SUMMARY

The law relating to negotiable instruments is not the law of one country or of one nation, it is the law of the commercial world in general, for, it consists of “certain principles of equity and usages of trade which general convenience and commonsense of justice had established to regulate the dealing of merchants and mariners in all the commercial countries of the civilised world.” Even now the laws of several countries in Europe are, at least so far as general principles are concerned, similar in many respects. Of course, on questions of detail, different countries have solved the various problems in different ways, but the essentials are the same, and this similarity of law is a pre-requisite for the vast international transactions that are carried on among the different countries.

The main object of the Negotiable Instruments Act is to legalize the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The purpose of the act was to present an orderly and authoritative statement of leading rules of law relating to the negotiable instruments. To achieve the objective of the Act, the legislature thought it proper to make provision in the Act for conferring certain privileges to the mercantile instruments contemplated under it and provide special procedure in case the obligation under the instrument was not discharged.

A Negotiable Instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time. According to the Negotiable Instruments Act, 1881 in India there are just three types of negotiable instruments i.e. promissory note, Bill of Exchange and cheque. Cheque also includes Demand Draft. More specifically, it is a document contemplated by a contract, which (1) warrants the payment of money, the promise of or order for conveyance of which is unconditional. (2) specifies or describes the payee, who is designated on and memorialized by the instrument; and (3) is capable of change through transfer by valid negotiation of the instrument.

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. In Mughal period too, there was same position. 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.

A negotiable instrument can be negotiated in two ways: (i) if the instrument is bearer instrument, the rights in it can be transferred by mere delivery from one person to another. It is however, necessary that the delivery of the negotiable instrument must have been made with an intention to transfer ownership, i.e. constitute the transferee as the holder of the instrument, as required by section 14,
(ii) If the instrument is an order one the rights in it can be transferred by endorsement and delivery.

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’. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or thought it be accustomably transferable, yet, if its nature be such as to render it
incapable of being in suit by the party holding it *pretempore*, it is not a negotiable instrument, not will delivery of it pass the property in it to a vendee, however, *bona-fide* if the transferor himself have not a good title to it and the transfer be made out of market overt.

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 thereafter. 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.

An accommodation instrument means one which has been made in order only to enable a person to raise money by endorsing or discounting the instrument. The person who makes a note or accepts a bill in order only to enable a needy person to raise a sum of money, has his remedy against the person whom he has thus accommodated. He is liable to the person who is for the time being the holder of the instrument and he can recover his indemnity from the accommodated party.
So far as jurisdiction of the Area is concerned, the complainant can choose any one of those courts having jurisdiction over any of the local areas within the territorial limits of which any one of the following acts took place: (i) Drawing of the cheque (ii) Presentation of the cheque; (iii) Returning of the cheque by drawee bank; (iv) Giving of notice in writing to the drawer of the cheque demanding payment of cheque and failure of the drawer to make payments within 15 days of receipt of notice. We are fully alive to the imperatives of a sound “Cheque system” and in our anxiety to scares away the offenders, we are providing more stringent deterrents as spelled out in the Negotiable Instruments Act (Amendment) 2002 interalia provides 2 years imprisonment and issue of notice from 15 days to 30 days and day to day hearing in the case and absent only giving the sound reasons.

It is well settled now that the Court has jurisdiction over the area where the cheque was issued or delivered or where the drawer of the cheque fails to make payment of the money or where the cheque was presented for encashment or the area where the payment was to be made. Therefore, the appellant had cause of action to file the complaint before the lower Court where the cheque was presented for encashment and the lower court had jurisdiction to take cognizance of the offence. Therefore, the finding of the lower court that it had no jurisdiction to take cognizance of the offence is absolutely unsustainable. In suits on negotiable instruments, though the plaintiff is not in general required to prove that he gave value for the instrument and the want of consideration is to be proved by the defendant, yet the burden may shift in case of fraud and undue influence etc. and the plaintiff may be required to prove his case.

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, 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. Cause of action may arise at the place where the cheque was issued or delivered or where the money was expressly or impliedly payable.
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.

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.

It is not necessary to always stay proceeding in civil action and whether the proceedings in action should be stayed or parallel proceeding both civil and criminal may continue depend from fact and circumstances of each case. There is no legal bar to the continuance of the civil and criminal proceedings simultaneously. Where any offence committed by a company is proved to have been committed with the consent or connivance or is attributable to any neglect on the part of any Director, Manager, Secretary or other Officer of the company then said Director, Manager, Secretary or Officer shall also be deemed to be guilty of that offence. It would mean that even if such Director, Manager, Secretary etc. was not incharge and was not responsible to the company for the conduct of the business of the company; he will still be liable if the offence was committed with his consent, connivance or due to his negligence.

It may be observed that the powers under Section 482 Cr. P.C. can be invoked only when redress under any other provision was unavailable. It has been held by the Supreme Court of India that the second revision petition even though filed under Section 482 of the Criminal Procedure Code is not maintainable. It is clear from a reading of Section 141 of the Act that if the offence under Section 138 of Negotiable Instruments Act is committed by the company or a firm, every person who was in charge and responsible for the affairs and conduct of the business for the company or firm, as the case may be at the time when the alleged offence was committed, is also liable for prosecution along with the company.

On considering the provisions of Section 138 to Section 142 of the Act. There is not hesitation in holding that there is no obligation on the part of the payee or the holder in due to specifically mentioned demanding to pay the said amount within fifteen days and there is no substance in the contention of the learned Counsel for the petitioner. The criminal proceedings are seldom stayed till the decisions of a civil suit over the self same matter but having regard to the facts and circumstances which in this Court opinion is a compelling circumstances when for ends of justice
there is no way out but to stay the criminal proceeding till disposal of the civil suit. The High Court would have to proceed entirely on the basis of the allegations made in the complaint or documents accompanying the same *per se*. It has no jurisdiction to examine the correctness or otherwise of the allegations. These powers cannot be exercised to stifle a legitimate prosecution.

Without evidence having come on record, it will not be appropriate for the petitioner to invoke the inherent powers of this Court and seek to halt the proceedings pending before the trial Magistrate. The offence under Section 138, Negotiable Instruments Act is to be proved by a complaint by proving all the ingredients of the offence laid down in the section. All the necessary factors have to be prayed at the trial. Trial Court will be competent Court to record the findings on materials, that may be placed before it by parties on questions of facts,. Powers under Article 226 of the Constitution are not meant to be exercised for this purpose at this stage. The requirement for an offence under Section 138 of the Act is the cheque must be drawn ‘for the discharge in whole or in part of any debt or other liability’. It is settled principle of law that inherent powers under Section 482 Cr. P.C. can be invoked to prevent abuse of the process of the Court or to secure ends of justice. Section 195 of the Code provides a bar on filing of complaint while Section 340 provides for removal of the bar by conferring jurisdiction on the Court to file complaints. Once an offence has been committed and is complete offence, merely by marking the payment will not put an end to the same. It may affect the gravity of the said offence. There is no ground, thus, to quash the proceedings. 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.

It is settled law that pendency of the criminal matter would not be an impediment to proceed with the civil suits. The criminal Court would deal with the offence punishable under the Act. On the other hand, the Courts rarely stay the criminal cases and only when the compelling circumstances require the exercise of
their power. Section 243 of the Code of Criminal Procedure does not exclude proceedings under Section 138 of the Act. Nor does Section 138 of the Act exclude the applicability of Section 243 of the Code of Criminal Procedure. In case all the conditions which are necessary for the payment of a cheque are present and have been fulfilled then if the bank dishonours a cheque it will amount to a breach of the contract for which the banker is liable to pay damages. The evidence shows that the breach of contract by the bank is confined to one particular draft or otherwise indicates that there was no intention to repudiate, damages will not be recoverable.

The defendant bank contended that the plaintiff was entitled to nominal damages only. If there is proof of special loss or damages, that will be taken into consideration for arriving at the exact quantum of damages. The Indian law on the subject is not at all different from the English law on the point. It is expected of a bank to honour its customer’s cheque if it has sufficient funds in his hands. If it fails to do so, it will be liable to damages. The reason is obvious. It injuriously affects the reputation, credit and integrity of its customer. All loss flowing naturally from the dishonour of a cheque may be taken into account in estimating the damages. To determine responsibility the law will consider the proximate and not the remote cause of an injury. So far as the civil remedy is concerned a customer on account of a wrongful dishonour can claim damages against the Bank. So far as the question of civil remedy for the payee is concerned, it is a case for recovery of money under the summary procedure which can be filed against the Drawer.

Section 138 was introduced with a laudable public policy behind it. It is intended to prevent or curtail a mischief which is likely to affect financial transactions, and thereby trade and business and ultimately, economy of the country. Even though the normal rule is that an act or illegal omission in order to constitution an offence, must be had with the requisite mental condition on the form of attention, knowledge or reasonable belief, that pre-requisites could be authority dispensed within appropriate cases by creating strict liability offences in the interest of nation, just like offences under the Prevention of Food Adulteration Act. Further, there is no point in contending that mens rea is not required for constituting an offence punishable under Section 138. As Section 142(b) indicates, the cause of action for a prosecution under 138 will arise only under Clause(c) of the proviso to Section 138.
when the drawer fails to make the payment within fifteen days of receipt of the notice under clause (b) of the proviso and there is a prohibition against taking cognizance except on a complaint in writing by the payee or holder in due course and that too except when the complaint is made within one month of the date on which the cause of action arises.

The main punishment prescribed is imprisonment which may extend to a period of one year. As regards fine, it is stated that the quantum may extend twice the amount of the cheque. It is important to note that the fine is not a compulsory punishment and only the maximum amount is prescribed. There guidelines do not alter the nature of the punishment. In the matter of sentence, the Magistrate is given a discretionary power depending upon the amount for which the cheque is drawn. A change is also need in the moral and psychological approach to the subject to establish a convention and it should be condemned unless warranted by serious consideration to prevent some positive wrong. A change in the mental, moral and psychological attitude of all having bank accounts and issuing cheques is also need to makes them realise that a changes is a precious document and value lies in the its being honoured and not in its being retuned for want of funds.

The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument which have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the Courts to deal with such matter has been found to be cumbersome which resulted delay in disposing the cases. To deal with the problem effectively further amendment has been made by the Parliament.