by the Defendants on taking a loan of Rs. 2,000/- . In April 1933 the amount due to the Plaintiff on the mortgage bond stood at Rs. 1098/- . Pro forma Defendant No. 6 had a current account with the Plaintiff company and he had to his credit in this account a sum of Rs. 1550/- .

Just before this time the Plaintiff company had embarked on a scheme of composition with its creditors. An application was made to the High Court in March 1933 and in April an order was passed for holding of the meeting of the depositor which was held on 21-5-1933 and, the arrangement was agreed to by the majority of the creditors. In June 1933 the scheme was sanctioned by the High Court and it came into operation with effect from 21-5-1933, the date when the scheme was adopted in the meeting of the creditors. On 20-5-1933 just one day before the meeting, pro forma Defendant No. 6 assigned for consideration his right to a sum of Rs. 1,105/- standing to his credit with the company to Defendants 1 to 5 who had borrowed the money on the mortgage bond. Notice of this transaction, was given to the Loan Company in June 1933.

The company refused to recognise this transfer and eventually the suit was brought for recovery of the amount due on the mortgage. The Defendants pleaded that they were entitled to get a set-off of Rs. 1,105/- which was assigned to them by the pro forma Defendant No. 6 against the money due on the mortgage loan. The contention of the Defendants was not accepted in this case. Justice Mukherjea dealing with the argument of Dr. Pal that the scheme framed u/s 153 of the Indian Companies Act would not stand in the way of the Defendants inasmuch as they constituted a separate class of creditors having interest different from that of the ordinary creditors and there was no separate meeting of the class of creditors to which these Defendants belonged, -- held that even assuming that, the creditors, who were also debtors, constituted a class by themselves and their conditions and interest were dissimilar to those of the ordinary creditors to make it impossible for them to meet together in a common platform, in the circumstances of the present case, this was of no assistance to the Defendants.

The circumstances were pointed out later and they were that the assignment was made only one day before the meeting was held; and the notice of the meeting had already been given, to the assignor. The other Judge Roxburg observed as follows:

There is no analogy here in the circumstances of bankruptcy and winding up such as are provided for in Section 46 of the Provincial Insolvency Act, 1920 and Section 47 of the Presidency Towns Insolvency Act, 1909, and are referred to in Krishna Chandra Bhoomick Vs. Pabna Dhanabhandar Co. Ltd., Relief is given under those provisions to a creditor only who has had mutual dealings with an insolvent or Company in liquidation. In the present case, it is not mutual dealings which have given rise to the claim for set-off, the claim is a deliberate creation of the debtor-creditor for the purpose of avoiding the scheme. It is not necessary for us to decide what would have been the position, had this been a genuine case of mutual dealings. It is evident that the class of debtor-creditors of this genuine character are in a very different position from the ordinary creditors, and it may well be that they cannot be bound by decisions of a meeting of ordinary creditors.

26. Reference may be made to the case of Sudhanya Kumar Rahut Vs. Faridpur Loan Office Ltd., In this case a depositor sued the bank for the money decree on his fixed deposit on 16-3-1933. There was some arrangement proposed between the bank and its depositors and the High Court on an application u/s 153 of the Companies Act ordered a meeting of the depositors to be called on 9-5-1933. On 28-5-1933 the majority of the depositors agreed to the scheme under which the depositors were not entitled to demand payment of the deposit money at once and were to be paid only in terms of the scheme.

The suit, however, which had been brought by the depositor, was decreed on 27-6-1933, by which the Plaintiff depositor gave up his claim in respect of Rs. 210/- and the balance was agreed to be paid by the bank in 15 instalments payable from September 1933 to 37. The scheme proposed was sanctioned by the High Court in August 1933. Under the decree two instalments were paid by the bank and it being in default in payment of the other instalments an application for execution was made on 8-6-1955. This execution was opposed on the ground that the scheme was in force and that it was binding on the decree-holder. The Courts below gave effect to the contention of the bank.

The High Court in appeal held that there was no proof that the notice of the meeting which sanctioned the scheme, was served on the decree-holder depositor. It further held that from the fact that the bank did not ask the High Court to stay the suit which was pending at the time, it was clear that the bank knew that the scheme was not intended to be binding on the decree-holder depositor and the word "depositors" in the scheme could not mean the "decree-holder depositor". It cannot be argued by the bank in the present case that the word "creditor" in the scheme applied to the debtor-creditor of the bank.

27. In my opinion therefore, there was a valid assignment of the amount of fixed deposit by Sri Thakuria in favour of the Defendant and he could claim a set-off in respect of that amount as against the amount due from him under the overdraft account and there is nothing in the orders of this Court or in the scheme which was ultimately sanctioned by this Court, which took away the right of the Defendant to claim a set-off.

28. The next question which is to be determined is whether the Defendant can claim set-off in respect of the amount of cheques sent by him on 12-8-1950 to the bank for being credited to his overdraft account.

29. On 21-6-1950 a cheque was issued for Rs. 130/- signed by Sri M.D. Baheti for payment to self or bearer to the Plaintiff bank. This cheque was sent to the bank by the Defendant with a request that the amount of the cheque be credited in his overdraft account on 12-8-1950. The cheque was returned to the Defendant on 21-9-1954. It has been filed and marked as Ex. F. The Plaintiff bank has filed an extract from the ledger account of Sri Murlidhar Baheti dated 6-3-1954. This account shows a credit balance of Rs. 130/5/9 in favour of Sri Murlidhar Baheti on that date. On the same date, that is 12-8-1950 the Defendant sent another cheque for Rs. 1,070A issued by one Ramchand Sitaram in favour of the Defendant on the Plaintiff bank. This cheque was also returned under the letter of 21-9-1954 to the Defendant and has been filed and is marked Ext. C. The cheque was issued on 26-6-1950.

The extract from the ledger account of Ram Chand Sitaram dated 6-3-1954 has been filed which shows a credit balance of Rs. 1,077/1/10/ in his account on that date. On the same date another cheque of Rs. 3,100/- drawn by Ramdeo Harakchand in favour of the Defendant dated 22-6-1950 was sent by the Defendant to the bank with a request that the amount be credited in his overdraft account. No such entry was made and the cheque was returned along with other cheques on the 21st September 1954. The extract from the entry of the ledger account of Ram Deo Harak Chand D/ - 6-3-1954 has been filed which shows a credit of Rs. 3,188A/5 in his account on that date.

Another cheque for Rs. 1,500/- issued by one T.C. Rathi for Dhansukhdas Rathi dated 21-6-1950 in favour of the Defendant was sent to the bank on 12-8-1950. This was also returned to the Defendant on 21-9-1954 without crediting the aforesaid amount in the overdraft account of the Defendant. The extract from the ledger account of Dhansukhdas Rathi dated 6-3-1954 has been filed, which shows the credit balance of Rs. 1,533-9-9 in his account on that date. A cheque for Rs. 619-14-9 issued by Tararam Hetram signed by the Defendant himself paid to the self or bearer was issued on 12-8-1950 and was sent to the bank on that date with a request that the amount be credited in the overdraft account of the Defendant.

This was not done and the cheque was returned on 21-9-1954 to the Defendant. The ledger account of Tararam Hetram has been filed and on the 6th March 1954, the account shows a credit balance of Rs. 319/14/9. The next cheque sent by the Defendant to the bank on 12-8-1950 was for Rs. 62 drawn by Ramkishan Ramgopal and signed by the Defendant himself. The amount was not credited in the overdraft account of the Defendant and the ledger account of Ram Kissan Ramgopal dated 6-3-1954 has been filed which shows a credit balance of Rs. 62/- on that date.

30. The facts which are not disputed are that on 12-8-1950 these cheques were sent to the bank by the Defendant with the request that the amounts of these cheques be deposited in the current account of the Defendant. Most of the cheques were drawn in the name of the Defendant and he was shown as the payee. Some of the cheques were issued for self or for bearer. The Defendant was therefore, entitled on presentation of those cheques to get the amount of the said cheques as a payee. It is admitted that these amounts were not credited to the Defendant's overdraft account and that the cheques were returned to the Defendant on 21-9-1954, after the suit had been filed.

It is also clear that the drawers of these cheques had the sufficient amount in their account on 12-8-1950 and the payment could not be refused on the ground that the drawers had not sufficient funds on the date to enable the bank to make payment against those cheques. It is also clear from the materials on the record that the bank neither made the credit entries of these items in the overdraft account of the Defendant nor debited the accounts of the respective drawers.

31. The Defendant contends that on 12-8-1950 when he sent these cheques, it amounted to payment of his dues and the bank was bound to credit the amount of these cheques in the overdraft account of the Defendant. If the contention of the Defendant is accepted that on 12-8-1950 the sending of these cheques amounted to payment of his dues, the question of the scheme being a bar to the Defendant's contention will not arise. The scheme was sanctioned on 19-4-1951. The order of 31-8-1950 passed by this Court directed that the meeting be convened on 30-10-1950. The payment was thus made by the Defendant long before the scheme was actually considered by the creditors at its meeting and any decision taken by the creditors at its meeting will not thus affect the payment made by the Defendant towards his debts.

32. It will be a question of fact in each case when a customer sends a cheque issued by another customer of the bank for payment to the bank as to whether it amounts to payment, by the said customer of some money of his own in the bank or it only amounts to the presentation of the cheque to the bank for collection. In Halsbury's Laws of England, 3rd Edn., Vol. 2 p. 177 the law in this respect is summarised as follows:

Where a cheque drawn by one customer of a bank is received from another customer, it is a question of fact whether it was presented for payment or paid in for collection. If the latter, the bank has the usual time of an agent for giving notice of dishonour, but must pay in preference "to a debt due to itself from the drawing customer.

33. Section 50 of the Contract Act provides that the performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions. The illustration attached to Section 50 clearly indicates, that the direction by the drawer of the cheque, to the bank to put the amount in the credit of the payee amounts to payment by the drawer to the payee. If the Defendant

deposited the cheques in his current account on the 12th August 1950, it was as good as a payment of cash to the bank unless the drawer had no funds in the bank to meet the amount of the cheque.

The bank retaining these cheques till 21-9-1954 could not turn round and say that it did not credit the account of the Defendant with that amount. In my opinion it was a proper payment by the Defendant of the amount of the cheques to the bank. The case put forward by the bank is that on 26-6-1950 there was a moratorium granted to the bank and by the order of this Court the bank was prohibited from making any payment to any depositor exceeding 25 per cent of the amount lying to his credit. If the bank would have accepted the cheques deposited by the Defendant towards payment of his debts, it would have amounted to payment of the entire amount lying to the credit of the drawers, which was not permissible under the orders of this Court.

I have already dealt with that point in dealing with the question of the payment of Rs. 12,000 by the Defendant and it is sufficient to point out at this stage that the bank at any rate after the 24th August 1950 was not prohibited by any order of this Court from making payments. The order granting interim moratorium stood discharged after the 24th August 1950. The order passed by this Court on an application u/s 153 of the Indian Companies Act on 31-8-1950 only stays any action against the bank, but did not lay down any condition for the discharge of the bank's liability. Moreover, the order of 26-6-1950 only granted stay of commencement or continuance of all actions and proceedings against the bank on condition that it made no payments to its creditors beyond 25 per cent of their dues.

If the bank had made any payments in contravention of the conditions laid down in the order, the stay order would have been discharged, but it could not be said that the payment itself would have been void in law and would not have been recognised by any Court of law. There was no question of any fraudulent preference of creditors at this stage. As I have already pointed out another approach to the case will be that if the bank had cashed the cheques and deposited them in the Defendant's account, the Defendant would have become creditor in place of the drawers of the cheques as against the bank. There could not thus have been any question of payment against the orders of this Court.

34. Section 6 of the Negotiable Instruments Act provides that a "cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. Section 9 of the Negotiable Instruments Act defines a "holder in due course" and a "payee; or indorsee" is included in the expression a "holder in due course". u/s 13 of the Negotiable Instruments Act a cheque payable either to order or to bearer is included in negotiable instruments and Section 14 of the Act provides that when a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

Section 31 of the Act makes it obligatory on a drawee of a cheque having sufficient funds of the drawer in his hands, to pay the cheque when duly required to do so. The default of payment no doubt gives a right to the drawer to claim compensation, but nonetheless there is an obligation on the drawee to make payment of the cheque on presentation if the funds are available. Section 36 of the Act provides that every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. Section 74 of the Act lays down that subject to the provisions of Section 31, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. In the present case all the cheques excepting two cheques, were issued prior to the passing of the order of this Court on 26-6-1950. They were presented by the Defendant only on 12-8-1950 for payment. In the meantime the order of this Court was passed on 26-6-1950. Section 84 of the Negotiable Instruments Act reads as follows:

84. (1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or person on whose account it is drawn had the right, at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of the banker to a larger amount than he would have been if such cheque had been paid.

(2) In determining what is a reasonable time, regard shall be had to the nature of instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of the cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him." This section makes it clear that if the cheque is not presented for payment within a reasonable time the liability of the drawer stands discharged and the holder of the cheque under Sub-section (3) of the said section becomes a creditor in lieu of Such drawer, or person of the banker to the extent" of the" discharge.

A reading of these sections makes it clear that the cheque is a negotiable instrument and the payee in this case was the holder in due course. When he presented the cheques on 12-8-1950, it was, beyond reasonable time, the cheques having been issued in June and the liability of the drawers stood discharged. The Defendant therefore became a creditor of the bank in respect of the amounts of the cheques under Section 84(3) of the Act.

It is also evident from the examination of these sections that the Defendant himself being a holder in due course could sue the bank on the cheques. In these circumstances I do not find why he cannot claim a set-off in respect of the aforesaid amounts. A negotiable instrument differs from an ordinary contract in many respects. In the case of a negotiable instrument the absolute benefit of the

contract is attached to the ownership of the document which according to ordinary rules would be only evidence of the contract. The proof of ownership is facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers and the proof of the transfer is dispensed with by presuming the bona fide possessor of the instrument to be the true owner.

The transfer of a negotiable instrument differs from the assignment of a contractual right in three different ways. First, in the case of a transfer of a negotiable instrument there is no necessity that the person liable for payment should be notified by the new holder of the change of ownership. Secondly, unlike the assignee of a contractual right, the transferee of a negotiable instrument does not take subject to equities. A holder for value who takes an instrument without notice of any defect in the title of the person who negotiated it to him acquires a perfect title. Thirdly, the rule that consideration must move from the promisee, which applies to contracts in general, does not apply to a negotiable instrument for the holder can sue for payment without proof that he himself gave value. The law has been thus summarised by Blackburn, J., in the case of *Crouch v. Credit Foncier of England* (1873) 8 QB 374 at pp. 3812:

It may therefore be laid down as a safe rule that where an instrument is by the custom or trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a negotiable instrument.... The person who, by a genuine indorsement, or where it is payable to bearer, by a delivery, becomes a holder, may sue in his own name on the contract, and if he is a bona fide holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.

35. Reference may be made to the case of *M'Lean v. Clydesdale Banking Co.* reported in 1883 (9) ACC 95. One W.B. Cotton was a customer of the Clydesdale Bank, Glasgow whose account was kept in the Argyle Street Branch and in the morning of Saturday, the 14th January, 1882, he paid into the credit of his account; a sum of money made up of bank notes and cheques. A cheque which he sent towards his account was drawn by one John M'Lean upon his account with the Bank of Scotland in favour of Cotton who endorsed it. The Clydesdale Bank on receiving the cheque, placed this amount to the credit of Cotton's account thereby extinguishing the sum overdrawn in his account to that extent.

On Monday M'Lean stopped payment of the cheque at the Bank of Scotland and the payment was therefore refused., M'Lean denied his liability to pay the amount of the cheque to Cotton. On these facts the Clydesdale Bank, Glasgow brought a suit against M'Lean for recovery of the amount. The defence taken by M'Lean was that there was no liability to pay to the bank. The matter went up to the House of Lords in appeal and the decree in favour of the Bank against M'Lean was maintained. Lord Blackburn as regards the liability of M'Lean observed as follows:

His liability was because, he having drawn the cheque upon the bank, the bank did not pay it on presentation. If the bank had not paid it because they had no funds in their hands, or if the bank having funds in their hands, had stopped payment and had become insolvent, the liability of M^{Lean} would have been the same. It was not because he countermanded the cheque and forbid the bank to pay it upon presentation, but because they did not pay it upon presentation, that the cause of action arose.

That being so, it only remains to see (the cheque being handed in this way to the bank, as the interlocutors find, and the bank taking it as having been properly transferred to them) whether that was merely a handing of it in the same way as a merchant would hand a cheque to his clerk to carry that cheque to the bank in order to get the money for it, or as he would hand a draft to his clerk to carry that draft in order that he might get it accepted, and the like. In such a case of course the servant or agent to whom he gives it has no property in it; it was not intended that he should have any, and he has none. Now in the present case did the bank get the cheque, in that way as a mere agent, and nothing else, or did they get it in order that they might have the property in it transferred to them and that they might become holders of it?"

Agreeing with the finding of the facts arrived at by the Court below it was held that the cheque was paid into the bank as cash with the intent that they might be the owners of it, and that Cotton's debt to them should be reduced by that amount. Dealing with the case of *Carrie v. Misa* reported in (1875) 10 Ex 153 or *Misa v. Currie* (1876) 1 ACC 554, it was observed as follows:

But I must own that I have never been able to perceive any ground for doubting that the Court of Exchequer Chamber were perfectly right in the case of (18.75) 10 Ex 153 when they held that the payment of a cheque, or a bill payable on demand, on account of a debt to a banker, a payment by which it was intended to be handed to them as property, and not merely handed to them as a servant or agent, but handed to them as cash with the object of reducing a balance, was a payment for perfectly good and valuable consideration; but I do not know that it is necessary to decide that point here, because it is not raised.

36. In the result therefore, I am of opinion that this appeal should be allowed and the Defendant can claim a set-off in respect of the amounts of the fixed deposit receipt and the cheques mentioned above. It is not disputed that if the Defendant can claim a set-off in respect of these amounts, the Plaintiff is not entitled to any decree. The result will be that the suit of the Plaintiff Respondent will stand dismissed, but in the circumstances- the parties will bear their own costs throughout.

Sinha, C.J.

37. I entirely agree and have nothing to add.