CHAPTER-SEVEN

CONCLUSION AND SUGGESTIONS

I. CONCLUSION

In India, prior to the enforcement of the present Negotiable Instrument Act, English Acts and Statutes dealing with this subject were in force. The frequent use of negotiable instruments in personal as well as business transaction in India was also not a totally new practice during the British regime. The reason was that since olden days, the use of such instruments like *Hundies*, was prevalent in India.

When British regime established in India three fold system in this regard was enforced and Muslims were governed by their respective personal law. The Europeans were governed for that purpose by English laws, whenever there was any conflict between personal laws, i.e. Hindu Law or Muslim law with English Bill of Exchange and there was no proof of any specific usage, the English law had to prevail. Thereafter, various English Acts and statutes were enforced in India to deal with the matters relating to negotiable instruments. Those acts and Statutes were enforced in India to deal with the matters relating to negotiable instruments.

The law merchant treated negotiable instruments as instruments that oiled the wheels of commerce and facilitated quick and prompt deals and transactions. This continues to be the position as now recognized by Legislation through possibly a change is taking place with the advent of credit cards, debit cards and so on it was said that negotiable instruments are merely instruments of credit, readily convertible into money and easily passable from one hand to another. With expanding commerce, growing demand from money could not be met by mere supply of coins and the instrument of credit took the function of money which they represented and thus became by degrees, articles of traffic. A man dared not dishonor his own acceptance of a bill of exchange, lest his credit be shaken in the commercial world. The Negotiable Instruments Act, 1881, is understood to be an enactment codifying the law
on the subject. A cheque is an acknowledged bill of exchange that is readily accepted in lieu of payment of money and it is negotiable.

A negotiable instrument is one the property in which is acquired by any one who takes it *bonafide* and for value, notwithstanding any defect of title in the person from whom he took it, from which is follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument. In order to ascertain the negotiability, whether it exists or not, certain tests can be applied. In other words negotiability means that a cheque is transferable. It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it *protempore*, then it is entitled to the name of a ‘negotiable instrument’, and the property in it passes to a *bona-fide* transferee for value, thought the transfer may not have taken place in ‘market overt’.

The general rule of law is undoubted that no one can transfer a better title than he himself possesses: *nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency, are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder.

It has been noted above that an order instrument can be negotiated by endorsement of the same and then delivery there of. The rights in the instrument are not transferred to the endorsee unless after the endorsement the same has been delivered. If a person makes the endorsement of an instrument but before the same could be delivered to the endorsee the endorser dies, the legal representatives of the decreased person can not negotiate the same by mere delivery thereof. Since the legal
representative is not the agent of the deceased. He cannot complete the process of negotiation left incomplete by the deceased.

When a negotiable instrument has been lost, or, has been obtained from any maker, acceptor, holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or endorsee who claims though the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder or from any party prior to such holder, unless such possessor or endorsee is, or some person though whom he claims was, a holder thereof in due course.

The currency of an instrument ends when it reaches its maturity or is dishonored earlier either by non-acceptance or by non-payment. Thereafter it is no more. Negotiable and a person acquiring it with knowledge of its dishonor or maturity gets no better rights than those of his transferor. The maturity of an instrument can be examined from its face particularly when it is payable after a fixed period of time so far as demand instruments are concerned. Maturity varies with the nature of the document. A promissory note payable on demand remains current until it is presented and dishonored.

A cheque is always payable on demand and remains current only for a short period after issue where an instrument has been dishonored before it reaches its maturity and the fact of dishonor is apparent on its face, no one can become its holder in due course there after. But if the fact of dishonor is not noted in the instrument and it is transferred to a person who did not know, he will acquire a good title to the instrument.

The present day economies of the world which are functioning beyond the international boundaries are relying to a very great extent on the mechanism of the Negotiable Instruments such as cheques and bank drafts and also the oriental bill of exchange as the business activities have increased, the attempt to commit crimes and indulge in activities for making easy money has also increased. Thus besides civil
law, an important development both, in internal and external trade is the growth of
Crimes and we find that banking transactions and banking business is every day being
confronted with criminal actions and this has led to an increase in the number of
criminal cases relating to or concerned with the Banking transactions.

By the fall in moral standards, even these negotiable instruments like cheques
issued started losing their creditability by not being honoured on presentment. It was
found that an action in the civil court for collection of the proceeds of a negotiable
instrument like a cheque tarried, thus defeating the very purpose of recognizing a
negotiable instrument as a speedy vehicle of commerce. It was in that context that
Chapter VII was inserted in the Negotiable Instruments Act by the Banking, Public
Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act
66 of 1988) with effect from 1 April 1989. The said Act inserted section 138 of 142 in
the Negotiable Instruments Act. The object and reasons for inserting the Chapter was
to enhance the acceptability of cheques in settlement of liabilities by making the
drawer liable for penalties in case of bouncing of cheques due to insufficiency of
funds in the accounts or for the reason that it exceeds the arrangements made by the
drawer, with adequate safeguards to prevent harassment of honest drawers.

Negotiable instrument is a convenient and safe means of transferring money,
and provides a permanent record and receipt for its transaction. The biggest danger in
accepting a cheque is that the person writing it may not have enough money in the
Bank to cover it. Forgery is another danger. The best defence against ‘bad cheques’ is
to refuse to accept cheques from strangers.

The offence under section 138 of the Negotiable Instruments Act will be
attracted only if the cheque is returned by the Bank unpaid either because of the
amount of money standing to the credit of that account is insufficient to honour the
cheque or that it exceeds the amount arranged to be paid for from the account by an
agreement made with the bank. On facts, since the cheque had been returned with an
endorsement “refer to drawer”, the return was not either due to insufficient funds in
the account to honour the cheque or because the amount shown in the cheque exceeded the arrangement and, therefore, even on this ground, no offence was made out.

Sometimes it is also suggested that the reasons, “Exceeds Arrangement” or “Not arranged for” may lead to an unwarranted disclosure of the customer’s account and may amount to a libel. For this reason the term “Refer to Drawer” should be preferred.

Thus, on one hand the banks are to watch the interest of their customers and to ensure that the honest bank customers are not being harassed and on the other hand there must be a change in the attitude of the people towards the cheques which should be given an increased acceptability.

The object of the notice is to give a chance to the drawer of the cheque to rectify his omission. Though in the notice demand for compensation, interest, cost etc. is also made the drawer will be absolved from his liability under section 138 if he makes the payment of the amount covered by the cheque of which he was aware within 15 days from the date of receipt of the notice or before the complaint is filed.

The company court cannot call before itself the proceedings under section 138 of the Negotiable Instruments Act and quash the proceedings. The power to quash those proceedings rests only with the hierarchy of the criminal courts.

The sanctity of the proceedings under section 138 of the Negotiable Instruments Act must, thus, be preserved and those proceedings, must continue as they arise out of the failure of the company’s directors to honour the negotiable instrument duly signed by them like a cheque. The proceedings under section 138 of the Negotiable Instruments Act are not for recovery of claim of money by a creditor for which the remedy would be by filing a civil suit.

Section 138 of the Amended Act is the section which may be terms as the king pin and provides both for punishment of imprisonment and fine both alternatively with imprisonment or fine as the case may be, yet, the working of the section is
governed by the three provisos to the Section which may be termed as the regulating and controlling factors. In case, any of the basic requirement, is not fulfilled and in any particular case is hit by non-compliance to the condition specified therein, a person cannot be prosecuted under Section 138 of the Act. These provisos have been in brief as under:-

Clause (b) of the proviso of Section 138 states that the payee or the holder in due course of the cheque makes a demand by giving a notice within 15 days of the receipt of information by him regarding the dishonour of the cheque. Now the period of 15 days has been increased to that of 30 days by the Amendment Bill No. 55 of 2002.

Where a cheque was issued for business purchased at one place and the recipient of the cheque also deposited the cheque into his account at that very place, but, after dishonour, he issued notice of dishonour from his place of business in some other town, it was held that a complaint filed at that place was competent. The cause of action partly arose there because to discharge his liability the drawer would have to make arrangement for payment at the recipient place. Thus the places where the payment was to be made and where the cheque was delivered are also relevant. Where a cheque was given at Delhi but was deposited by the payee at some other place, there was no jurisdiction at that place. It is the duty of the debtor to seek his creditor and, therefore, the court at the place of the payee had jurisdiction.

Cause of action may arise at the place where the cheque was issued or delivered or where the money was expressly or impliedly payable. Where there was averment in the complainant of an agreement to return the money at the residence of the complainant, it was held that the cause of action arose there

It may be mentioned that the existence of a civil remedy would not necessarily exclude a trial by a criminal court of an offence. Similarly there cannot be any absolute proposition of law that whenever any civil proceeding is pending between the parties, criminal proceeding can never be proceeded with. There are many
transactions, which result, civil as well as criminal liabilities. Cheating, misappropriate and theft is undoubtedly the transactions of this type. Therefore, simply because civil proceedings between the parties are pending, it cannot be said that criminal proceedings cannot be go on.

After the introduction of the amendment by the Banking Public Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, it was expected that the problem relating to the dishonour of the cheques shall be reduced to a great extent and the people shall realise that in case of dishonour of the cheques issued by them they may be put to trouble and suffer penal consequences. However, we find that the problem has not been solved to the extent it was expected and there has been a flood of litigation resulting from the amended Act and specially because certain matters have been left at the mercy of the winds which has resulted in a number of legal precautions interpretations and time of hurdles. It would have been better that since the offence is to be tried in accordance with the sections 200,204 of the Code of Criminal Procedure, there should be an amendment in the returning memos issued by the bank and since for the application of section 138 of the Act, it was necessary that the cheque drawn by a person for the discharge, in whole or in part, of any debt or other liability should have been returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank. Thus, there must have been the fulfilment of the conditions as laid down in section 138 of the Act which relates to dishonour of cheques for insufficiency.

It was suggested that the returning memo, should contain the following two additional grounds, namely:

1. Insufficiency of funds to honour a cheque; and
2. Exceeds the amount arranged to be paid from the account by an agreement with the bank.
As has already been explained that the procedure involved under the Act to file a complaint is the same procedure as laid down under sections 200 to 204 of the Code of Criminal Procedure. The said procedure is as under :-

i) After presenting the complaint to the Court a date is fixed for recording the pre-summoning evidence. Whether a short date is given or a long date is given depends on the mercy of the court staff and also depends on the fact as to how much busy the said court is with other works. In these circumstances it may be suggested that in the same manner as there are Rent Control Court, Matrimonial Courts, Children Courts, Labour Courts etc. there may be the courts deciding the cases resulting from the dishonour of cheques. Keeping in view the number of cases which are coming under the purview of the amended Act, in a place like Delhi, there can be at least four such Courts.

ii) After recording the evidence of the complainant, the complainant is required to summon relevant statement of account of the accused from bankers duly certified under the Bankers’ Books Evidence Act to prove the insufficient balance in the account of the accused and further the complainant is also required to summon his bankers to prove the dishonour of cheque, debit advice, etc. The question arises whether all this drama is necessary. Everybody will appreciate that this involves only unwarranted delay and harassment and results in frustration. The complaint is required to be present on all the dates except when exemption may have been taken. The entire process as involved is cumbersome and tiring and takes a good period of time and expenses as well.

When a Promissory note or Bill of Exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon
The object of Noting and Protesting is to get some person to accept it for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. In the case of inland bills, the object in noting and protesting is not to preserve the recourse against the drawer or an endorser, for protest and note are not necessary at all. In the case of foreign bills it is necessary to preserve the recourse against all the previous parties. Where a bill or note is required to be protested within a specified time or before any further proceedings are taken, it will be sufficient to note the instrument for protest before the expiry of such time or the commencement of such proceeding. The formal protest can be extended at any time thereafter as such proceeding.

The formal protest can be extended at any time thereafter as of the date of noting. Thus for the purposes of making a protest within a specified time or filing of a suit, mere noting for protest serves as protest and becomes equivalent to protest enabling the party to serve the formal protest thereafter.

For the banks it has become a bigger problem as every day the banks are receiving a number of summons from different Court where the representatives of banks are required to be present on the date of the hearing so that their statements on the basis of the records summoned, may be recorded. In each Court for the purpose of pre-summoning evidence the statement of the complainant is to be recorded and the original cheques, returning memos, debit advice, copy of legal notice, postal registration receipt, AD cards are to be proved and it is only after this part of the game is over successfully then the summons to the accused can be sent.

Everybody is aware that the delay denies justice and causes inconvenience. In fact, it debars the complainant from going to the Court of Law.

It is not understood as to why the procedure has been made so cumbersome when there is section 139 in the Act which provides for a presumption in favour of the holder of a cheque. On the same date when the complaint is filed, the statement of the complainant can be got recorded on the basis of -
i) The cheque in original,

ii) The returning memo from the bank,

iii) The certified copy of the statement of account of the accused taken from his bank,

iv) A copy of the notice sent to the accused along with the postal receipt,

v) A.D. card duly signed by the accused or the registered envelope returned back with the endorsement “refused” which shall amount to a constructive notice.

The question now arises whether all this procedure is necessary. The law should be amended and it should be provided that there is a quick disposal of cases and no wastage of time and money. In case the pre-summoning evidence is to be recorded then as per practice prevailing now the records from the banks are to be summoned, and amongst other things statements of the account of the accused person is proved on record.

It is also a matter of common experience that usually Rs. 100 to Rs. 125 are deposited for a clerk of the bank to come and give evidence. Usually, bank has to pay about Rs. 300 as reimbursement to the clerk who is away on the date and is not expected to return back to duty on the said day and thus the bank suffers a monetary loss to the extent of the amount which is not reimbursed by anybody and there is accumulation of work on this account and other customers suffer. It is not necessary that person who goes to the court with the record of the bank summoned will come back after having this statement recorded on that very day. Experience shows that on most the dates there are no chances of his going back to the bank on account of the reason that his statement could not be recorded as either the court was on leave or the member did not reach or that the opposite counsel was on leave and thus matters are being dragged on from one date to the other without any progress in the complaint filed against the accused as procedural delays and the legal technicalities provide a long rope to the accused escape punishment. The entire process proves to be tiresome,
harassing, cumbersome and minimum time period required is about 2/3 years in most of the cases and may be less in certain other cases where all steps are taken to avoid the delay. It also happens that on certain dates the entire evidence is available but the complainant is not available and as such no progress can take place. There are thousands and thousands of cases which are now pending before the Courts. There is also the question of the bankers to maintain secrecy. Usually the complainant summons the records of the bank for the entire month and although the complainant and the court concerned are concerned only with one date, yet the information about the account of the accused is available for all the dates in that particular month. Besides the above question, there are a number of tactics adopted by the accused to get the matters delayed for longer period on these dates for adjournment and further provided by such incidents as the court concerned being on leave, the court being closed due to lawyers’ strike, any of the Advocates being ill and seeking adjournment on this ground, record not forthcoming on a particular date from any of the banks for a request having been received from a bank for adjournment due to any reason, time not being available with the court for recording the evidence, and stakes being large in the matters relating to punishment.

The person who issues cheques and at the time of issuing the cheques are aware of the fact that a cheque issued by them may be bounced on account of necessary funds not being available in the account with a view to escape the criminal liability try that the memos of return which are issued by the banks should contain some such clause or reason which may bring them out from the criminal liability. Thus, we find that there are memos which contain such remarks as “Refer to Drawer”, “Account closed”, “Present Again”, “Payment Stopped” etc. etc. It is argued before the court that no prosecution can take place when there are such reasons as regard to drawer, account closed, or payment stopped. The question arises as to whether the complaints when such returning memos have been given can be maintained or are liable to be quashed. Fortunately there are a number of judgements issued by the
various courts which lead to the conclusion that such remarks cannot help the person issuing the cheques.

We have to provide an interpretation which is consistent with the legislative object. The purpose is achieved by making a provision of notice under the scheme of Act. When the cheque was returned on the second occasion with the endorsement “Payment stopped by the Drawer”, there was no indication that the return was not due to insufficiency of funds or exceeding of the amount arranged to be paid. It could be seen only during the course of trial whether the cheque was returned unpaid due to the insufficiency of funds as pleaded in the complaint, or otherwise. The complaint could not be quashed in case related to a cheque returned by the banker with the endorsement “Refer to Drawer”, “insufficiency of Funds” or “Account Closed”. In this case also the question was whether the provision of section 138 is not attracted when a cheque is returned with such endorsement. It was held by the court that all these reasons contained in the returning memo relates to the intention of the drawer not to make the payment. The court also referred to the scheme of the Act and to the fact that the legislature has provide an opportunity to the drawer to explain the endorsement made by the banker and it is only for this purpose that there is a provision of giving a notice to the drawer of the cheque which is a sufficient opportunity provided to the accused person either to pay up the amount covered by the cheque after receipt of notice or to explain the dishonour of the cheque and endorsement of the banker for such dishonour. The Court had very clearly stated that we should not provide an absolutely literal and strict interpretation of the section as that would frustrate and render meaningless the legislative intent and would denude the provisions of its penal effect. Thus we should try to adopt an attitude which is reasonable and rational. Another suggestion which can be given is that the courts should not grant adjournments without substantial reasons.

Adjournments should not be granted except for very cogent reasons and the court should impose heavy costs for adjournment if there has been any lapse on the
part of the complainant. Thus there are legal and administrative problems, which are to be solved, and it is only after that the some progress may be made. So far as the banks are concerned, the records summoned from the bank should be presumed to be correct and the court shall provide a minimum period during which the case is to be decided and for every neglect on the part of the party, they should be burdened with heavy costs Special courts should be formulated for the cases under Section 138 and 142 of the amended Negotiable Instruments Act. They feel that the procedure which is to be adopted by the banks in the amended Act which \textit{inter alia} provides rushing to the court with the record of the bank and besides the wastage of time, and money involved in the cases, a high price is to be paid by the banks and the whole process is proving cumbersome, time consuming, expensive and miserable. Another aspect of the matter, which cannot be ignored, is that in case a complaint under section 138 shall take five years to be decided and the accused is discharged on technical pleas then civil remedy would be lost. Either there should be a change in the Limitation Act or it should be otherwise provided that in case certain time is spent in pursuing the criminal remedy as provided under the Negotiable Instruments Act, 1881 the time so spent shall not be counted in the matter calculating the period of limitation in case a civil action is to be taken against the accused.

The legal machinery is to be geared in a new direction to prove a memo cure to the dishonour of cheques. What is needed is a simultaneous change in the mental attitude and thinking of the individuals. In fact, the legislative intent by providing for a notice after the dishonour of the cheque to the drawer of the cheque aims only to bring home the philosophy to him that dishonour of the cheque issued by him. In case a person does not pay even after the receipt of the notice within the statutory period and does not settle the matter with the drawee or payee of the cheque, there cannot be any other inference except that such person wanted to defraud the creditor or the delay the payment for the purpose of providing harassment and loss to the payee which the Act wants to put an end but the providing penalty in case of
dishonour of the cheque Chapter XVII comprising the Section 138 to 147 has been inserted only with a view to enhancing the losing acceptability and credibility of the cheques which is a backbone of the monetary system not only in the national but in the international economy as a whole and specially keeping in view the fact the instance of dishonour of cheques in India is greater in comparison to the other countries.

As the battle is not to be fought on the legal field alone. A change is also needed in the moral and psychological approach to the subject to establish a convention that ‘Dishonour of a cheque never pays’ and it should be condemned unless warranted by serious consideration to prevent some positive wrong. In such cases the reason “Payment stopped” may be justified but it should not be on account of lack of funds. A change in the mental, moral and psychological attitude of all, having bank accounts and issuing cheques needs to make them realise that a cheque is a precious document and value lies in the its being honoured and not in its being retuned for want of funds. Dishonour should only be in compelling circumstances which can be explained and which are not in connection with the non-availability of sufficient funds.