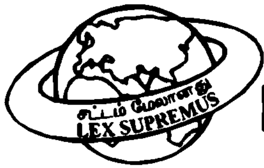

THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
(State University Established by Act No. 43 of 1997)
M.G.R. Main Road, Perungudi, Chennai - 600 096.

BANKING LAW

STUDY MATERIAL

By

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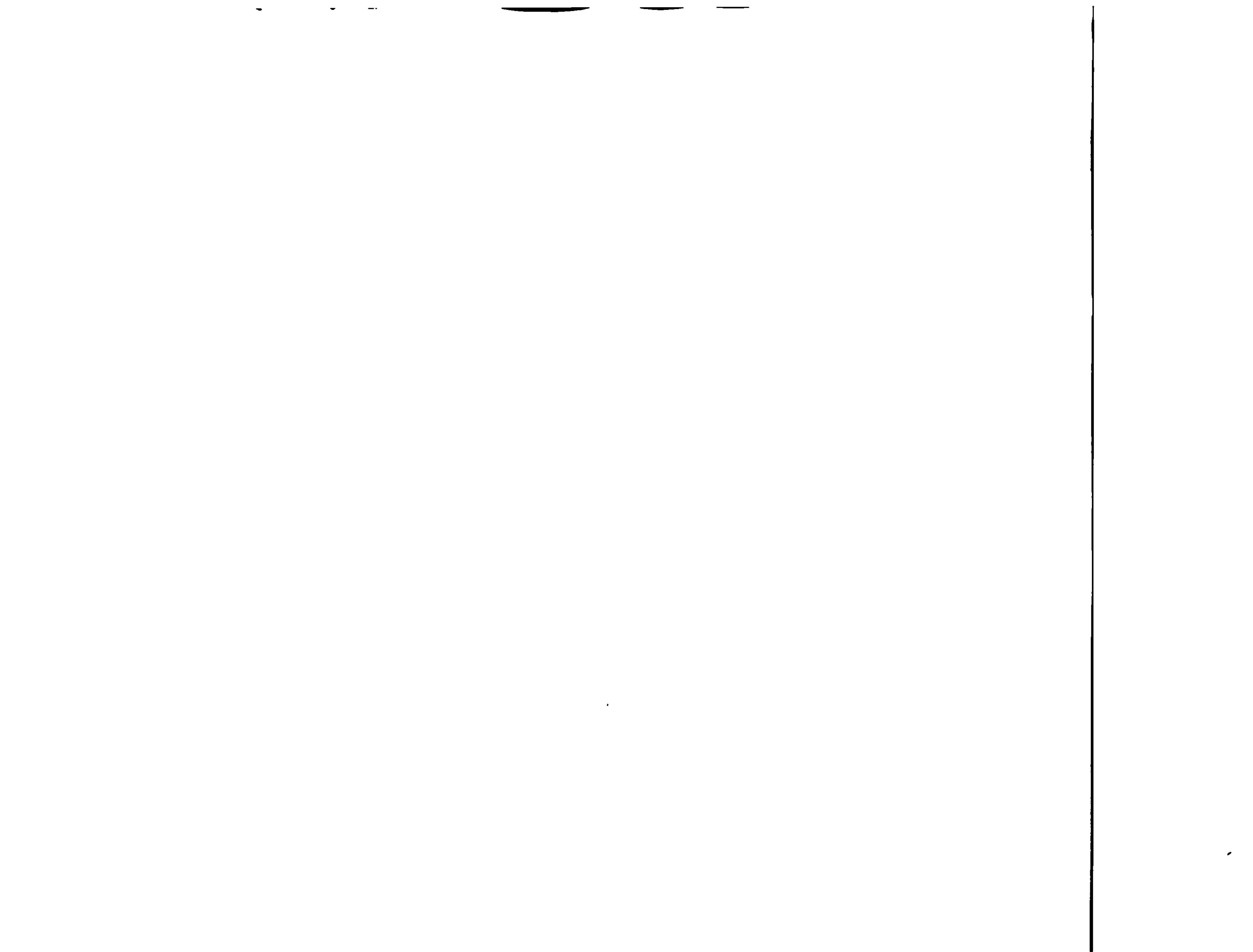


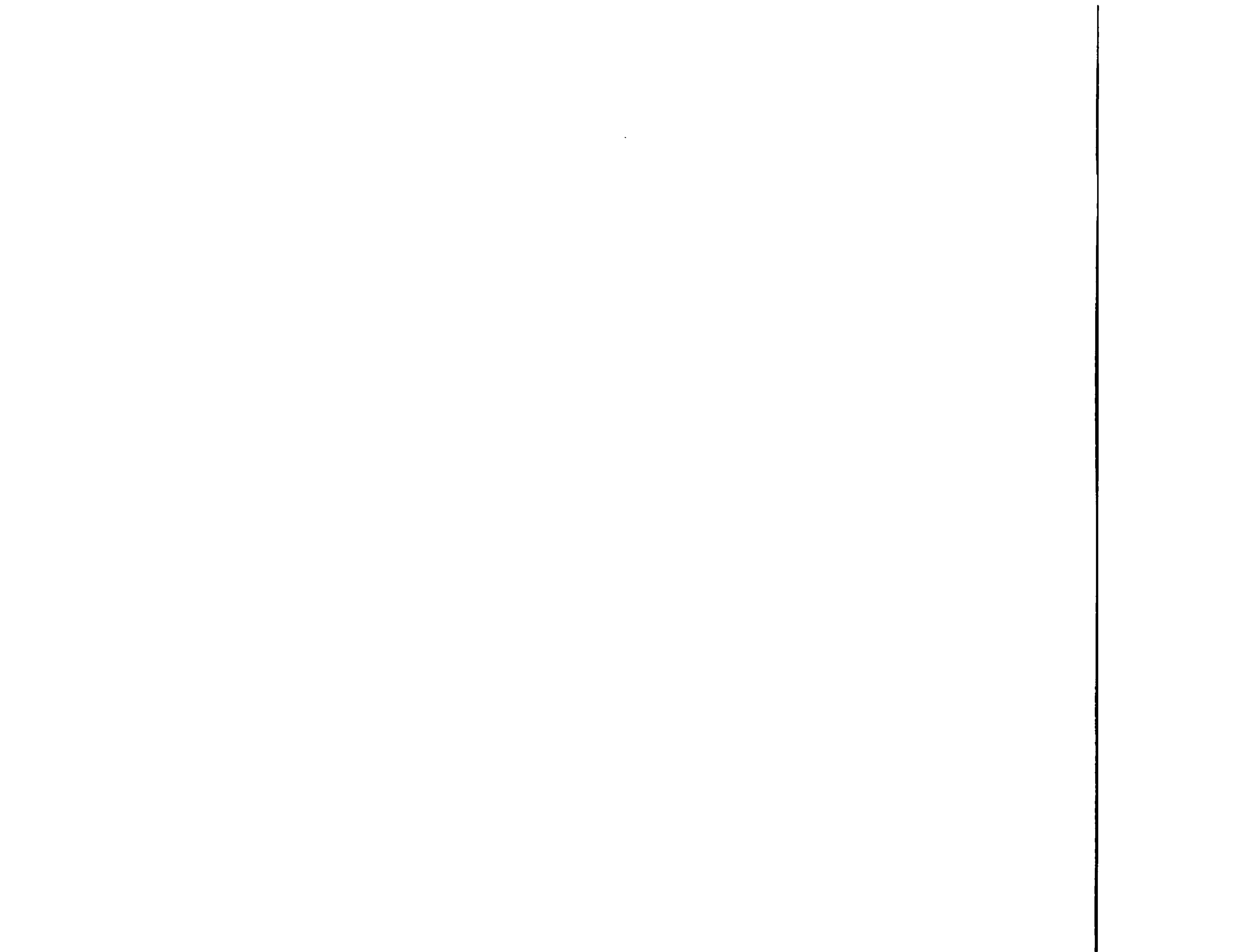
MESSAGE

Knowledge is power. Legal Knowledge is a potential power. It can be exercised effectively everywhere. Of all the domains of reality, it is Legal Knowledge, which deals with rights and liabilities, commissions and omissions, etc., empower the holder of such knowledge to have prominence over the rest. Law Schools and Law Colleges that offer Legal Education vary in their stature on the basis of their ability in imparting the quality Legal Education to the students. Of all the Law Schools and Colleges, only those that educate their students to understand the nuances of law effectively and to facilitate them to think originally, excel. School of Excellence in Law aims to be in top of such institutions.

The revolution in Information and Communication Technology dump lot of information in the virtual world. Some of the information are mischievous and dangerous. Some others are spoiling the young minds and eating away their time. Students are in puzzle and in dilemma to find out the right information and data. They do not know how to select the right from the wrong, so as to understand, internalise and assimilate into knowledge. Hence in the present scenario, the role of teachers gains much more importance in guiding the students to select the reliable, valid, relevant and suitable information from the most complicated, perplexed and unreliable data.

The teachers of the School of Excellence in Law have made a maiden attempt select, compile and present a comprehensive course material to guide the students in various subjects of law. The students can use such materials as guidance and travel further in their pursuit of legal knowledge. Guidance cannot be a complete source of information. It is a source that facilitates the students to search further source of information and enrich their knowledge. Read the materials, refer relevant text books and case laws and widen the knowledge.

Dr. P. Vanangamudi
Vice-Chancellor



PREFACE

The Banking system plays a vital role in economy of our country. Unlike other laws banking law is not single subject, but it is a combination of several laws (General Principles of contract and special contract, property law, consumer law, regulatory law and tortious law).

The development of banking from indigenous and un-organised to the organised and modern bank is development in the financial system and also the evolution of central bank helped to protect the depositors interest and promote and development of the banking in India. The Reserve bank of India as a central banker has a monitor and control over the banking system in India.

Due to increase in banking business, as a measure all the banks have started providing mobile banking and electronic banking facilities, starting from fulfilling KYC norms, introduction others to open an account, Accounting opening, various electronic transfer (IMPS, NEFT etc.) and so on.

The banking law as a curriculum gives detailed picture about the working of banks, various types of entities related to it, instruments used in banking system, relationship between banker and customer and also rights and liabilities of them.

All care has been taken to prepare this material. This material is not all inclusive, but in addition to the Statues and other preferred texts. Therefore the Students are advised to take extra effort understand the subject.

I wish you all the best.

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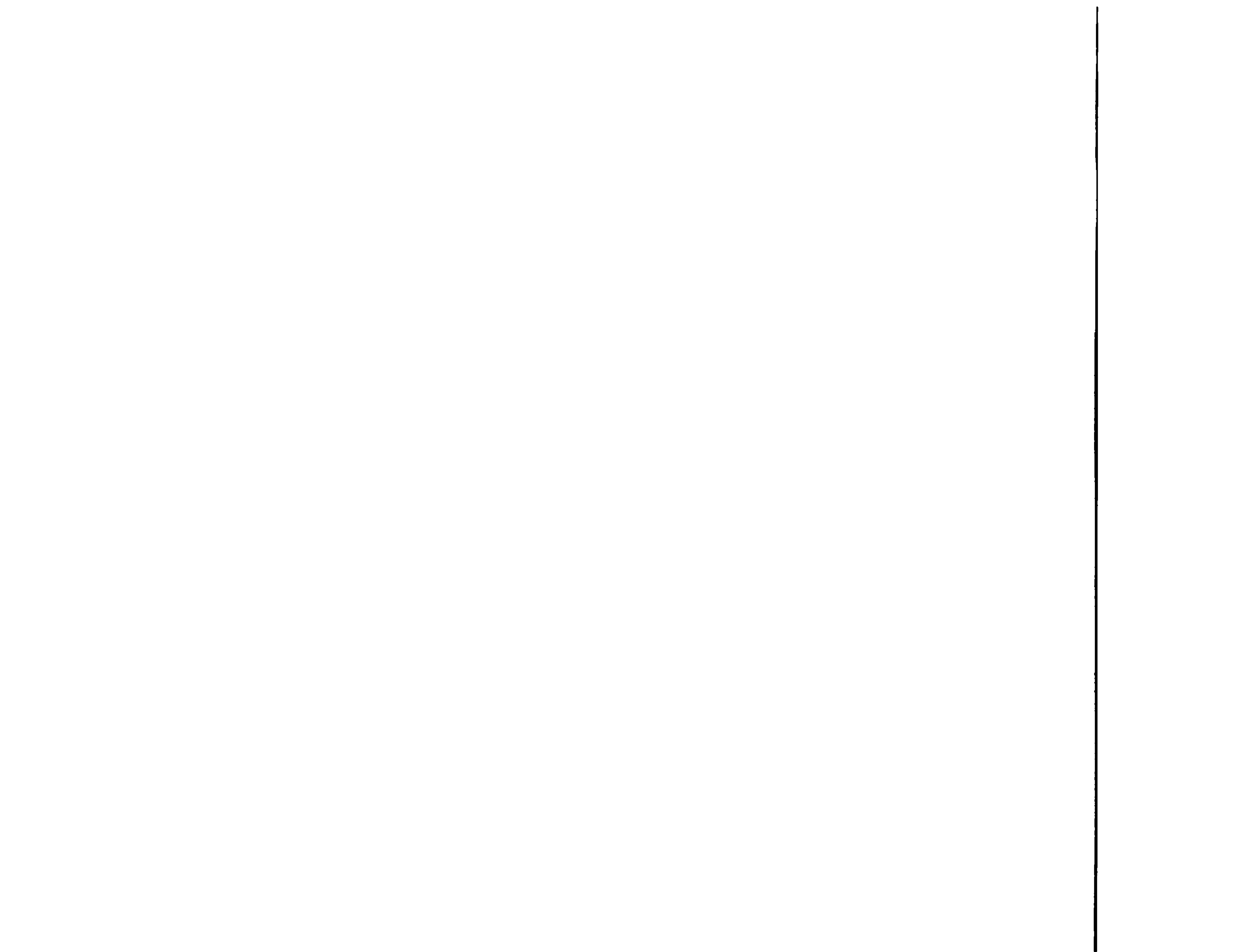

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UNIT - I

INTRODUCTION TO BANKING LAW

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    ii. Private Banks

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  6. Specialized Banks

  7. Non Banking Finance Company (NBFC) & Asset Finance Company (AFC)

IV. Banking Nationalisation

I. Evolution of Banking

Bank is the term derived from the German word 'banck' which means, heap or mound or joint sock fund with this the Italian word 'banca' which means heap of money was coined. There is the other opinion among the scholars that the word 'bank' derived from the French words 'bancus', or 'banque[1] which means a 'bench' or 'money exchange table'. The Jewish people transacted their everyday business on benches in the market place and as their practice the bench shadowed the modern banking counter. If the 'banque' (bench) is broken or not able to use it by the people or failed then the 'banque' become ' brankrupt'.

What is Bank?

A bank is defined by Merriam-Webster's online as "an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds." While they are simple to describe, the roles of banks, bankers, and banking are—for some—not as simple to understand. "Banking" can be defined as "the business of banking," a vibrant business that continually evolves to meet the latest financial needs and economic conditions. In order to understand how banking evolves, it is important to gain a broad understanding of financial concepts, fundamental banking functions, and the banking business in a technology driven world.

Banks have become essential to the economic life of every modern society. A successful banking system has not only become crucial for the functioning of every business, it has also become central to the daily routine of most people. While the possession and use of a bank account still remained limited to the better

[1] Gordan and Nataraj

of four or five decades ago, it has now become impossible to participate in the economic life of most industrialized societies without a bank account. Today, most people have a bank accounts with which they receive their salary, pay their bills, and invest their savings. This is particularly the case in modern, democratic, and industrialized nations—but not only there. As a result, the security of bank deposits has become a matter of great political and economic importance, with governments doing their best to ensure their security. This process shall be explored in greater detail below. However, this section will first examine why the banking sector has attracted such a great amount of official attention. This has mainly been the result of factors specific to the banking sector:

1. Banks provide all other parts of an economy as well as the consumers on which all businesses ultimately depend with credit. An efficient and well-performing banking sector is therefore fundamental to the health of any economy.

2. The banking industry is one of the most vulnerable parts of the modern economic system. The collapse of a bank has a very different and often much deeper impact than the failure of firms belonging to other sectors of the economy. While the bankruptcy of a company normally benefits other companies in the same industry by giving them an opportunity to take over its customer base, the collapse of a bank can seriously damage its competitors. The constant flow of capital from financial institution to financial institution has created a high level of interdependence within the finance and banking sectors.

A bank unable to live up to its financial commitments can therefore cause serious difficulties and disruption for the rest of its industry. Moreover, the reaction of a wider public often unable to differentiate between "good" and "bad" banks to a major bank collapse or banking scandal can lead to a so-called "bank run". Such a massive withdrawal of money from accounts by normal consumers is likely to have knock-on effects on "healthy" banks, since the liquidation of an "unhealthy" bank's assets and liabilities (a process which in itself can incur heavy losses) is neither a quick nor an easy process. All things considered, the collapse of a bank can have catastrophic consequences for an entire banking industry and even a country's economic performance as a whole. Moreover, the credit system could come under threat in such a situation, leading to potentially crippling financial and ultimately social turmoil.

The banks have become an important institution in our life. To save our money, send money to our relatives, to pay fees, take demand draft, to receive scholarship from Government, receiving salary from the employer, to get subsidy from the government as direct benefit transfer and so on. This is why in as a good governance the State is much concentrating on financial literacy and financial inclusion.

The Oxford Advanced learners dictionary (New 8th edn.) defines bank as "an organisation that provides various financial services to its customers or others"

Establishment of Chartered Banks

Established	Bank
1157	Bank of Venice
1401	Bank of a
1407	Bank of Genoa
1609	Bank of Amsterdam
1690	Bank of Hamburg
1694	Bank of England

History of Banking in India

Banking in India has a very special origin; it started with giving of loans to others. Banking was synonymous with money lending. Manusmirithi speaks of deposits, pledges, loans and interest rate. Interest could be legally charged between 2% to 5% per month according to the transaction. The state regulated these transactions to prevent over charge of interest by the lenders and collection of usury was not allowed during those periods. The debtor or his family member had a pious obligation to repay the debt on the heir of the dead person. With the development in trade and commerce, the traders evolved system of money transfer. The main instrument used in that period was the bill of exchange or hundi. The Indian bankers acted as treasurer, insurer money changer.

II. Important Events of Banking in India

Year	Evolution and banking reforms
1786	General Bank of India
1806	Bank of Hindustan and Bengal
1809	Bank of Bengal
1840	Bank of Bombay
1843	Bank of Madras
1865	Allahabad Bank
1894	Punjab National Bank
Second half of 19th Century	Some exchange banks and Indian joint stock banks were set up
1900	Nine joint stock companies, eight exchange banks and three presidency banks were existed.
1921	IBI (Imperial Banks of India) three presidency banks were amalgamated and IBI formed under Companies Act, 1913.
1900-1930	Due to world war and other financial crisis, to maintain stability in financial system the central banks were emerged all around the world
1934	The Reserve Banks of India were created as Central bank for India.
1949	The Banking Regulation was enacted to regulation and restructure banks in India.
1950	Schedule VI, List I, Union List, Entry 38. Reserve Bank of India, Entry 43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including co-operative societies, Entry 45. Banking. List II, State List Entry 32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies. List III Concurrent List Entry 9. Bankruptcy and insolvency.

Year	Evolution and banking reforms
1955	SBI Act enacted to convert Imperial Bank of India to SBI
1959	Nationalisation of SBI and Associate Banks
1961	Insurance cover were extended to deposits
1969 & 1980	Nationalisation of Banks, 14 and 6 banks were nationalized
1971	Creation of credit guarantee corporation, to protect the depositors
1975	Creation of Regional Rural Banks
1993	The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
1993, 2001, 2013	License was given to private bank, foreign bank to start universal bankingin India.
2002	The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, This Act allows recovering loans from commercial and personal loans by public auction.
2013	FSLRC (Financial Sector Legislative Reforms Commission constituted under the Chairmanship of former Supreme Court Justice B.N..Srikrishna, based on his report India Finance Code Bill prepared
2016	The Insolvency and Bankruptcy Code, 2016 enacted to prevent multiple contradictory elements in the legal arrangements. The Act has chosen the strategy of repealing man y existing laws on bankruptcy and insolvency, and writing a clean modern law which is a simple, coherent, and effective answer to the problems under Indian conditions. (refer unit III)
2016	Banks Board Bureau (BBB) The BBB will be a body of eminent professionals and officials, which will replace the Appointments Board for appointment of Whole-time Directors as well as non-Executive Chairman of PSBs
2016	MPC: Monetary Policy Committee created to take policy decisions.

III. Different types of banks

The structure of banking in India consists of following components:

1. Central Bank – Reserve Bank of India (RBI)

The Reserve Bank of India was established on April 1, 1935 in accordance with the provisions of the Reserve Bank of India Act, 1934. The Central Office of the Reserve Bank was initially established in Calcutta but was permanently moved to Mumbai in 1937. The Central Office is where the Governor sits and where policies are formulated. Though originally privately owned, since nationalisation in 1949, the Reserve Bank is fully owned by the Government of India. The RBI is fully owned by the Government of India. It was inaugurated with share capital of Rs. 5 Cr divided into shares of Rs. 100 each fully paid up. RBI is governed by a central board (headed by a governor) appointed by the central government of India. RBI has 22 regional offices across India. The reserve bank of India was nationalized in the year 1949.

Preamble of the RBI

"Whereas it is expedient to constitute a Reserve Bank for India to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in [India] and generally to operate the currency any credit system of the country to its advantage;

And whereas in the present disorganization of the monetary systems of the world it is not possible to determine what will be suitable as a permanent basis for the Indian monetary system;

But whereas it is expedient to make temporary provision on the basis of the existing monetary system and to leave the question of the monetary standard best suited to India to be considered when the international monetary position has become sufficiently clear and stable to make it possible to frame permanent measures"

Establishment and incorporation of Reserve Bank.

(1) A bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency from the [Central Government] and of carrying on the business of banking in accordance with the provisions of this Act.

(2) The Bank shall be a body corporate by the name of the Reserve Bank of India, having perpetual succession and a common seal, and shall by the said name sue and be sued.

Composition of the Central Board and term of office of Directors

[(1) The Central Board shall consist of the following Directors, namely: - (a) a Governor and [not more than four] Deputy Governors to be appointed by the Central Government;

(b) four Directors to be nominated byte Central Government, one from each of the four Local Boards as constituted by section 9;

(c) [ten] Directors to be nominated by the Central Government; and

(d) [two Government officials] to be nominated by the Central Government;]

(2) The Governor and Deputy Governors shall devote their whole time to the affairs of the Bank, and shall receive such salaries and allowances as may be determined by the Central Board, with the approval of the [Central Government]: [Provided that the Central Board may, if in its opinion it is necessary in the public interest so to do, permit the Governor or a Deputy Governor to undertake, at the request of the Central Government or any State Government, such part-time honorary work, whether related to the purposes of this Act or not, as is not likely to interfere with his duties as Governor or Deputy Governor, as the case may be:]

[Provided further that the Central Government may, in consultation with the Bank, appoint a Deputy Governor as the Chairman of the National Bank, on such terms and conditions as that Government may specify.]

(3) A Deputy Governor and the Director nominated under clause (d) of subsection (1) may attend any meeting of the Central Board and take part in its deliberations but shall not be entitled to vote: [Provided that when the Governor is, for any reason, unable to attend any such meeting, a Deputy Governor authorised by him in this behalf in writing may vote for him at that meeting.]

(4) The Governor and a Deputy Governor shall hold office for such term not exceeding five years as the [Central Government] may fix when appointing them, and shall be eligible for re-appointment. [A Director nominated under clause(c) of sub-section (1) shall [* * *] hold office for a period of four years [and] [shall be eligible for reappointment: Provided that any such Director shall not be appointed for more than two terms, that is, for a maximum period of eight years either continuously or intermittently.] A Director nominated under clause (d) of sub-section (1) shall hold office during the pleasure of the [Central Government].

(5) No act or proceeding of the Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

(6) Repealed

(7) A retiring Director shall be eligible for re-nomination.]

RBI's Business transactions (s.17).

The Bank shall be authorized to carry on and transact the several kinds of business hereinafter specified, namely:-

(1) the accepting of money on deposit without interest from and the collection of money for, [* * *] the [Central Government], [* * *] the [State] Governments [* * *] [* * *] local authorities, banks and any other persons;

(2) (a) the purchase, sale and rediscount of bills of exchange and promissory notes, [drawn on [and payable in India]] and arising out of bona fide commercial or trade transactions bearing two or more good signatures, one of which shall be that of a scheduled bank [or a State co-operative bank] [or any financial institution, which is predominantly engaged in the acceptance or discounting of bills of exchange and promissory notes and which is approved by the Bank in this behalf] [* * *] and [maturing,–

(i) in the case of bills of exchange and promissory notes arising out of any such transaction relating to the export of goods from India, within one hundred and eighty days, and

(ii) in any other case, within ninety days, from the date of such purchase or rediscount exclusive of days of grace;]

(b) the purchase, sale and rediscount of bills of exchange and promissory notes, [drawn [and payable in India]] and bearing two or more good signatures, one of which shall be that of a scheduled bank [or a [State] co-operative bank or any financial institution, which is predominantly engaged in the acceptance or discounting of bills of exchange and promissory notes and which is approved by the Bank in this behalf] and drawn or issued for the purpose of [financing agricultural operations] or the marketing of crops, and maturing within [fifteen months] from the date of such purchase or rediscount, exclusive of days of grace; [* * * * *]

[(bb) the purchase, sale and rediscount of bills of exchange and promissory notes drawn and payable in India and bearing two or more good signatures, one of which shall be that of a State Co-operative bank] or a State financial corporation [or any financial institution, which is predominantly engaged in the acceptance or discounting of bills of exchange and promissory notes and which is approved by the Bank in this behalf, and drawn or issued for the purpose of financing the production or marketing activities of cottage and small scale industries approved by the Bank and maturing within twelve months from the date of such purchase or rediscount, exclusive of days of grace, provided that the payment of the principal and interest of such bills of exchange or promissory notes is fully guaranteed by the State Government;]

(c) the purchase, sale and rediscount of bills of exchange and promissory notes [drawn [and payable in India]] and bearing the signature of a scheduled bank, [* * *] and issued or drawn for the purpose of holding or trading in securities of [the Central Government [or a [State] Government]][* * *] and maturing within ninety days from the date of such purchase or rediscount, exclusive of days of grace; (3) (a) the purchase from and sale to scheduled banks

[(b) the purchase, sale and rediscount of bills of exchange (including treasury bills) drawn in or on any place in any country outside India which is a member of the International Monetary Fund and maturing,-

(i) in the case of bills of exchange arising out of any bona fide transaction relating to the export of goods from India, within one hundred and eighty days, and

(ii) in any other case, within ninety days, from the date of such purchase or rediscount: Provided that no such purchase, sale or rediscount shall be made in India except with a scheduled bank or a State co-operative bank;] [* * * * *]

[(3A) the making to any scheduled bank or State co-operative bank, of loans and advances, against promissory notes of such bank, repayable on demand or on the expiry of fixed periods not exceeding one hundred and eighty days; Provided that the borrowing bank furnishes a declaration in writing, to the effect that –

(i) it holds bills of exchange arising out of any transaction relating to the export of goods from India, of a value not less than the amount of such loans or advances, –

(a) drawn in India and on any place in any country outside India which is a member of the International Monetary Fund or in any other country notified in this behalf by the Bank in the Gazette of India, and [(b) maturing not later than one hundred and eighty days from the date of the loan or advance, and it will, so long as any part of such loans and advances remains unpaid, continue to hold such bills of exchange ofa value not less than the amount of such loans or advances outstanding for the time being; or]

[(ii) it has granted a pre-shipment loan or advance to an exporter or any other person in India in order to enable him to export goods from India, the amount of the loan or advance drawn and outstanding at any time being not less than the outstanding amount of the loan or advance obtained by the borrowing bank from the Bank;]]

[(3B) the making to any scheduled bank or State co-operative bank of loans and advances repayable on demand or on the expiry of fixed periods not exceeding one hundred and eighty days against promissory notes of such bank; Provided that the borrowing bank furnishes a declaration in writing to the effect that it has made loans and advances for bona fide commercial or trade transactions or for financing agricultural operations or the marketing of crops or for other agricultural purposes as set out in the declaration and the said declaration includes such other particulars as may be required by the Bank:] the making to [* * *] local authorities, scheduled banks [State] cooperative banks [and State Financial Corporations [* * *]] of loans and advances, repayable on demand or on the expiry of fixed periods not exceeding ninety days, against the security of –

(a) stocks, funds and securities (other than immovable property) in which a trustee is authorized to invest trust money by any Act of Parliament [of the United Kingdom] or by any law for the time being in force in [India][* * *];

(b) gold or silver or documents of title to the same;

(c) such bills of exchange and promissory notes as are eligible for purchase or rediscount by the Bank [or as are fully guaranteed as to the repayment of the principal and payment of interest by a State Government];

(d) promissory notes of any scheduled bank [State]] Co-operative bank], supported by documents of title to goods [such documents having 1

[(4A) the making to any State Financial Corporation [* * *], of loans and advances repayable on the expiry of fixed periods not exceeding eighteen months from the date of such loan or advance, against securities of the Central Government or of any State Government, of any maturity, or against bonds and debentures issued by that Corporation and guaranteed by the State Government concerned and maturing within a period not exceeding eighteen months from the date of such loan or advance: [Provided that the previous approval of the State Government shall be obtained for the borrowing by the State Financial Corporation and the amount of loans and advances granted to that Corporation under this clause shall not, at any time, exceed in the aggregate [twice the paid up share capital] thereof];

[(4AA) the making of annual contributions to the National Rural Credit (Long Term Operations) Fund and the National Rural Credit] (Stabilisation) Fund established under sections 42 and 43, respectively, of the National Bank for Agriculture and Rural Development Act, 1981;]

[(4B) the making to the Industrial Finance Corporation of India [* * *] of loans and advances, – (a) repayable on demand or on the expiry of fixed periods not exceeding ninety days from the date of such loan or advance, against securities of the Central Government or of any State Government; or

(b) repayable on the expiry of fixed periods not exceeding eighteen months from the date of such loan or advance, against securities of the Central Government of any maturity or against bonds and debentures issued by the said Corporation and guaranteed by the Central Government and maturing within a period not exceeding eighteen months from the date of such loan or advance:

[(4BB) the making to any financial institution notified by the Central Government in this behalf, of loans and advances, –

(a) repayable on demand or on the expiry of fixed periods not exceeding ninety days from the date of such loan or advance, against the securities of the Central Government or of any State Government, or (b) repayable on the expiry of fixed periods not exceeding eighteen months from the date of such loan or advance, against securities of the Central Government or of any State Government, of any maturity, or against bonds and debentures issued by that financial institution and guaranteed by the Central Government or any State Government, and maturing within a period not exceeding eighteen months from the date of such loan or advance:

Provided that the amount of loans and advances granted to a financial institution under sub-clause (b) shall not, at any time, exceed in the aggregate sixty per cent, of the paid-up share capital thereof];

[(4BBB) the making to the Unit Trust of loans and advances - (i) repayable on demand or on the expiry of a fixed period not exceeding ninety days from the date of such loan or advance against the security of

stocks, funds and securities (other than immovable property) in which a trustee is authorised to invest trust money by any law for the time being in force in India;

(ii) repayable on demand or within a period of eighteen months from the date of such loan or advance against the security of the bonds of the Unit Trust issued with the approval of and guaranteed by the Central Government];

[(iii) for the purpose of any scheme other than the first unit scheme under the Unit Trust of India Act, 1963 on such terms and conditions and against the security of such other property of the Unit Trust as may be specified in this behalf by the Bank]];

[(4C) the making to a Warehousing Corporation established under the Agricultural Produce Development and Warehousing) Corporations Act, 1956, of loans and advances, -

(a) repayable on demand or on the expiry of fixed periods not exceeding ninety days, from the date of such loanor advance, against securities of the Central Government or of any State Government, or

(b) repayable on the expiry of fixed periods not exceeding eighteen months from the date of such loan or advance, against securities of the Central Government or of any State Government, of any maturity, or against bonds and debentures issued by the Corporation to which the loan or advance is made, and guaranteed by the Central ora State Government, and maturing within a period not exceeding eighteen months from the date of such loan or advance:

Provided that the amount of loans and advances granted under clause (b) shall not at any time exceed, in the aggregate, three crores of rupees in the case of the Central Warehousing Corporation and fifty lakhs of rupees in the case of a State Warehousing Corporation];

[(4D) the making to the Deposit Insurance Corporation of loans and advances; and generally assisting the Corporation in such manner and on such terms as may be determined by the Central Board];

[(4DD) the making to the National Housing Bank of loans and advances and generally assisting the National Housing Bank in such manner and on such terms as may be determined by the Central Board];

[(4E) the making to the National Bank of loans and advances repayable on demand or on the expiry of fixed period not exceeding eighteen months from the date of making of the loan or advance, either-

(i) against the security of stocks, funds and securities (other than immovable property) in which a trustee is authorised to invest trust money by any law for the time being in force in India; or [the Exim Bank] [or the Reconstruction Bank] [or the Small Industries Bank] out of the National Industrial Credit (Long Term Operations) Fund established under section 46C;

[(4GG) the making of loans and advances to, and the purchasing of bonds and debentures of, the National Housing Bank out of the National Housing Credit (Long Term Operations) Fund established under section 46D];

(4H) the making to [*****] [the Small Industries Bank] of loans and advances -

(a) repayable on demand or on the expiry of fixed periods not exceeding ninety days, from the date of such loan or advance against the security of stocks, funds and securities (other than immovable property) in which a trustee is authorised to invest trust money by any law for the time being in force in India; or

(b) against the security of bills of exchange or promissory notes, arising out of bona fide commercial or trade transactions bearing two or more good signatures and maturing within five years from the date of such loan or advance];

[(4-I) the making to scheduled banks, [the Exim Bank] [or the Reconstruction Bank or the Small Industries Bank], the Industrial Finance Corporation and any other financial institution as may, on the recommendation of the Bank, be approved in this behalf by the Central Government of loans and advances repayable on demand or otherwise and against such security and on such other terms and conditions as may be approved in this behalf by the Central Board for the purpose of enabling such banks, or financial institution, as the case may be, to purchase foreign exchange from the Bank for the purpose of financing the import of capital goods or for such other purposes as may be approved by the Central Government];

[(4J) the making to the Exim Bank of loans and advances – (a) repayable on demand or on the expiry of a fixed period not exceeding ninety days, from the date of such loan or advance against the security of stocks, funds and securities (other than immovable property) in which a trustee is authorised to invest trust money by any law for the time being in force in India; or (b) against the security of bills of exchange or promissory notes, arising out of bona fide commercial or trade transactions bearing two or more good signatures and maturing within five years from the date of such loan or advance;]

[(4K) the making to the Reconstruction Bank of loans and advances – (a) repayable on demand or on the expiry of a fixed period not exceeding ninety days, from the date of such loan or advance against the security of stocks, funds and securities (other than immovable property) in which a trustee is authorised to invest trust money by any law for the time being in force in India; or

(b) against the security of bills of exchange or promissory notes, arising out of bona fide commercial or trade transactions bearing two or more good signatures and maturing within five years from the date of such loan or advance];

(5) the making to the [Central Government] [***] [and [State Governments]] of advances repayable in each case not later than three months from the date of the making of the advance;

[(6) the issue of demand drafts, telegraphic transfers and other kinds of remittances made payable at its own offices or agencies, the purchase of telegraphic transfers, and the making, issue and circulation of bank post bills];

[(6A) dealing in derivatives, and, with the approval of the Central Board, in any other financial instrument. Explanation.— For the purposes of this clause, "derivative" means an instrument, to be settled at a future date, whose value is derived from change in one or a combination of more than one of the following underlyings, namely:—

(a) interest rate, (b) price of securities of the Central Government or a State Government or of such securities of a local authority as may be specified in this behalf by the Central Government, (c) price of foreign securities, (d) foreign exchange rate, (e) index of rates or prices, (f) credit rating or credit index, (g) price of gold or silver coins, or gold or silver bullion, or (h) any other variable of similar nature];

(8) the Purchase and sale of securities

[(8A) the purchase and sale of shares in, or the capital of [the [National Bank] [the Deposit Insurance Corporation], [*****], the State Bank [or any other bank [or financial institution] notified by the Central Government in this behalf]];

[(8AA) the promoting, establishing, supporting or aiding in the promotion, establishment and support of any financial institution, whether as its subsidiary or otherwise;]

[(8B) the keeping of deposits with the State Bank for such specific purposes as may be approved by the Central Government in this behalf];

(9) the custody of monies, securities and other articles of value, and the collection of the proceeds, whether principal, interest or dividends, of any such securities;

(10) the sale and realisation of all property, whether movable or immovable, which may in any way come into the possession of the Bank in satisfaction, or part satisfaction, of any of its claims;

(11) the acting as agent for[* * *] the [Central Government] [or any [State] Government or any local authority [or the Industrial Finance Corporation of India [* * *] [or any other body corporate which is established or constituted by or under any other law] [or the Government of any such country outside India or [any such person or authority] as may be approved in this behalf by the Central Government] in the transaction of any of the following kinds of business, namely; –

(a) the purchase and sale of gold or silver [or foreign exchange];

(b) the purchase, sale, transfer and custody of bills of exchange, securities or shares in any company;

(c) the collection of the proceeds, whether principal, interest or dividends, of any securities or shares:

(d) the remittance of such proceeds, at the risk of the principal, by bills of exchange payable either in India or elsewhere; (e) the management of public debt; [* * *] the issue and management of [* * *] bonds and debentures];

[(11A) the acting as agent for the Central Government, –

[(a) in guaranteeing the due performance by any small scale industrial concern, approved by the Central Government, of its obligations to any bank or other financial institution in respect of loans and advances made, or other credit facilities provided, to it by such bank or other financial institution and the making as such agent of payments in connection with such guarantee, and (b) in administering any scheme for subsidising the rate of interest or other charges in relation to any loans or advances made, or other credit facilities provided, by banks or other financial institutions for the purpose of financing or facilitating any export from India and the making as such agent of payments on behalf of the Central Government;]

[(12) the purchase and sale of gold or silver coins and gold and silver bullion and foreign exchange and the opening of a gold account with the principal currency authority of any foreign country or the Bank for International Settlements or any international or regional bank or financial institution formed by such principal currency authority or authorities or by the Government of any foreign country;]

[(12A) the purchase and sale of securities issued by the Government of any country outside India or by any institution or body corporate established outsideIndia and expressed to be payable in a foreign currency or any international or composite currency unit, being in the case of purchase by the Bank securities maturing within a period of ten years from the date of purchase: Provided that in the case of securities of an institution or body corporate, the repayment of principal and payment of interest in respect of such securities shall be guaranteed by the Government of the country concerned];

[(12AA) lending or borrowing of securities of the Central Government or a State Government or of such securities of a local authority as may be specified in this behalf by the Central Government or foreign securities;

(12AB) dealing in repo or reverse repo: Provided that lending or borrowing of funds by way of repo or reverse repo shall not be subject to any limitation contained in this section.

Explanation.— For the purposes of this clause,—

(a) "repo" means an instrument for borrowing funds by selling securities of the Central Government or a State Government or of such securities of a local authority as may be specified in this behalf by the Central Government or foreign securities, with an agreement to re purchase the said securities on a mutually agreed future date at an agreed price which includes interest for the funds borrowed;

(b) "reverse repo" means an instrument for lending funds by purchasing securities of the Central Government or a State Government or of such securities of a local authority as may be specified in this behalf by the Central Government or foreign securities, with an agreement to resell the said securities on a mutually agreed future date at an agreed price which includes interest for the funds lent];

[(12B) the making of loans and advances in foreign currencies to scheduled banks, [****] [the Exim Bank], [the Reconstruction Bank or the Small Industries Bank], the Industrial Finance Corporation, any State Financial Corporation and any other financial institution as may, on the recommendation of the Bank, be approved by the Central Government and on such terms and conditions as may be specified by the Central Board in this behalf, against promissory notes of such bank or financial institution, as the case may be: Provided that the borrowing bank or financial institution, as the case may be, furnishes a declaration in writing to the effect that – (a) it has made loans and advances in foreign currencies for financing international trade or for the import of capital goods or for such other purposes as may be approved by the Central Government; and (b) that the amount of loans or advances so made and outstanding at any time will not be less than the outstanding amount of the loans or advances obtained by it from the Bank;]

[(13) the opening of an account with an office outside India of any bank, including a bank incorporated in India or the making of an agency agreement with, and the acting as an agent or correspondent of, any bank incorporated outside India, or the principal currency authority of any country under the law for the time being in force in that country or any international or regional bank or financial institution formed by such principal currency authorities or foreign governments, and the investing of the funds of the Bank in the shares and securities of any such international or regional bank or financial institution or of any other foreign institution as may be approved by the Central Board in this behalf];

[(13A) participation in any arrangement for the clearing and settlement of any amounts due from, or to, any person or authority on account of the external trade of India with any other country or group of countries or of any remittances to, or from, that country or group of countries, including the advancing, or receiving, of any amount in any currency in connection therewith, and, for that purpose, becoming, with the approval of the Central Government, a member of any international or regional clearing union of central banks, monetary or other authorities, or being associated with any such clearing arrangements, or becoming a member of any body or association formed by central banks, monetary or other similar authorities, or being associated with the same in any manner];

(14) the borrowing of money for a period not exceeding one month for the purposes of the business of the Bank, and the giving of security for money so borrowed: Provided that no money shall be borrowed under this clause from any person in India [* * *] other than a scheduled bank [* * *] or from any person The words "or a Burma Scheduled Bank" ins. by the M. O. 1937, omitted by s.11, Act 11 of 1947outside India [* * *] other than a bank which is the principal currency authority of any country under the law for the time being in force in that country: Provided further that the total amount of such borrowing from persons in India [* * *] shall not at any time exceed the amount of the [capital] of the Bank:

(15) the making and issue of bank notes subject to the provisions of this Act

[(15A) the exercise of powers and functions and the performance of duties entrusted to the Bank under this act or under any other law for the time being in force;]

[(15B) the providing of facilities for training in banking and for the promotion of research, where, in the opinion of the Bank, such provision may facilitate the exercise by the Bank of its powers and functions, or the discharge of its duties;]

(16) generally, the doing of all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under this Act

Functions of RBI

A bank which is entrusted with the functions of guiding and regulating the banking system of a country is known as its Central bank. Such a bank does not deal with the general public. It acts essentially as Government's banker, maintain deposit accounts of all other banks and advances money to other banks, when needed. The Central Bank provides guidance to other banks whenever they face any problem. It is therefore known as the banker's bank. The Reserve Bank of India is the central bank of our country. The Central Bank maintains record of Government revenue and expenditure under various heads. It also advises the Government on monetary and credit policies and decides on the interest rates for bank deposits and bank loans. In addition, foreign exchange rates are also determined by the central bank. Another important function of the Central Bank is the issuance of currency notes, regulating their circulation in the country by different methods. No other bank than the Central Bank can issue currency.

The general superintendence and direction of the bank is entrusted to central board of directors of 20 members, the Governor and four deputy Governors, one Governmental official from the ministry of Finance, ten nominated directors by the government to give representation to important elements in the economic life of the country, and the four nominated director by the Central Government to represent the four local boards with the headquarters at Mumbai, Kolkata, Chennai and 29 New Delhi. Local Board consists of five members each central government appointed for a term of four years to represent territorial and economic interests and the interests of cooperative and indigenous banks.

The RBI Act 1934 was commenced on April 1, 1935. The Act, 1934 provides the statutory basis of the functioning of the bank. The bank was constituted for the need of following:

- To regulate the issues of banknotes.
- To maintain reserves with a view to securing monetary stability
- To operate the credit and currency system of the country to its advantage.

Bank of Issue: The RBI formulates, implements, and monitors the monitory policy. Its main objective is maintaining price stability and ensuring adequate flow of credit to productive sector. Regulator-Supervisor of the financial system: RBI prescribes broad parameters of banking operations within which the country's banking and financial system functions. Their main objective is to maintain public confidence in the system, protect depositor's interest and provide cost effective banking services to the public. Manager of exchange control: The manager of exchange control department manages the foreign exchange, according to the foreign exchange management act, 1999. The manager's main objective is to facilitate external trade and payment and promote orderly development and maintenance of foreign exchange market in India.

Issuer of currency: A person who works as an issuer, issues and exchanges or destroys the currency and coins that are not fit for circulation. His main objective is to give the public adequate quantity of supplies of currency notes and coins and in good quality.

Developmental role: The RBI performs the wide range of promotional functions to support national objectives such as contests, coupons maintaining good public relations and many more.

Regulatory functions: There are also some of the related functions to the above mentioned main functions. They are such as; banker to the government, banker to banks etc....

1. Banker to government performs merchant banking function for the central and the state governments; also acts as their banker.
2. Banker to banks maintains banking accounts to all scheduled banks.
3. Controller of Credit: RBI performs the following tasks:
4. It holds the cash reserves of all the scheduled banks.
5. It controls the credit operations of banks through quantitative and qualitative controls.
6. It controls the banking system through the system of licensing, inspection and calling for information.
7. It acts as the lender of the last resort by providing rediscount facilities to

Scheduled banks.

The powers of RBI in the different roles as regulator and supervisor can be listed as follows

a. Power to licence;
b. Power to appointment and removal of banking boards and personal
c. Power to regulate the business of banks
d. Power to give directions
e. Power to inspect and supervise banks
f. Power regarding audit of books
g. Power to collect, collate furnish credit information
h. Power to relating to moratorium, amalgamation and winding up and
i. Power to impose penalties

Supervisory Functions:

In addition to its traditional central banking functions, the Reserve Bank performs certain non-monetary functions of the nature of supervision of banks and promotion of sound banking in India. The Reserve Bank Act 1934 and the banking regulation act 1949 have given the RBI wide powers of supervision and control over commercial and co-operative banks, relating to licensing and establishments, branch expansion, liquidity of their assets, management and methods of working, amalgamation, reconstruction and liquidation.

The RBI is authorized to carry out periodical inspections of the banks and to call for returns and necessary information from them. The nationalisation of 14 major Indian scheduled banks in July 1969 has imposed new responsibilities on the RBI for directing the growth of banking and credit policies towards more rapid development of the economy and realisation of certain desired social objectives. The supervisory functions of the RBI have helped a great deal in improving the standard of banking in India to develop on sound lines and to improve the methods of their operation.

Promotional Functions:

With economic growth assuming a new urgency since independence, the range of the Reserve Bank's functions has steadily widened. The bank now performs a variety of developmental and promotional functions, which, at one time, were regarded as outside the normal scope of central banking. The Reserve bank was asked to promote banking habit, extend banking facilities to rural and semi-urban areas, and establish and promote new specialized financing agencies Indian Scheduled Commercial Banks

The commercial banking structure in India consists of scheduled commercial banks, and unscheduled banks. Scheduled Banks: Scheduled Banks in India constitute those banks which have been included in the second schedule of RBI act 1934. RBI in turn includes only those banks in this schedule which satisfy the criteria laid down vide section 42(6a) of the Act.

2. Commercial Banks

A commercial bank is a profit-seeking business firm, dealing in money and credit. It is a financial institution dealing in money in the sense that it accepts deposits of money from the public to keep them in its custody for safety. So also, it deals in credit, i.e., it creates credit by making advances out of the funds received as deposits to needy people. It thus, functions as a mobiliser of saving in the economy. A bank is, therefore like a reservoir into which flow the savings, the idle surplus money of households and from which loans are given on interest to businessmen and others who need them for investment or productive uses.

1. Deposit Banks: The most important type of deposit banks is the commercial banks.

They have connection with the commercial class of people. These banks accept deposits from the public and lend them to needy parties. Since their deposits are for short period only, these banks extend loans only for a short period. Ordinarily these banks lend money for a period between 3 to 6 months. They do not like to lend money for long periods or to invest their funds in any way in long term securities.

2. Industrial Banks: Industries require a huge capital for a long period to buy machinery

and equipment. Industrial banks help such industrialists. They provide long term loans to industries. Besides, they buy shares and debentures of companies, and enable them to have fixed capital. Sometimes, they even underwrite the debentures and shares of big industrial concerns. The important functions of industrial banks are:

a) They accept long term deposits.

b) They meet the credit requirements of industries by extending long term loans.

c) These banks advise the industrial firms regarding the sale and purchase of shares and debentures.

The industrial banks play a vital role in accelerating industrial development. In India, after attainment of independence, several industrial banks were started with large paid up capital. They are, The Industrial Finance Corporation (I.F.C.), The State Financial Corporations (S.F.C.), Industrial Credit and Investment Corporation of India (ICICI) and Industrial Development Bank of India (IDBI) etc.

3. Savings Banks:These banks were specially established to encourage thrift among small savers and therefore, they were willing to accept small sums as deposits. They encourage savings of the poor and middle class people. In India we do not have such special institutions, but post offices perform such functions. After nationalisation most of the nationalised banks accept the saving deposits.

4. Agricultural Banks: Agriculture has its own problems and hence there are separate banks to finance it. These banks are organised on co-operative lines and therefore do not work on the principle of maximum profit for the shareholders. These banks meet the credit requirements of the farmers through term loans, viz., short, medium and long term loans. There are two types of agricultural banks,

a) Agricultural Co-operative Banks, and

b) Land Mortgage Banks. Co-operative Banks are mainly for short periods. For long periods there are Land Mortgage Banks. Both these types of banks are performing useful functions in India.

5. Exchange Banks: These banks finance mostly for the foreign trade of a country. Their main function is to discount, accept and collect foreign bills of exchange. They buy and sell foreign currency and thus help businessmen in their transactions. They also carry on the ordinary banking business.

In India, there are some commercial banks which are branches of foreign banks. These banks facilitate for the conversion of Indian currency into foreign currency to make payments to foreign exporters. They purchase bills from exporters and sell their proceeds to importers. They purchase and sell "forward exchange" too and thus minimise the difference in exchange rates between different periods, and also protect merchants from losses arising out of exchange fluctuations by bearing the risk. The industrial and commercial development of a country depends these days, largely upon the efficiency of these institutions.

6. Miscellaneous Banks: There are certain kinds of banks which have arisen in due course to meet the specialised needs of the people. In England and America, there are investment banks whose object is to control the distribution of capital into several uses.

American Trade Unions have got labour banks, where the savings of the labourers are pooled together. In London, there are the London Discount House whose business is "to go about the city seeking for bills to discount." There are numerous types of different banks in the world, carrying on one or the other banking business.

Functions of Commercial Banks

Primary: Acceptance of deposits Advancing loans, Creation of credit, Clearing of cheques, Financing foreign trade and Remittance of funds

Secondary: Agency Services and General Utility Services

a. Public sector Banks

There are 27 public sector banks in India (as on 04.08.2016) are the ones in which the government has a major holding. They are divided into two groups i.e. Nationalized Banks and State Bank of India and its associates. Among them, there are 19 nationalized banks and 8 State Bank of India associates. Public Sector Banks dominate 75% of deposits and 71% of advances in the banking industry. Public Sector Banks dominate commercial banking India. These can be further classified into: 1) State Bank of India 2) Nationalized banks 3) Regional Rural Banks

b. Private Banks

The private sector banks played a crucial role in the growth of joint stock banking in India. They represent part of the indian banking sector that is made up of both private and public sector banks. The "private-sector banks" are banks where greater parts of state or equity are held by the private shareholders and not by government.

Banking in India has been dominated by public sector banks since the 1969 when all major banks were nationalised by the Indian government. However, since liberalisation in government banking policy in the 1990s, old and new private sector banks have re-emerged. They have grown faster & bigger over the two decades since liberalisation using the latest technology, providing contemporary innovations and monetary tools and techniques.The private sector banks are split into two groups by financial regulators in India, old and new. The old private sector banks existed prior to the nationalisation in 1969 and kept their independence because they were either too small or specialist to be included in nationalisation. The new private sector banks are those that have gained their banking license since the liberalisation in the 1990s. there are two types of private sector banks in india namely Old Private Banks (OPB) and New Private Bank (NPB).

The Private sector banks introduced the concept of online banking in India. This was mostly because the private banks were technologically well equipped. Online banking is extremely common today since you can sit anywhere and go ahead with your banking transactions. You do not have to personally visit your bank. The Private sector banks were using state of the art technology and fully computerized systems since the time they entered the Indian market whereas the Public sector banks were not. However despite the technological challenges the public sector banks in India are still the preferred destinations for many as they are considered as safer options for money deposit.

c. Foreign Banks

As of 31st December 2016, there are 46 foreign banks from 26 countries operating as branches and 46 banks from 22 countries operating as representative offices. Although the discussion around differential licensing is still nascent, there is one foreign bank present as a credit card issuer with limited banking licence. In addition, a number of foreign banks have also entered India via the NBFC route, while a considerable number have set up captive centres in the country. Foreign banks present in India as representative offices often have correspondent banking relationships with domestic banks and provide a useful platform for foreign banks to access opportunities for foreign currency lending to Indian corporate and financial institutions. Foreign banks have less than 1% of the total branch network but about 7% of the total banking sector assets and a sizeable 11% of profits. With 334 branches in all, the share of foreign bank branches is less than 1%.

1. Co-operative Banks

   a. Primary Credit Societies

   b. Central Co-operative Banks

   c. State Co-operative Banks

Co-operative banks are small-sized units organized in the cooperative sector which operate both in urban and non-urban regions. These banks are traditionally centered on communities, localities and work place groups and they essentially lend to small borrowers and businesses. The term Urban Co-operative Banks (UCBs), though not formally defined, refers to primary cooperative banks located in urban and semi-urban areas., It has establishment and functions are mostly based on following principles namely, Voluntary and open membership, Democratic member control, Member economic participation

Autonomy and independence, Education, training and information, Co-operation among Co-operatives and Concern for Community.

These banks provide most services such as savings and current accounts, safe deposit lockers, loan or mortgages to private and business customers. For middle class users, for whom a bank is where they can save their money, facilities like Internet banking or phone banking is not very important. Although they

are not better than private banks in terms of facilities provided, their interest rates are definitely competitive. However, unlike private banks, the documentation process is lengthy if not stringent and getting a loan approved quickly is rather difficult. The criteria for getting a loan from a UCB are less stringent than for a loan from a commercial bank.

2. Regional Rural Banks

The nationalization of the banks in 1969 boosted the confidence of the public in the Banking system of the country. However, in the early 1970s, there was a feeling that even after nationalization, there were cultural issues which made it difficult for commercial banks, even under government ownership, to lend to farmers. This issue was taken up by the government and it set up Narasimham Working Group in 1975. On the basis of this committee's recommendations, a Regional Rural Banks Ordinance was promulgated in September 1975, which was replaced by the Regional Rural Banks Act 1976.Regional Rural Banks (RRBs) were established in 1975 under the provisions of the Ordinance promulgated on the 26th September 1975 and followed by Regional Rural Banks Act, 1976 with a view to develop the rural economy and to create a supplementary channel to the 'Cooperative Credit Structure' with a view to enlarge institutional credit for the rural and agriculture sector.

The Government of India, the concerned State Government and the bank, which had sponsored the RRB contributed to the share capital of RRBs in the proportion of 50%, 15% and 35%, respectively. The area of operation of the RRBs is limited to notified few districts in a State. The RRBs mobilise deposits primarily from rural/semi-urban areas and provide loans and advances mostly to small and marginal farmers, agricultural labourers , rural artisans and other segments of priority sector.

The RBI in 2001 constituted a Committee under the Chairmanship of Dr V S Vyas on "Flow of Credit to Agriculture and Related Activities from the Banking System" which examined relevance of RRBs in the rural credit system and the alternatives for making it viable. The consolidation process thus was initiated in the year 2005 as an off-shoot of Dr Vyas Committee Recommendations. First phase of amalgamation was initiated Sponsor Bank-wise within a State in 2005 and the second phase was across the Sponsor banks within a State in 2012. The process was initiated with a view to provide better customer service by having better infrastructure, computerization, experienced work force, common publicity and marketing efforts etc. The amalgamated RRBs also benefit from larger area of operation, enhanced credit exposure limits for high value and diverse banking activities. As a result of amalgamation, number of the RRBs has been reduced from 196 to 64 as on 31 March 2013. The number of branches of RRBs increased to 17856 as on 31 March 2013 covering 635 districts throughout the country.

Sources of Funds

The sources of funds of RRBs comprise of owned fund, deposits, borrowings from NABARD, Sponsor Banks and other sources including SIDBI and National Housing Bank.

The owned funds of RRBs comprising of share capital, share capital deposits received from the shareholders and the reserves stood at 19304 crore as on 31 March 2013 as against 16462 crore as on 31 March 2012; registering a growth of 17.26%. The increase in owned funds to the tune of 2842 crore was mainly on account of accretion to reserves by the profit making RRBs. The share capital and share capital deposits together amounted to 6174 crore

(a) The Chakrabarty Committee reviewed the financial position of all RRBs in 2010 and recommended for recapitalisation of 40 out of 82 RRBs for strengthening their CRAR to the level of 9 per cent by 31 March 2012. According to the Committee, the remaining RRBs are in a position to achieve the desired level of

CRAR on their own. Accepting the recommendations of the committee, the GOI along with other shareholders decided to recapitalise the RRBs by infusing funds to the extent of 2200 Crore. The shareholder wise proportion (GOI/Sponsor Banks/State Governments) is 50:35:15 respectively.

(b) As on 31 March 2013, an amount of 2015.86 crore has been released to 37 RRBs in 20 States. The released amount includes GoI's contribution of 1003.92 crore, State Govt's contribution of 303.59 crore and Sponsor bank's contribution of 708.35 crore. The recapitalisation is complete in respect of 35 RRBs (5 in Odisha , 3 in MP, 2 in Uttarakhand, 2 in Jharkhand, 2 in Chhatisgarh, 2 in Bihar, 2 in Maharashtra, 3 in West Bengal, 5 in Rajasthan and one each in Assam, Arunachal Pradesh, Nagaland, Tripura, J&K, Karnataka, Tamil Nadu, Gujarat & UT of Puducherry). GoI share 7.99 cr. is pending in respect of Manipur Rural Bank. Mizoram State Government has partially released 0.50 crore in respect of Mizoram Rural Bank and 2.80 crore is pending. Two State Govts.viz. UP(2 RRBs), & J&K (1 RRB) have not released any amount in respect of 3 RRBs operating in their states. Out of 35 fully recapitalised RRBs, 3 RRBs viz. Central Madhya Pradesh GB, Manipur Rural Bank and Mizoram GB have not achieved CRAR of 9 per cent as on 31.3.2013. Deposits of RRBs increased from 186336 crore to 211458 crore during the year registering growth rate of 13.48 %. There are Thirty three (33) RRBs having deposits of more than 3000 crore each.

5. Development Banks

"Development banks are those financial institutions whose prime goal (motive) is to finance the primary (basic) needs of the society. Such funding results in the growth and development of social and economic sectors of the nation. However, needs of the society vary from region to region due to differences seen in its communal structure, economy and other aspects."

"Development banks are financial institutions established to lend (loan) finance (money) on subsidized interest rate. Such lending is sanctioned to promote and develop important sectors like agriculture, industry, import-export, housing and allied activities."

Development bank is essentially a multi-purpose financial institution with a broad development outlook. A development bank may, thus, be defined as a financial institution concerned with providing all types of financial assistance (medium as well as long term) to business units, in the form of loans, underwriting, investment and guarantee operations, and promotional activities — economic development in general, and industrial development, in particular.

Features of a Development Bank:

a. It is a specialised financial institution.

b. It provides medium and long term finance to business units.

c. Unlike commercial banks, it does not accept deposits from the public.

d. It is not just a term-lending institution. It is a multi-purpose financial institution.

e. It is essentially a development-oriented bank. Its primary object is to promote economic development by promoting investment and entrepreneurial activity in a developing economy. It encourages new and small entrepreneurs and seeks balanced regional growth.

f. It provides financial assistance not only to the private sector but also to the public sector undertakings.

g. It aims at promoting the saving and investment habit in the community.

h. It does not compete with the normal channels of finance, i.e., finance already made available by the banks and other conventional financial institutions. Its major role is of a gap-filler, i. e., to fill up the deficiencies of the existing financial facilities.

i. Its motive is to serve public interest rather than to make profits. It works in the general interest of the nation.

6. Specialized Banks

SFIs are institutions set up mainly by the government for providing medium and long-term financial assistance to industry. As these institutions provide developmental finance, that is, finance for investment in fixed assets, they are also known as 'development banks' or 'development financial institutions'. These institutions receive funds for their financing operations primarily from the government or other public institutions. These institutions also raise funds from the capital market. Some of the important institutions are named as follows.

a. Export Import Bank of India

b. Small Industries Development Bank of India

c. National Bank for Agricultural and Rural Development

Types of Specialised Financial Institutions

Specialised financial institutions may be divided into the following types:

(a) All India Development Banks

1. Industrial Development Bank of India (IDBI) 2. Small Industries Development Bank of India (SIDBI) 3.Industrial Finance Corporation of India (IFCI) 4. Industrial credit and Investment corporation of India (ICICI) 5. National Bank for Agriculture and Rural Development (NABARD) 6. Industrial Investment Bank of India Ltd. (previously, Industrial Reconstruction Bank of India)

(b) State-level Institutions 1. State Financial Corporations (SFCs) 2.State Industrial Development Corporations (SIDC) 3. State Industrial Investment Corporations (SIIC)

(c) Investment institutions

1. Unit Trust of India (UTI) 2. Life Insurance Corporation of India (LIC) 3. General Insurance Corporation (GIC)

Need for establishing SFIs are mainly because of the following reasons:-

1. It was difficult for industry in general to procure sufficient long term funds in the capital markets. There were no other institutions to supply long-term finance to industry. Traditionally, only short term finance could be availed from commercial banks. SFIs were established to ensure that industry get sufficient long-term funds and in the desired sectors in accordance with planned priorities.

Certain particular sections of the industry faced greater difficulties than others in procuring long-term finance. These included (a) Small and medium sized concerns, (b) new concerns set up by new entrepreneurial groups, (c) specific industries, such as cotton and jute, which required funds for modernisation, (d) concerns involved in innovation and new technological developments, (e) concerns requiring extra-ordinarily large amounts of finance with a long gestation period, (f) concerns in backward regions. SFIs were established to meet the long-term financial requirement of such concerns, on economic and social ground.

7. NBFC & Microfinance institutions

A Non Banking Financial Company (NBFC) is a company registered under the Companies Act, 1956 of India, engaged in the business of loans and advances, acquisition of shares, stock, bonds hire-purchase, insurance business or chit business but does not include any institution whose principal business is that includes agriculture or industrial activity or the sale, purchase or construction of immovable property

The working and operations of NBFCs are regulated by the Reserve Bank of India (RBI) within the framework of the Reserve Bank of India Act, 1934 (Chapter III B) and the directions issued by it.

Types

Asset Finance Company (AFC): An AFC is a company which is a financial institution carrying on as its principal business the financing of physical assets supporting productive/economic, such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines. Principal business for this purpose is defined as aggregate of financing real/physical assets supporting economic activity and income arising there from is not less than 60% of its total assets and total income respectively.

Investment Company (IC):IC means any company which is a financial institution carrying on as its principal business the acquisition of securities.

Loan Company (LC): LC means any company which is a financial institution carrying on as its principal business the providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an Asset Finance Company.

Infrastructure Finance Company (IFC):IFC is a non-banking finance company a) which deploys at least 75 per cent of its total assets in infrastructure loans, b) has a minimum Net Owned Funds of Rs. 300 crore, c) has a minimum credit rating of 'A 'or equivalent d) and a CRAR of 15%.

Infrastructure Debt Fund: Non- Banking Financial Company (IDF-NBFC)

IDF-NBFC is a company registered as NBFC to facilitate the flow of long term debt into infrastructure projects. IDF-NBFC raise resources through issue of Rupee or Dollar denominated bonds of minimum 5 year maturity. Only Infrastructure Finance Companies (IFC) can sponsor IDF-NBFCs.

Non-Banking Financial Company – Factors (NBFC-Factors)

NBFC-Factor is a non-deposit taking NBFC engaged in the principal business of factoring. The financial assets in the factoring business should constitute at least 50 percent of its total assets and its income derived from factoring business should not be less than 50 percent of its gross income.

Gold Loan NBFCs in India:Over the years, gold loan NBFCs witnessed an upsurge in Indian financial market, owing mainly to the recent period of appreciation in gold price and consequent increase in the demand for gold loan by all sections of society, especially the poor and middle class to make the both ends meet. Though there are many NBFCs offering gold loans in India, about 95 per cent of the gold loan business is handled by three Kerala based companies, viz., Muthoot Finance, Manapuram Finance and Muthoot Fincorp. Growth of gold loan NBFCs eventuating from various factors including Asset Under Management (AUM), number of branches, and also the number of customers etc. Growth of gold loan NBFCs occurred both in terms of the size of their balance sheet and their physical presence that compelled to increase their dependence on public funds including bank finance and non-convertible debentures. Aggressive structuring of gold loans resulting from the uncomplicated, undemanding and fast process of documentation along with the higher Loan to Value (LTV) ratio include some of the major factors that augment the growth of Gold loan NBFCs.

Residuary Non-Banking Companies (RNBCs):Residuary Non-Banking Company is a class of NBFC which is a company and has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner and not being Investment, Asset Financing, Loan Company. These companies are required to maintain investments as per directions of RBI, in addition to liquid assets.

NATIONALISAITON OF BANKS IN INDIA

YEAR	BANKS
1955	State Bank of India nationalized
1959 – 7 subsidiaries nationalized and associated with SBI	1. State Bank of Bikaner and Jaipur 2. State Bank of Hyderabad 3. State Bank of Indore 4. State Bank of Mysore 5. State Bank of Patiala 6. State Bank of Saurashtra 7. State Bank of Travancore
1969 – 14 major commercial Banks nationalized on 19th July 1969.	1. Allahabad Bank 2. Bank of Baroda 3. Bank of India 4. Bank of Maharashtra 5. Canara Bank 6. Central Bank of India 7. Dena Bank 8. Indian Bank 9. Indian Overseas Bank 10. Punjab National Bank 11. Syndicate Bank 12. UCO Bank 13. Union Bank of India 14. United Bank of India
1980 – 6 more commercial Banks nationalized.	1. Andhra Bank 2. Corporation Bank 3. New Bank of India 4. Oriental Bank of Commerce 5. Punjab & Sindh Bank 6. Vijaya Bank

India after independence chose a path of socialism and conservative economic practice. There were sufficient justification to this path, India had just come out colonization and any liberalism would pose threat to its sovereignty. Prime Minister Nehru therefore chose a path of state controlled economic growth and streamlined allocation of limited budget. In order to priority allocation of resources the government sought to nationalise 14 banks. The government thus brought out an ordinance to this effect and 14 banks were nationalised. R.C Cooper a spirited litigant approached the court challenging the Ordinance.

With a lot written about this judgment, there is very little known about the petitioner in this case, Rustom Cavasjee Cooper. He was the Director of Central Bank of India, and held shares in many of the banks that were nationalised. Interestingly he was also member of the Swantra Party which vouched for friendlier economic practices. He approached the Hon'ble Supreme Court of India in 1969, his case was argued by Senior Counsel Nani Phalkhivala and the Union was represented by the then Attorney General, Niren De and Solicitor General, Jagdish Swarup. Considering the gravity of the case the petition was referred to the constitution bench comprising of 11 judges.

The petitioner invoked the Original Jurisdiction of the Court under Art.32, and argued his rights under art 14,19 and 31 were violated with the ordinance(Acquisition and Transfer of Undertaking) which subsequently became an act on 22nd July 1969. The arguments stretched for seven months and court delivered itsjudgment on 10thFebruary 1970.

The arguments for the petitioner included constitutional overreach as he alleged violation of legislative powers and encroachment of the parliament in the state list. The petitioner also contended that promulgation of ordinance under art.123 was invalid as there existed no condition precedent. He also argued of violation of fundamental and constitutional right. The respondent believed the petitioner had no locus in this case as he was not the owner of property defined under 31(c).

The court in its judgement held the ordinance-act to be within legislative competence, it however declared the ordinance void on merit. It did not denationalise the banks but instead increased the compensation of such banks. One wonders, if denationalisation did not occur what was the point of declaring it void!. Subsequent to the judgment the Union brought about the 25th amendment to undo the R.C Cooper case, this became the subject matter of another landmark case, Kesavananda Bharathi. In Kesavananda the court upheld the 25th amendment and hence legitimising the actions of the Union. It however went onto lay various safeguards for protection of fundamental rights during constitutional amendments.

RUSTOM CAVASJEE COOPER v. UNION OF INDIA

(1970 AIR 564, 1970 SCR (3) 530)

Bench: Shah, J.C. & Sikri, S.M., Shelat, J.M. & Bhargava, Vishishtha, Mitter, G.K. & Vaidyialingam, C.A., Hegde, K.S. & Grover, A.N., Ray, A.N. & Reddy, P.J. & Dua, I.D.

On July 19, 1964, the Acting President promulgated, in exercise of the power conferred by cl. (1) of Article 123 of the Constitution, Ordinance 8 of 1969, transferring to and vesting the undertaking of 14 named Commercial Banks, which held deposits of not less than rupees fifty crores, in the corresponding new Banks set up under the Ordinance. Petitions challenging the constitutionality of the Ordinance were lodged in this Court, but before they were heard Parliament enacted the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The object of the Actwas to provide for the acquisition and transfer of the Undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with the national policy and _objectives and for matters connected therewith or incidental thereto.

The Act repealed the Ordinance and came into force on July 19, 1969, i.e., the day on which the Ordinance was promulgated, and the Undertaking of every named Bank with all its rights, liabilities and assets was deemed, with effect from that date, to have vested in the corresponding new bank. By s. 15(2) (e), the named Banks were entitled to engage in business other than banking which by virtue of s.6(1) of the Banking Regulation Act, 1949, they were not prohibited from carrying on. Section 6 read with Schedule 11 provided for and prescribed the method of determining compensation for acquisition of the undertaking.

Compensation to be determined was for the acquisition of the undertaking as a unit and by section 6(2), though separate valuation had to be made in respect of the several matters specified in Schedule 11 of the Act, the amount of compensation was to be deemed to be a single compensation.

Under Schedule 11 the compensation payable was to be the sum-total of the value of the assets under the heads (a) to(h), calculated in accordance with the provisions of Part I less the sum total of the liabilities and obligations calculated in accordance with the provisions of Part 11. The corresponding new Banks took over vacant possession of the lands and buildings of the named Banks. By Explanation I to cl. (e) of Part I of Schedule It the value of any land or building to be taken into account in valuing the assets was to be the market value or the ascertained value whichever was less; by Explanation 2 cl. (1) ascertained value"' in respect of buildings wholly occupied on the date of the commencement of the Act was to be twelve times the amount of annual rent or the rent for which the building could reasonably be expected to be let out from year to year, reduced by certain deductions for maintenance, repairs etc.;

under cl. (3) of Explanation 2 the value of open land with no building thereon or which was not appurtenant to any building was to be determined with reference to the price at which sale or purchase of comparable 'lands were made during the period of three years immediately preceding the commencement of the Act. The compensation was to be determine (1), in the absence of agreement, by a tribunal and paid in securities which would mature not before ten years. The petitioner held shares in some of the named Banks, had accounts. Current and fixed deposit, in these Banks and was also a Director of one of the Banks. In petitions 'under Article 32 of the Constitution.

GROUNDS OF CHALLENGE OF CONSTITUTIONAL VALIDITY

(i) the Ordinance was invalid because the condition precedent to the exercise of the power under Article 23 did not exist:

(ii) the Act was not within the legislative competence of Parliament, because, (a) to the extent to which the Act vested in the corresponding new Banks the assets of business

other thanBanking the Act trenched upon the authority of the State Legislature and (b) the power to legislate for acquisition of property in entry 42 List III did not include the power to legislate for acquisition of an undertaking;

(iii) Articles 19(1)(f) and 31(2) are not mutually exclusive and a law providing for acquisition of property for a public purpose could be tested for its validity on the ground that it imposed limitations on the right to property which were not reasonable; so tested, the provisions of the Act which transferred the Undertaking of, the named Banks and prohibited those Banks from carrying on business of Banking and practically prohibited them from carrying on non-banking business, impaired the freedoms guaranteed by Articles 19(1) (f) and (g);

(iv) the provisions of the Act which prohibited the named Banks from carrying on banking business and, practically, prohibited them from carrying on non-banking business violated the guarantee of equal protection and were, therefore, discriminatory; (v) the Act violated the guarantee of compensation under Article 31(2);

(vi)the Act impaired the guarantee of 'freedom of trade under Article 301; and

(vii) retrospective operation given to Act 22 of 1969 was ineffective since there was novalid Ordinance in existence and the provision in the Act retrospectively validating infringement of the fundamental rights of citizens was not within the competence of Parliament. On behalf of the Union of India a preliminary objection was raised that the petitions were not maintainable because, no fundamental right of the petitioner was directly impaired as he was not the owner of the property of the undertaking taken over.

[Since the judgment is voluminous, only some of the excerpts are given here, students are advised to refer the entire order]

ORDER

In accordance with the opinion of the majority Petitions Nos. 300 and 298 are allowed, and it is declared that the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 is invalid and the action taken or deemed to be, taken in exercise of the powers under the Act is declared unauthorised. Petition No. 222 is dismissed. There will be no order as to costs. in these three petitions.

UNIT - II

BANKER AND CUSTOMER

CONTENTS

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IX. Different of Special Category customers

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Banker and customer relationship

Most, if not all of us, maintain bank accounts. Banker-customer relationship begins no sooner the customer opens an account and a banking service is transacted. A remarkable feature of this relationship is its attendant legal rights and obligations on both sides. It is of interest to note that the relationship between a banker and a customer depends on the activities, products or services provided by the bank to its customers.

Definition of Banker

An attempt was made to find out a statutory definition of the terms 'Banker' and 'Customer'. In the Indian statutes no definition is found. However, the term 'Banking' finds a place in the Banking Regulation Act 1949. Section 5(b) states that Banking "means the accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawals by cheque, draft, cash or otherwise". Again, sub-section (d) states "Banking Company means any company which transacts business of banking in India".

The banking law in India is a borrowed one from English Law. The banking laws in both the countries have not been codified and only certain aspects have been codified. The development of this branch of law is from the case law of the U.K. and the Indian Judiciary. Other than the Negotiable Instruments Act, laws such as Bankers Book Evidence Act, Reserve Bank of India Act, State Bank of India Act, the Banking Regulation Act, the Transfer of Property Act, the Cheques Act, the Interest Act and many other statutes also deal with certain aspects of banking.

Definition of Customer

No definition is in the statute for a 'Customer'. Therefore we have to look in detail the relationship between a Banker and a Customer according to the transactions and the variety of services offered and availed from the bank. This is also not an easy task as there is a considerable increase in the nature, variety and services offered by banks.

In *S.B.N. Ltd. v. De Lluch* (2004) 18 NWLR (Pt.905)341, this "....consist in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the Government, State and National, and municipal and other corporations". A person cannot be referred to as a customer of a bank without holding an account with the bank. It is immaterial whether the account is opened in the name of a person in trust for another; the name on the bank's record will be regarded as the customer. The court in *NDIC v Okem Enterprises Limited* (2004) 10 NWLR (Pt. 880) 107, *Ironbar v FMF* (2009) 15 NWLR (Pt. 1165) 506, defines a customer of a bank as any person having an account with a bank or for whom the bank has agreed to collect items and includes a bank owning on account with another bank. Thus, a customer is a person whose money has been accepted by a bank on the undertaken to honour cheques up to the amount standing to his credit. Customers of the bank may include individuals, firms, organisations and other banks.

Two theories of Customer

Although the term as such is not defined, attempts have been made by courts to define a customer. But no statutory definition is available either in the Indian Law or in the British Law.As per English law, two theories are available. The old view expounded by Sir John Paget terms it as a Time Factor". That is an individual opening an account for the first time today cannot be termed as a customer. To constitute a customer there must be some recognisable course or habit of dealing in the nature of regular banking services. It is difficult to reconcile the idea of a single transaction with that of a customer. The word surely predicates even grammatically some minimum of custom and antithetic to an isolated act. It is believed that even tradesman differentiates between a customer and a casual purchaser.

It follows therefore that two things are necessary for a person to Use considered a customer;

1. Some recognisable course or habit of dealing between him and the bank.
2. The transaction should be in the nature of regular banking business.

As regards (1) above, it was held in Mathews v. Williams Brown & Co [10 T.L.R - 1894-386] that in order to constitute a person a customer of a bank, he should have some sort of an account with the bank, but that the initial transaction in opening an account did not set up the relation of a banker and customer, and there had to be some measure of continuity and custom. On account of this, banks are even now reluctant to open an account with crossed cheques.

This theory of 'time factor' has now' become archaic. The second view is that of Heber.L.Hart. According to Hart, a customer is a person who has an account with a banker. Hart says, that a person is a customer if he keeps either a current account or a deposit account with the bank, or, it would seems, if the bank systematically transacts with him or for him any kind of banking business. Generally it may be stated that a customer is any person, who has some sort of an account with a bank and that relationship normally commences as soon as the account is opened.

A bank customer therefore differs from the normal understanding of the term in that the word 'Customer' usually denotes a relationship resulting from habit or commercial dealings. An isolated purchase by a person from a trader will not suggest that the purchaser should be described as a customer. From the banking angle, a habit or continued dealing will not normally make a person a customer unless there is an account opened in his name, where as a stranger can become a customer just as soon as he opens the account.

This view is amply illustrated in *Great Western Railway v. County Banking Co. Ltd*[(1901) A.C. 414], In this case, Mr. Huggins, a poor law overseer, fraudulently obtained a cheque from the plaintiff and encased the same with the defendant bank. He was well known at the bank's branch because it has been his practice over a number of years to encash cheques with that bank branch. The stolen (fraudulently obtained) cheque was crossed "not negotiable". This aspect was apparently ignored till the case came before the House of Lords. It was held that the bank could not succeed as holder for value because of the crossing on the cheque and that Section 82 of the Bills of Exchange Act - which was then the law - would not avail to bank as Huggins was not a customer. In this case it was held that it is true that there is no definition of customer in the *Act*,.but it-is a well known expression and that there must be some account, either a deposit or current account or some similar relation, to make a man customer of the bank.

Till the decision in *Ladbroke v. Todd*[1914) 30 T.L.R. 433] it was believed that there had to be some continuity of custom as well as maintenance of an account to constitute a Bank Customer. In this case, it was laid down that the relation of a Banker and Customer begins as soon as the first cheque is paid in and accepted for collection and not merely when it is paid.

Again in *Commissioners of Taxation v. English Scottish & Australian Bank*[(1920)A.C. 683] their Lordships are of the opinion that the word "Customer" signifies a relationship in which duration is not of the essence. A customer whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in view of their Lordships, a customer of the bank in the sense of the statute irrespective of whether his connection is of short or long standing.

When there is no statutory definition we have to cull out the true deposit account or some similar relations.

a) To make a man a customer of the bank there must be either a current or deposit account or some similar relations.

b) Relationship of Banker and Customer begins as soon as a sum of money or a cheque is paid in and the bank accepts it and is prepared to open an account.

c) The word 'Customer' signifies the relationship in which the duration is not an essence.

In India we have followed the English law on the subject and in the Indian law also we cannot find a definition. In *Bank of India v. Goparathan Nair*[AIR 1970 Kerala 74], it was held that so far as the banking transactions are concerned, the customer is one whose money has been accepted on the understanding that the bank will honour transactions to the amount standing to his credit, irrespective of his connection being of short or long standing. Thus, it is not necessary that the account shall have been operated for some time to merit that the person is known as a customer and even if there is a single transaction, it is sufficient. The dealing between the person and the bank should be relating to banking business.

Nature of banking business

The legal relationship between a banker and a customer arises out of the various transactions, entered between them. Till India became independent, the functions and role of commercial banks were very much restricted. The bankers mainly dealt with the acceptance of deposits and were lending to well establish

customers with full security back up. In the international scenario also there has been vast progress in the financial markets in the last 5 to 7 years. We shall now examine the transactions entered between the banks and its customers and their nature. These are broadly as Deposit Transactions Loan Transactions and Services.

Different types of Accounts

Banks have been used by the general public as a repository to keep their surplus funds. The term 'general public' is used in a wide context. Individual account holders, viz the individuals who want to keep their savings safely open accounts in the banks. Their accounts are commercially known as 'P' segment deposits or Personal Segment Deposits. In addition, proprietor concerns, partnerships, limited companies, trusts etc., also open and operate their accounts with the commercial banks. 'P' segment customers keep their money for safety and earn interest to ensure that they build reserves for meeting unforeseen contingencies.

Saving Accounts (SA)

Most customers generally open Savings Bank accounts. Savings Bank accounts are of two types viz.

(1) Bank account from which money can be withdrawn by cheque. This is called checking or Cheque book facility a/c. These accounts can be operated in single names or in joint names. In the case of joint accounts, there can again be 'either or survivor' or 'former or survivor'. Again these accounts can be operated either jointly or individually.

To open a cheque book facility account, banks prescribe that there should always be a minimum balance of Rs.250/- kept in the account. There shall not be more than 50 withdrawals in the account in a calendar year. The banks will pay an interest, at present 5%, on the minimum balance standing to the credit of the account between 10th and 30th .of the calendar month.' These cheque book facility accounts should be properly introduced to the bank. The introductory reference can be made either by an existing customer or by a staff member with more than 5 years of service. The branch/bank has to forward a letter of thanks to the introducer. This in practice never happens.' The customer is identified by his specimen signature and an account number allotted by the bank. Whenever money is paid out of the account, the banker should verify the signature of the customer on the cheque with the specimen signature on record with him.

In case of Savings Bank Accounts a pass book is issued to the customer and for Current Accounts, periodical statement of accounts is provided to the customer. At branches with computer facility, banks do not generally provide pass books; they only provide the customer with a monthly or weekly statement of accounts. Banks also stipulate that if amount exceeding, say, Rs.5,000/- is withdrawn by a single cheque in a Savings Bank Account, that will cause ineligibility for interest for the month.

These Savings Bank Accounts can be opened for an individual singly or jointly, on behalf of a minor by the minor's natural guardian, or for a firm, trust or association. But in any case banks do not permit the use of Savings Bank Accounts to be operated as Current Accounts, by the customer.

(2) Another type of Savings Bank Account is called the Ordinary Savings Bank Account which can be operated with a minimum balance of Rs.20. Third party cheques are not collected, negotiated or credited to this type of account. The account holder himself should be present for and receive the withdrawals of monies. No cheque book will be issued to this type of account holder. All withdrawals are to be accompanied by the pass book. Generally .this types of accounts are opened for the Tow income group of people who open account only as a savings venue.The interest in the Savings Bank Account is credited at half yearly intervals.

Fixed Deposits or Term Deposits

Individuals, firms, companies and all legal entities are entitled to open fixed deposit accounts. The banks accent Fixed or Term Deposits and pay interests at rates always higher than that paid on Savings Bank Accounts. Only those who have surplus money which can be blocked and who want a higher rate of return on their monies will opt to deposit their monies in Fixed Deposit Accounts. Banks obtain specimen signature of the customers. These Fixed Deposit receipts are not negotiable. On the face of the receipt itself, one can find the legend 'Not Transferable'. The amount held under this type of account is repayable only after the period for which the money has been deposited.

However, the banks at their discretion grant loans up to 75% of the amount in Fixed Deposits. These loans carry an interest at a rate which will be 2% higher than the rate at which the banks received the money from the depositor. There is also a facility to withdraw the money prematurely i.e., before the expiry of the period for which the amount has been deposited. However the depositors are penalised by the bank by paying interest at a rate lower than that rate for which the term deposit has run. There are various types of Fixed or Term deposits. In one scheme the banks accept smaller amount and repay a higher or prefixed amount by compounding the interest payable for the term. In such cases, periodical interest payments are not made. In another scheme, banks agree to pay interest monthly or quarterly or half-yearly or on annual basis.

Another type of savings is the Recurring Deposit Scheme, wherein the investor deposits on a daily (as in the case of pigmy scheme) or monthly basis a fixed amount and receives back all monies deposited by him as a lump sum with interest calculated on a compounded basis at the end of the period on the date of maturity. The rates of interest on deposits are regulated by the Reserve Bank of India from time to time. Banks accept deposits as per the regulation of the Reserve Bank of India. However, in fixed deposit accounts, banks pay the interest for the period at the same rate agreed upon initially, even if there is an upward or downward revision in the interest rates.

There are various permutations and combinations of the fixed deposit accounts invented by the ingenuity of the individual banks and implemented under various names, after appropriate approval by the Reserve Bank of India. From the bankers point of view, the savings bank accounts and fixed deposit accounts, particularly from the personal segment are considered as stable deposits and one can find the banks conducting deposit mobilisation campaigns every year for these type of deposits.

Current Accounts

Current accounts are generally opened and operated by individuals and organisations that need to issue cheques in larger numbers, for example firms, traders, manufacturers, limited companies, trusts etc. Banks stipulate that the accounts should always show a minimum balance of Rs.500/-. Some foreign banks stipulate that the minimum balance in the account should always be Rs.5000/-. Banks exercise an option to close the accounts if the balances fall below the stipulated minimum, although it is doubtful if it can legally do so. Individuals are supplied with 'bearer' cheque books, firms and companies with 'order' cheque books. There is no restriction on the number and amount of withdrawals.

No interest is paid on the balances. However banks levy a charge depending upon the value of the account and the cost-benefit ratio of running the account to the bank. Introductory reference is compulsory for Current Accounts. In the case of limited companies, certified copies of the Memorandum and Articles of Association, Certificate of Incorporation, Certificate of Commencement of Business along with a Board Resolution is insisted to open the account. In such cases introductory reference is not insisted. Banks provide the customers with periodical statement of accounts. Banks also record the names of the persons authorised to operate the accounts and keep the specimen signatures of authorised persons to operate the accounts.

The above paragraphs briefly mention the nature of various deposit accounts. There is an association of the banks called the 'Indian Banks Association' comprising of all scheduled commercial banks in India. This association has codified formats for the use by banks such as the account opening forms, pay-in- slips, cheque formats etc. The association has a rules committee which prescribes the rules for the conduct of the various types of accounts from time to time.

One of the topics which has not been dealt with in detail is 'Introductory Reference' to open bank accounts. The banking custom and practice insist that introductory reference is essential for opening the Accounts. There is no legal requirement to obtain such references. It is a matter of practice. The internal rules of the bank provide for it. It is not proposed to deal with this topic in detail here. The same will be dealt with in detail when we see the rights and liabilities of the collecting banker.

The purpose of introductory reference is "to identify the prospective customers". This will enable the banker to discover whether the new customer might use the account for fraudulent purposes of encashing cheques belonging to others. The duty of an introducer is only moral and not legal. It may be pointed out that it is not incumbent on the part of the bank to obtain such reference in all cases.

The internal rules of the bank and the Indian Banks Association Rules prescribe for such references to be obtained. But it is also not mandatory. On account of the large number of incidence of frauds in banks, the Indian Parliament is to bring out a bill to insist upon affixing of a photograph of the customer on the pass books and the account opening forms. This may to some extent remove the difficulty for identifying a customer. However, a fraudulent customer will always find ways to commit frauds. The moral duty cast upon the customer will put the existing good customers to exercise caution in introducing all types of persons to open accounts.

The legal decisions deal with the negligence of the bank in not obtaining the introductory reference and it is established law that the introducer will not run into any legal problems only for having introduced an account holder.

Banker and customer relationships

DEBTOR - CREDITOR RELATION

The primary relationship between a banker and customer is that of a debtor and creditor. But one of the terms of this implied contract is that money lent to the banker is not payable except on demand. There are a good number of legal decisions maintaining this view by courts in India and in the U.K. According to Sir John Paget, the relationship of Banker and Customer is primarily of debtor and creditor; the respective positions being determined by the existing state of the account. Instead of the money being set apart in a safe room, it is replaced by a debt due from the banker. The money deposited with him becomes his property and is absolutely at the disposal of the bank.

In *Foley v. Hill* [(1848)2 H.L. 28] an account in the name of the plaintiff was opened in 1829 with the defendant bank, with an initial credit of 61, 171 pounds. The agreed rate of interest on the deposit was 2%. There were two later debits for 1700 pounds and 2000 pounds. Interest entries were shown in separate columns and interest amount was not credited to the main account. In 1833 the plaintiff sought to recover the money outstanding by an action in Chancery for an account. This account being so simple was held not to be ex-facie a matter for a Court of Equity, and the plaintiff thereupon claimed that the relationship of a banker with his customer was analogous to that of an agent and his principal, and that he was entitled to an account on that basis, and therefore, the relationship being a fiduciary nature, the Statute of Limitation did not apply.

The House of Lords held that the relationship was that of debtor and creditor and that therefore the matter was not one for an account in equity. Lord Cottenham L.C. stated that money paid into a bank, ceases altogether to be the money of the principal; it is then the money of banker, who is bound to return an equivalent by paying a similar sum to that deposited with him he is asked for it. The money paid to the bankers is the money known by the principal to be placed there for the purpose of being under the control of the banker. It is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal according to custom of bankers in some places, or the principal and or a small rate of interest according 'to the custom of the bankers in other places.

This decision establishes the relationship of debtor and creditor and not that of any agent.

The Bombay High Court also holding the 'debtor-creditor' theory of the relationship has held that the customer cannot, therefore, claim any amount due from the banker as a preferential creditor if the bank is wound up [*Velji Lakshamsey & Co v. Dr.Banarjee (1955)25 Comp Cas 395*]

In *Joachimson v. Swiss Bank Corporation* [(1921)3 K.B. 110] the plaintiff firm was a partnership between two Germans and a naturalized Englishman. On August 1, 1914 one of the Germans died and the partnership was thus dissolved. On the outbreak of war three days later, the other German became an alien enemy. On August 1, the firm's account with the bank had a credit balance. On June 5, 1919, the naturalised partner commenced an action in the name of the firm to recover the amount lying in credit in the bank, the cause of action being alleged to have arisen on or before August 1, 1914.

The firm had not made any demand on or before that date for payment of the sum in question and the bank (which had counter-claimed for a larger sum than the balance in the account) pleaded on the point here at issue, *inter alia* that there had thus accrued no cause of action to the firm on August 1, 1914 and that the action therefore was not maintainable. On appeal, the court of Appeal held that where money was standing to the credit of a customer on current account at the bank a previous demand was necessary before an action could be maintained against the bank for money and the court gave a judgment in favour of the defendant bank.

In his judgement Atkin L. J. observed, "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides. They include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer. But the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept; and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for 2 or 3 days, it is term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as to mislead the bank or to facilitate forgery. It is necessarily a term of such contract that the bank is liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept".

In the same judgment, Bankers L.J.stated that having regard to the peculiarity of the relation there must be a number of super added obligations beyond the one specifically mentioned in *Foley v. Hill.*Unless this were so, the banker, like an ordinary debtor must seek out his creditor and repay him his loan as it immediately becomes due - that is to say, directly after the customer has paid the money into his account - and the customer, like any ordinary creditor, can demand repayment of the loan by his debtor at any time and place; It is impossible to imagine the relation between banker and customer as it exists, without the stipulation that, if the customer seeks to withdraw his loan, he must make an application to the banker for it.

Section 444 of Seven American Jurisprudence mentions the relationship. It is a fundamental rule of banking law that in case of a general deposit of money in a bank, the moment the money is deposited it becomes the property of the bank, and the bank and the depositor assume the relationship of debtor and creditor. The legal effect of the transaction is that of a loan to the bank upon the promise and obligation, usually implied by bank, to pay or repay the amount deposited usually upon demand.

Bombay High Court has further elucidated in *Velji Lakamsey & Co v. Dr.Banarjee* [(1955) 25 Comp.Cas 395] that the relation between a banker and its customer is that of a debtor and creditor and any amount due by the banker to the customer in that relationship cannot be claimed by the customer from the bank as a preferential credit if the bank is wound up Sat a customer may give certain specific direction to the bank and constitute the bank his agent. If the bank acts as an agent and not a debtor, then the agency brings about a fiduciary relationship which lasts until the agency is terminated. Therefore if the customer were to give directions to the bank that a certain amount must be paid to a certain person, then till that amount is paid pursuant to the directions of the customer, the agency would continue and the bank would hold the amount not as a debtor of the customer but in the capacity of a trustee and the amount would be impressed with a trust.

In *Santosh Kumar v. King*[AIR 1952 CAL 193] it was held that the relation between a depositor and a bank is the simple relationship .of a creditor and debtor. When we conclude the relationship between a banker and customer is that of a debtor and creditor, the statement is not complete. The debt between a debtor and creditor, and a bank and its customer, are different. A debt due from a bank to a customer and debt due from a borrower has two distinctions. In the first case, there is no necessity of a demand by a creditor for payment. So far as the bank and customer is concerned, it is an exception to the rule that a debtor should find his customer. Here the creditor (customer) has to make a demand on the debtor (banker). The demand should be made at the branch where the customer keeps his accounts.

In *Delhi Cloth General Mills Co. Ltd v. Harnam Singh*[AIR 1955 S.C. 590] it was held that the banker customer contract is an exception to the rule that a debtor should find his creditor.

Agency relationship

Another service offered by the bankers to the customers is to collect the customers' cheques and credit other instruments such as dividend warrants, interest warrants, pension bills etc. In these cases the relationship between the parties is that of a principal and an agent. The customer is the principal and the banker, the agent. In the day to day functioning, the banker renders many services to the customer viz.,

1. buying and selling of stocks and shares on behalf of the customer;
2. collection of various types of instruments for and on behalf of the customer;
3. acting as executor and trustee of customer, acting as a representative to the customer, filing of I.T. returns of customer, executing the standing instructions of the customer.

The case of *Travancore National And Quilon Bank*[AIR 1940 Madras 139] dealt with an application for payment of a certain sum of money to the applicant in preference to the ordinary customer of the bank which went into liquidation. The applicant paid the amount to the bank on 20th June 1938; the day on which the bank suspended payment, for remittance as a telegraphic transfer to a company in Bombay. The remitter had a current account in the bank. The bank did not remit the amount but debited to the customer's account with the charges for the proposed remittance. The money was not transferred because on that Very day the bank suspended payment. The High Court held that on the facts of the case the money was held apart by the bank as the property of the applicant. The money was received by the bank in the capacity of a mere agent. This follows that monies held apart by a banker as the property of the customer does not form part of the bank's assets in liquidation.

In the case of the Official Assignee of Madras representing the Estate of *S N Firm v. Natesan Pillai*[AIR 1940 Madras 441] monies paid by the customer for the purpose of effecting a specific transaction were credited by the bank in their suspense account. The bank failed and a point was raised as to whether the customer is entitled to any preference. It was held that the amounts were received by the firm in a fiduciary capacity and not as between a banker and a customer. In such cases where the bank is in a fiduciary position in respect of monies received by it for the specific purpose and credits the sums in its suspense account, the relationship is not that of a debtor and creditor.

In *Durga Lai Mohan Lai v. Governor General in Council* [AIR 1952 590] it was held that if a bank received a crossed cheque from his customer for collection, the bank acts as a banker and an agent of a customer and not as a holder of the cheque in due course. But if the cheque is discounted or negotiated or purchased by the bank the property with it passes on to the bank. Then he becomes a holder in due course and ceases to be the customer's banker or agent in relafion to that transaction. The distinction between a banker who receives a cheque or instrument for collection and the bank which negotiates the cheque is different. In the first case the bank acts as an agent and in the second case the banker becomes a holder in due course. When the bank merely acts as a collecting agent he has. no cause of action against the drawee bank if the drawee bank refuses payment. The cause of action remains with the customer. When the banker becomes a holder in due course he is entitled to sue under Section 131 of the Negotiable Instruments Act which protects the banker who in good faith and without negligence receives payment for a customer of a crossed cheque, when the title to the cheque proves defective. In the Indian Law a banker is deemed to receive payment for a customer even though he credits the customer's account with the amount before receiving payment.

Banker as an agent is bound to carry out the directions of his principal viz the customer and conduct the business of the agency with such skill as is generally possessed by persons engaged in similar business; unless the principal has notice of his want o: skill.

He should compensate his principal in respect of any loss incurred by his failure to carry out the directions of his principal or by his negligence in the conduct of the business of agency.

Another recent case was decided by the Consumer Protection Forum of Mysore in 1990. In that case, a customer applied for a draft from the branch of a bank in Mysore for remittance as examination fee, to appear for an examination conducted by the Chartered Accountants Association. The branch issued the demand draft and the customer promptly forwarded the same to the Institute. The draft was returned by the paying branch for the reason that the demand draft was not signed by an authorised official of the issuing branch. The customer's application to sit for the examination was rejected by the Institute as they did not receive the fee in time. The customer approached the Consumer Protection Forum and the forum awarded a compensation of Rs.30,000/- for the negligence of the bank and held that the bank in the instant case undertook an agency function and was negligent. The bank paid the compensation amount.

The principle of law is clearly stated in the maxim - qui per valium - facit per seipsum facere videtur; that is "he who does an act through another is deemed in law to do it himself".

A reference to Article 63 in Bowstead on Agency illustrates that this principle - every agent who employs a sub-agent is liable to the principal for the money received by the sub-agent to the principal's use and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment.

In *Punjab National Bank Ltd v. R.B.L. Banarasi Das & Co*[AIR 1960 Punjab 590] a reference was made to section 182 of the Indian Contract Act which defines a Principal and his Agent. The argument in the case was that the plaintiff bank was the agent of the defendant. Three cases of sub-agents are defined in the English Law.

1. Those employed without the authority, express or implicit, of the principal by whose acts the principal is not bound.

2. Those employed with the express or implied authority of the principal but between whom and the principal, there is no privity of contract.

3. Those employed with the principal's authority between whom and the principal there is privity of contract, and a direct relationship of principal and agent is accordingly established.

It was argued that the case in question fell under category (2) above and it was argued by the appellant that the case fell under category (3). It was stated that if a banker is dilatory in endeavouring to procure acceptance or payment or is otherwise negligent in doing the business of agency, and his customer suffers for the consequences, the banker would be liable to make good the customer's loss. It is also well established that the collecting banker is under no special duty as such to protect the interests of the person to whom he presents a draft for acceptance or payment.

Invariably, banks accept cheques or bills for collection only for its customers. But there are cases where the customers do not have accounts, at a particular bank in a particular place. In such cases, it is by custom that banks accept such instruments for collection. Being the first agents of the Reserve Bank of India, the State Bank group was the only bank where

Government/Treasury transactions were conducted. In many rural places, public, particularly contractors receive Government bills payable at the district treasury centres and payable at the State bank group. The user public in such cases presents the Government bill or cheque to the branch of the State Bank group to get them collected from the district headquarters branches and remit the proceeds by means of a pay order or banker's cheque. In such cases the bank (State Bank Group) acts as an agent to the tenderer/lodger of the instrument. A decision on this point is found in *The Bank of India v. The Official Liquidator*[AIR 1950 Bombay 375]. In this case the customer had no account with the bank. The customer forwarded a cheque with a covering letter to the bank requesting to collect the proceeds and remit the same less their charges by a cheque in lodger's favour on a bank at Bombay. It was held that the bank in the instant case acted only as an agent.

Trustee Relationship

The basic relationship between a banker and a customer is that of a debtor and creditor. In some cases, the relationship is that of principal and agent. The customer is the principal, and the banker is the agent. A third relationship of the banker as a trustee is also evolved. There are number of decisions both by the English and the Indian courts. For example, a remittance was sent to a banker with instructions to purchase shares of a company. Bank bought some shares, but before completing the rest of the purchase the bank failed, it was held that the bank stood in the position of a trustee to the remitter and, the remitter was entitled to a refund of the unspent balance.

Where a banker pursuant to instructions, express or implied has credited the proceeds of a bill or other document entrusted to him for collection, the relationship of debtor and creditor arises from the time of his doing so. Where, the banker has suspended his business before receipt of such amount, he holds the money as trustee for his customer, irrespective of whether or not the latter has an account with him on the date of the receipt of the money and whether or not the money has been credited in that account.

When a bank is appointed as a receiver by a court in a partition suit between the members of a Joint Hindu Family and the money received by the bank are deposited in a current account with itself, the bank is acting as a trustee for the amount. When the bank receives the money for a specific purpose or in a fiduciary capacity as in the instant case as a court receiver, the bank will be a trustee for the amount.

Where a sum of money is paid to the general account of the customer with the direction that it must be applied in a particular manner as and when the occasion arises, until the said sum of money is appropriated in the manner directed, no question of trust would arise.

In cases where the relationship is that of a trustee and beneficiary of the trust and the banks hold the money in a fiduciary capacity, it is the duty of the banks not to commit a breach of trust by putting the money contrary to the terms of the trust.

A customer of a bank having a deposit executed a power of attorney in favour of a third person to secure instruments at higher rate of interest. The amounts were withdrawn by the power of attorney holder to discharge his own debts to the bank. In such cases, the depositor can sue both the bank and the power holder and the power holder becomes a constructive trustee. Similarly where an employee furnishes security deposit for employment in banks a trustee relationship is created and the employee will be entitled to be treated as a preferential creditor for the security deposit in case the bank fails.

The decision of the Supreme Court of India in *New bank of India v. Peary Lal*[AIR 1962 S.C. 1003] is notable. It was held - where a person dealing with a bank delivers money to the bank, the intention to create a relationship of creditor and debtor between him and the bank is presumed. But this presumption is rebuttable. Where money is paid to a bank with special instructions to retain the money pending further instructions or to pay over the same to another person who had no banking account with the bank and the bank accepts the instructions and holds the money pending receipt for instructions from that other person or whose instruction are given by a customer to his banker that a part of the amount lying in his account be forwarded to another bank to meet a bill to become due and payable by him and the amount is sent by the banker as directed, a trust results and the presumption which ordinarily arises by reason of payment of money to the bank is rebutted.

Besides, being of the status of a trustee in these circumstances, a banker will also accept the role of an executor if appointed as such under a will or a trust. Executorships are a function which has, of late, become a growing business for the bank for good fee.

Bailer and Bailee relationship

One of the many services offered by a commercial bank is called safe custody facility. Bank accepts from its customers sealed boxes and packets for safe custody. In most of the cases the banker can open such safe custody articles, boxes or packets only as per the instructions of the person who deposits the same for safe custody. A customer may chose to keep with his bank his last will and testament. In such a case he may also instruct his bank to open the packet on receipt of the notice or knowledge of his death. And if in the will the bank is appointed by the deceased as his executor or trustee the bank will have to take care of the assets of the deceased and execute the will in toto.

The contents of the safe deposit article are not made known to the bank and there will be a narration in the safe custody receipts issued by the bank 'Received a 'packet', - 'box' contents not known". The bank will also record the instructions of the customer in their books as well as in the safe custody receipt about the return/delivery of the packets-articles at a later date.

It is usual and accepted practice for one bank branch at a centre to keep the duplicate keys of the safes and strong rooms of another bank branch at the same centre. It is also the practice for a bank branch to keep such keys at a branch in the same centre or at a nearby centre of the same bank. In all such cases, the narrations in the safe custody receipts and the registers will .contain the - "said to contain the duplicate keys deliverable against the joint signature of the branch manager and accountant/ cash officer".

The banks may or may not charge for such safe keepings. A customer who takes a fixed deposit from a bank may like to keep the receipt with his banker in safe custody for various reasons. The banks in India do not charge any fees for such safe custody. The depositors in such cases also instruct the banks to credit the periodical interest payable to his account. In all such cases bank as a matter of practice do not charge any fees for such safe custody.

The legal relationship that arises in case of safe deposit or safe custody is that of bailment. The customer who deposits with the bank for safe custody is the bailor and the bank the bailee. Such safe custody should be under the condition that the article or property shall be returned to the bailor as soon as the purpose for which the bailment was created is over.

The law of bailment is explained in the Indian Contract Act. Section 148 of the Contract Act defines bailment, bailor and bailee. A bailment is the delivery of goods by one person to another for some purpose, upon a contract, that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

In cases where the bank does not charge any fees for such safe custody, the bank can be termed as a gratuitous bailee. In cases where fees are levied, the bank becomes a bailee for reward. The distinction between these two types of bailment is that the gratuitous bailee must do his best with what he has got. He must use all the facilities he has to protect the goods bailed to him; but he is not bound to do more. He has to take the same care as he takes for his own property. He is not bound in law to provide at his cost the means of ensuring a higher degree of security for the articles deposited with him. As a bailee for reward, he is bound to adopt at his cost all appliances and safeguards he can procure. A banker obtains a mandate from his customer and if he complies with it, he runs no risk; if he does not, he may be at risk either on the grounds of negligence or conversion. In a bailment, the bailee may be made liable for want of care.

The Supreme Court of India in *United Commercial Bank v. Hem Chandra Sarkar* [AIR 1990 SC 1329] decided the question of law, whether in the circumstances of the case the appellant bank was an agent of the respondent or a bailee in respect of goods entrusted for delivery to the respondent against payment.

In 1945, Hem Chandra Sarkar was carrying on the business of wholesale and retail trade in textiles & yarn and cloth at Agartala. He was appointed as government nominee to indent and lift cloth and yarn to Agartala from mills in different parts of India. For the purpose of that business Hem Chandra Sarkar maintained a current account in the UCO Bank. The case of Sarkar was that there was an oral agreement on 2.9.1950 under which the latter inter alia was to receive bills, documents and airway receipts sent by or on behalf of Sarkar from his agents or suppliers and would release and/or take delivery of goods sent by them, as and when goods arrive at Agartala.

The bank would keep or hold the said goods stored in its godown for and on behalf and on account of the customer and for his benefit. It was also alleged by Sarkar - the plaintiff - that the payment of bills in respect of goods dispatched to the bank should be made by the plaintiff. He should be given the delivery of goods and air receipts by the bank according to his convenience and requirement. It was further stated that under the said terms and conditions, the banker constituted himself and acted as an express trustee and or agent of plaintiff in relation to the said goods and air receipts and stood in fiduciary relationship with the plaintiff.

Complaining non-delivery of goods even after receiving payment thereof, the plaintiff brought a suit for accounts, damages, compensation and delivery of goods or their equivalent in money valued at Rs. 2,68,198/-

The bank denied all allegations and claimed that it never acted as an agent, trustee or depositee of the plaintiff. The bank also denied the existence of any fiduciary relationship. The bank stated that certain parties from Calcutta were supplying goods to various parties including the plaintiff in Agartala and the bank used to send the bills along with the respective air bills to their Agartala branch for presentation to the drawees and the bank would deliver the same against payment. The bank maintained that it had dealt with all such goods of the Calcutta parties, recovered monthly charges at the instructions of the drawers and the drawee (plaintiff) and debited to the account of the plaintiff. When funds were not available in the current account of the plaintiff, the said charges were recovered from the drawers. The goods in the custody of the bank on behalf of the Calcutta parties which were paid for by the plaintiff would be delivered to the plaintiff and the goods for which no payment was made would be returned to the drawers.

The trial court held that there was an agreement or arrangement between the parties regarding payment of bills or charges for the account of the plaintiff and regarding storing of the goods received by the bank in its godown, of which the plaintiff came to be the owner and for delivery of those goods as and when required by the plaintiff. The trial court also held that the bank acted as an agent of the plaintiff. In this suit, such agency of the defendant a relation of trust and confidence and the goods which came to be owned by the plaintiff on payment of the value thereof and which remained in the branch of the bank were impressed with trust for the benefit of the plaintiff and further that there was no escape from the conclusion that the bank stood in a fiduciary relationship with the plaintiff.

Accordingly, the trial court decreed the suit in part directing delivery of goods or the value equivalent to Rs. 1,26,500/-. A commissioner was also appointed by the court to take accounts.

The High Court of Calcutta confirmed the decree of the trial court. As to the question of legal relationship, the High court observed that had the plaintiff paid the value of goods and that the bank neither delivered the goods nor rendered accounts, a fiduciary relationship could exist between the parties in respect of the goods for which value was paid by the plaintiff.

The Supreme Court held that the High court and trial court were not justified in holding that a fiduciary relationship had existed. This inference was drawn primarily from the debit entries in the plaintiff's current account. The court also held that the bank took charge of goods, articles, securities as bailee and not as trustee or agent. Bailment is the delivery or transfer of possession of a chattel with a specific mandate which requires the identical 'res' either to be returned to the bailor or to be dealt with in a particular way by the bailee as per directions of the bailor. One important distinction between agency and bailment is that the bailee does not represent the bailor. He merely exercises, with the leave of the bailor, certain powers of the bailor in respect of his property. Secondly bailee has no power to make contracts on behalf of the bailor. Nor can he make the bailor liable simply as a bailor for any act he does.

There was nothing to indicate that the bank represented the Calcutta parties or the plaintiff with authority to change the contractual or legal relationship of the parties and there is no justification to hold that the bank acted as agent of the plaintiff. The bank having received the price of the goods had failed to deliver the same to him. The banker being a Bailee, either gratuitous or for reward, is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take care of his own property of the like description. In fact a paid bailee must use the greatest possible care and is expected to employ all precautions in respect of the goods deposited with him. If the property is not delivered to the true owner the banker cannot avoid his liability for conversion. The bank could not avoid liability to return the goods as agreed upon or to pay an equivalent amount to the plaintiff. Even if we assume that the goods were delivered to a wrong person, the bank has to own the responsibility to pay the plaintiff. The liability of a banker to a customer in such a case is absolute even if no negligence is proved.

The court held that in practice the bankers do not set up the Statute of Limitations against their customers or their legal representatives and the court did not see any reason as to why this case should be an exception to that practice.

In practice, if a current account or savings bank account is not operated by a customer for a period of three years, the bank transfers the balances in such accounts to another account called inoperative account. Operations after that period are permitted only after making reasonable enquiries and verifying carefully the signature of the customer.

If the accounts are not operated for 5 to 7 years, the balances are transferred to the unclaimed deposit account. The law and instructions also provide that the balances unclaimed over a period should be transferred to the Central Government. However, in practice it is seldom done.

Customers in many cases seek the advices of their bank on matters of investment in securities for booking forward

Legal Nature of Passbook

In a fast and ever growing economy all over the world, the banker's pass books have been replaced to a great extent by computer statements. Complete computerisation is now available in all the developed countries like UK, Europe, USA, Japan and Singapore. Even in India, computerisation is in fast progress. The State Bank of India is the biggest bank in India with over 8000 branches. Of these, 100 branches contribute to 80% of the bank's entire business. All these branches have now a Computer set up. Shortly, 1000 branches of the bank will be fully computerised. So is the case with the other major commercial banks in India. All the foreign banks having offices in India are fully automated.

Banks now supply to the customers statement of their accounts in the form of loose sheets periodically. Some customers are given daily, weekly, fortnightly or monthly statements. This has the merit that it raises a presumption that the Customer has notice of his account, though there is no return of the statement to the bank which was the pass book's main claim to be an account as stated, and from which it derives its name. The pass book has not yet been completely replaced by the computer statements. Legal nature of the computer statements, its nature and contents have not yet been tested by courts. As all the legal incidents of pass book apply with equal force to a statement we shall see theposition of the pass book. Pass Books are issued to all customers who keep Savings Bank Accounts. In the case of current accounts pass books are issued only when demanded by the customer.

The pass books contain the name or names of the customer/s, the account number, the ledger number, the name and address of the customer and the mode of operation. If it is a joint account it will contain 'Either or Survivor' 'Former or Survivor' or 'any one'. It will also contain the date of opening the account, the name of the branch and signature in full of the branch manager of the branch.

It is a replica of the ledger at the bank branch. The only change is that, instead of the word "Debit" and "Credit" and balance in the ledger, the pass book will have columns for amount withdrawn and amount deposited; and balance. The pass book also contains a column "initials" which indicates that the entries are authenticated by an authorised person of the bank with his initials. Some banks print out the extracts of the Savings Bank Rules in the pass book itself for the convenience of the customers.

The English law on the subject is irrelevant to India. In *Canara Bank v. Canara Sales Corporatise* [(1987)62CompCas 280], the Supreme Court has held that it is rule law that obtains in England which has been followed by the Supreme Court and High courts in this country'.

According to Sir John Paget "the position of the Pass Book in law is unsatisfactory from the standpoint of well negligence, or reckless disregard on the part of either banker or customer its proper function is to constitute a conclusive unquestionable record of the transactions should be recognised as such. After full examination on the part of the customer, all entries, at least to his debit, ought, to be final and not liable to be at any rate to the detriment of the banker. Such is, definitely not the effect of the pass book".

In *Devaynes v. Noble* [(1816) 1 Meriavale 529 at Court of Chancery ordered an enquiry into the nature of the pass book. The enquiry report stated, that on the pass book to the customer, he examines it, and if there. any error or omission brings or sends it back to be rectified or if not, his silence is regarded as an admission that the entries are correct.

However, in view of the various decisions in England and India; the position obtaining today is far from what is stated above! There are a large number of cases on the topic the extracts: which are not reproduced in this paper. In Chatterton v. London and County Bank [1891 - The Times Jan 21] the cry had found for the plaintiff and it was held that there was no duty on the customer to examine the pass book and thus there was no negligence.

Similarly, in *Kepatigalla Rubber Estates Ltd v. National Bank of India Ltd*[(1909) 2 K.B. 1010], it was held that the company was under no obligation to organise its business as to make forgeries unpractical. If this was so, then according to Bray.J.a secretary of the company, by going to the bank on his own purpose in order to prevent the discovery of his own fraud and without knowledge on the part of any of the directors and getting the pass book, can bind the company for all purposes. Clearly, an officer of a company cannot bind the company by approving the balance shown in the company's pass book. In the case of forged cheques, the primary cause of the loss is the negligence of the bank in honoring the forgery and the forger may be in a position to suppress the evidence in the pass book from his employers. Any number of decisions by the highest courts in England is available. A reference to Paget's Law on banking will make all such references with ease. So far as Indian law on this topic is concerned, the law has been clearly laid down by our Supreme Court in *Canara Bank v. Canara Sales Corporation & others*[(1987)62 Comp.Cases 280].

The Supreme Court has held that the plea of implied terms, indirectly constructive notice, and estoppel by negligence, stands rejected. Mere silence, omission or failure to act is hot a sufficient ground to establish a case in favour of the bank to non suit its customer. The relevant portion of the judgment in the case - "Unless the bank is able to satisfy the court of either an express condition in the contract with its customer or an unequivocal ratification, it will not be possible to save the bank from its liability. The banks do business for their benefit. Customers also get some benefit. If the banks are to insist upon extreme care by the customers in minutely looking into the pass book and the statements sent by them, no bank perhaps can do profitable business. It is common knowledge that the entries in the pass books and the statements of account sent often by the bank are not readable, decipherable or legible. There is always an element of trust between the bank and its customer. The bank's business depends upon this trust. Whenever a cheque purporting to be by a customer is presented before a bank, it carries a mandate to the bank to pay. If a cheque is forged there is no such mandate. The bank can escape liability only if it can establish knowledge to the customer of forgery in the cheques. Inaction for continuously long period cannot by itself afford a satisfactory ground for the bank to escape the liability".

In this case, the position prevailing in the United States of America was also discussed.

In the U.S.A, it is settled law that it is the duty of the customer to examine the pass book.

In *Morgan v. United States Mortgage and Trust Co* [(1913) 208 New York Reports 218] decided by the New York Court of Appeal, it was stated: The depositor who sends his pass book to be written up and receives it back with his paid cheques and vouchers is bound to examine the pass book and vouchers

and to report to the bank without unreasonable delay any errors which may be discovered. Negligence in this case means the neglect to do those things dictated by ordinary business custom and providence and fair dealings towards the bank which, if done, would have prevented the wrong doing which resulted from the omission.

Entries in the pass book

As long as the entries in the pass book are 100 percent correct, there is no need to examine the debit and credit entries. All the customers will then be happy and satisfied as also the banks.

But the position that is prevailing is not a position of 100 percent correctness. Mistakes happen at the bank branch regarding the posting of the entries and they may sometimes be favourable to the customers and at other times to some other customers or to the bank itself. The banks take adequate precautions to prevent the occurence of such mistakes. But still mistakes happen. Such mistakes contribute to the following situations:

Entries favourable to customer:

The pass book belongs to the customer. But he has no authority to make entries in the pass book. The entries are made by the bank. As the entries are made by the bank, the same can be used as evidence against him.

In Akrokerri (Atlantic) MinesLtd. v. Economic Bank[(1904) 2 K.B. 471] it was held that"The pass book belongs to the customer and the entriesmade in it by the bank are statements on which the customer is entitled to act". If the position of the customer has not been adversely affected, by relying upon the pass book, the bank may show that a certain entry was made erroneously. When an uncleared cheque has been shown as has been received in cash entry in the pass book, the bankcan show the real nature of the entry and have the error rectified. If the bank has shown erroneously a larger credit balance in the pass book than is actually due to the customer, who, relying upon the accuracy of the pass book, draws a cheque, the bank is not right in returning the cheque. If the bank does, it is liable to pay damages for wrongful dishonour. In determining this question of fact, a great deal depends upon whether the customer was led through the erroneous entry to act in a manner in which he would otherwise not have done and whether such action has been to his detriment.

It happens that the bank may erroneously affect double credits of the same remittance so that the account and the pass book will show a larger balance. In such cases, when the bank discovers the mistake, he should inform his customer. By that time, the customer may have drawn the amount which actually does not belong to him. Until the customer clears the matter, the bank should not permit further operations by withdrawals in the account.

A fictitious entry made by a bank employee cannot be relied upon by a customer who has not received notice of the same, or acted so as to alter his position.

In *State Bank of India v. Shyma Devi*[AIR 1978 S.C. 1263], the bank employee made false entries in the pass book in his handwriting but embezzled the amounts. In this case, the respondent's husband issued a crossed cheque for Rs.4000/- and made payable to "Self" and that cheque was deposited in the bank by the respondent for being credited to her account. She did not obtain the counterfoil or a receipt. Another cheque was issued by her husband for Rs.7000/- for transferring the amount to her account was also deposited by her. In this instance also, no counterfoil or receipt was obtained. The employee to whom these cheques were given was not looking after Savings Bank counter at the relevant time.

The Supreme Court held that the bank was not liable as the employee had not acted within the scope of his employment with the bank. The respondent had not discharged the onus on her to show that she paid the amount to an employee of the bank and that the amount was received by the employee in the course of his employment. The false entry about the deposit of the amount in the pass book could not shift the onus on the bank to prove the contrary.

Entries favourable to bank

So far as the entries in the pass book are favourable to the bank, it is difficult to define with certainty the extent to which the customer is bound by them. From the court rulings, the following observations could be made.

Responsibilities of customer

Where the customer has so acted, as to render the entries of the settled or stated account, and is guilty of negligence in regard to them and as a result, the banker's position is affected in a manner disadvantageous to him, probably the customer will not be allowed to dispute the correctness of the entry. It is doubtful as to what acts or omissions on the part of the customer would amount to settlement of accounts, or to negligence in regard thereto. But it is certain, that the receipt of the pass book by the customer, showing the balance of his account with or without the cheque honoured and its return to the bank by him without taking exception to the entry under dispute, does not constitute such negligence as will preclude him from disputing the same. In other words, the customer is not bound to examine the entries in his pass book and the banker, upon receipt of the pass book from the customer without any objection from time to time, is not entitled to infer that the latter has accepted the entries as correct. This proposition was laid down in *Chatterton v. London and County Bank*[Times London - 21 Jan 1891].

As against this proposition which is unfavourable to the bank, a passage from the case of *Vagliano Bros. v. Bank of England*[(1891)23 QBD 243] may now be examined. "There is another point to be considered. The plaintiff from time to time received from the bank, his pass book, with entries debiting the payments made, for which the bank sent bills as vouchers, which were retained by the plaintiff when he returned without objection, the pass book. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from the settlement of account. But there was no evidence to show that, as between a customer and his banker, is an implied contract as to the settlement of the account by such a dealing between the banker and his customer, the plaintiff had done anything which can be considered a neglect of his duty to the bank or negligence on his part".

In *Balakrishna Pramanik v. Bhownipore Banking Corporation Ltd* [(1932) 59 Cal 662], it was held that a customer must intelligently examine the entries in his pass book and dispute or call for explanation from the bank, regarding the entries in the pass book, it was further held that he could not later complain about the entries in the pass book, where compound interest at monthly intervals was being charged and debited. It was considered that continued and persistent acquiescence of this character gave rise to a presumption that there was an agreement between the customer and the bank to charge compound interest, as was done in this case.

We may conclude that if the bankers succeed in establishing a custom, the courts may give legal recognition to the same : Lord Halsbury in *Vagliano Bros v. Bank of England*stated "The false documents were paid, duly debited to the customer and duly entered in his pass book, and so far as the banker could know or conjecture, brought to his knowledge on every occasion upon which the payment was made and the bills were returned - Was not the customer bound to know the contents of his own pass book ?

A banker in no case is justified in withholding from his customer any amount received for his credit, but omitted to enter the same in the pass book, on the plea of acquiescence on the part of the customer.In *Essa Ismail v. Indian Bank Ltd*[(1963) 1. Comp. L.J. 194] the Kerala High Court held that unless there is evidence to show that the practice or custom indicated or stated a settled account, the customer is not precluded from questioning the debit entries in the pass book.

In practice, the banks have to ensure that the pass books are updated and sent back to the customer as often as possible and should not allow the pass book to remain with him for unduly long periods, without the customer being given an opportunity to examine the same. As per internal rules, the pass books should as far as possible, be collected from the bank by the account holders on the same day duly filled up and completed immediately after the transaction. If left overnight, the bank will issue a receipt in the form of paper token. The pass book should be collected against this token within a week. If the account holder fails to collect the pass book within this period, the pass book will be sent to his address by registered post acknowledgement due at the customer's cost.

Another internal rule of the banks provides that the counter clerk should enter the undelivered pass books in a register called the Pass Book Retained Register; which requires to be scrutinized by the branch manager periodically, to ensure against the retention of the pass books for unduly long periods. But these internal rules are always violated and the nonobservance leads the banks to difficulties.

Balance confirmation letter

A practice that is prevailing in the banking system in India is to send a balance information letter to its customer/s with a request to return the same to the bank. In the case of loan accounts, banks can use the same as an acknowledgement of the debt. Limited companies and firms call for such balance confirmation to satisfy their Auditors about the correctness of the balance. The bank keeping an account in another bank also calls for the balance confirmation.The balance confirmation letters are sent by the bank at half yearly or yearly intervals when they close their accounts.

Having confirmed the balance by returning the confirmation letter duly signed to the bank, whether the customer can object to any debit entry preceding the balance, is a question not free from doubt. The question arises as to whether the acknowledgement would act as an estoppel because in such cases the bank's defence is more powerful than the entries in the pass book or statement of accounts. The Kerala High Court in *Essa Ismail v. Indian Bank Ltd.*[(1963) 1 Com. L.J. 194} observed that unless there is evidence to show that the practice or custom indicated or stated or settled account, the customer is not precluded from questioning the debit entries in the pass book but, when the confirmation slips are sent to and signed by the customer, he will be bound by the debit entries made. In this case, a debit entry in the customer's account was questioned, not by the customer, but by his heirs, several years after the entry was made, and there was enough evidence to show that the customer has acquiesced in the entry.

However, if one of the entries consists of .payment by the bank of a forged cheque or arises out of a fraud committed by the bank's employees, the question is whether the customer can claim reimbursement in spite of his signing the balance confirmation. From the decision in the case, *Allahabad Bank Ltd v. Kulbhushan and others*[AIR 1961 Punjab 571], it would appear, he can. In law, the bank cannot compel the customers to sign and return the balance confirmation letters/slips.

Termination of Banker and Customer Relationship

Where the terms of a contract become impossible to perform due to circumstances not in the contemplation of the parties, the contract is said to have been frustrated. This may also apply in a banker/customer contractual relationship.

In *Diamond Bank v. Ogochukwu* (2008) 1 NWLR (Part 11067), incidences which may frustrate a contract where listed to include:

1. where the subject matter of the contract has been frustrated or is no longer available;
2. due to death or incapacity of a party to a contract;
3. where the contract has become illegal to perform as a result of a new legislation;
4. where there is a outbreak of war; or
5. where the commercial purpose of the contract has failed.

A banker/customer relationship may also be terminated. This maybe by:

1. The mutual agreement of both parties.
2. The customer – by closing his account.
3. The bank – with reasonable notice to the customer; what constitutes reasonable notice depends on the character of the account and the special facts and circumstances of each case.

Operation of Law – this could be as a direct consequence of the:

1. death of the customer – the estate of the deceased could however have access to the account upon display of the certificate of death and other relevant documents.
2. mental incapacity of the customer – the legally appointed trustees may however access to his/her account on his behalf.
3. bankruptcy (individual) or insolvency/winding up (company) of the customer – the trustees in bankruptcy would be the ones to proceed in this instance; a new relationship may be formed between the bank and the trustee in bankruptcy or the liquidator.
4. insolvency of the bank - where the bank is itself is declared bankrupt.
5. order of court – e.g. a garnishee order for the amount in the account to be paid in favour of a judgement creditor, a freeze order, a writ of sequestration issued against a customer held in contempt, etc.

The banker and his customer relationship depend upon the nature of service provided by a banker. Accepting deposits and lending and/or investing are the important in banking businesses. In addition to its primary functions, it deals with various customers by providing other services like safe custody services, safe deposit lockers, and assisting the clients by collecting their cheques and other instruments as an agent and trustees for them. So, based on the above a banker customer relationship can be classified as under. While banks play a critical role in financial intermediation and in the creation of money, banker's primary focus is the satisfaction of customers' financial needs. Banking services satisfy financial needs such as:

1. Earning a return on idle funds
2. Borrowing money to achieve goals
3. Preventing losses
4. Managing money conveniently and efficiently

Different of Special Category customers

Accounts of Limited Companies

The accounts of the limited companies form a large and major portion of the business of the banks. In India, the formation and conduct of the companies are governed by the Companies Act, 1956 and in the U.K. by the Companies Act of 1948 and 1967. Most of the provisions of the Indian law are based on the British law. When limited companies approach a bank to open an account, whether as a depositor or as a borrower the following formalities are to be complied with.

(a) An account opening form for the purpose (different one in the case of limited companies) duly completed.

(b) A certified copy of the Memorandum of Association and Articles of Association.

(c) A certified copy of the Certificate of Incorporation issued by the Registrar of Companies.

(d) Certificate of Commencement of Business where applicable, i.e., only in the case of public company.

(e) A certified copy of the resolution to open the bank account at the bank branch certified by the chairman, or secretary or a principal officer of the company. Generally, this resolution is printed on the reverse of the account opening form and the company need only submit the same duly signed by the person who acted as the chairman at the meeting after passing the resolution and after affixing the company seal.

The account opening form also mentions the name of the persons authorised to operate the account either singly or jointly and has to be signed by the persons authorised to operate the accounts. Some banks obtain the specimen signature of the persons authorised to operate in a separate specimen signature card.In practice, the banks enter on one side of the ledger and in a register the important provisions of the Memorandum and

Articles of Association of the company. As per Company law, the Memorandum and Articles of Association are as it were, the boundaries within which the companies can operate. It is fundamental and except in certain cases it is unalterable in law. The Articles of Association contain the regulations which control the internal management of the company. The Articles and Memorandum can be altered by the provisions contained in the Companies Act. Any person dealing with a company is supposed to know the provisions of the Memorandum and Articles of Association. The position of the banker vis a vis the Memorandum and Articles of Association become more important when the bank is a lender to the company. The banks must ascertain from Articles that the directors have necessary powers to borrow. In cases where the bank deals with a company in accordance with the Memorandum and Articles of Association and has complied with the other requirements, then the bank is not concerned with the internal management of the company. There may be irregularities in the appointment of directors and passing of various resolutions. It is not the liability of the banker to verify the correctness of these matters.

Two British cases deal with the doctrine of indoor management. One is the rule in Turuquand's case [*Royal British Bank v. Thruquand* (1856)-6 E & B - 327]. A person may be acting as a managing director, but in fact he may never have been appointed as a managing director.

In *Mahany v. Liquidator of East Holyford Mining Company*[(1975)L.R.7 H.L. 869] the House of Lords applied the rule. A mining company was formed and it issued shares. The proceeds were credited to the bank account. No meeting of the directors was held and no proper appointment of directors and the company secretary was made. A formal notice was sent to the bank by a person signing as secretary, authorising the

bank to pay cheques signed by the two of the three directors and counter signed by the company secretary. A copy of the alleged resolution authorising this arrangement was also sent to the bank. Cheques were drawn in this way and the balance disposed off. The liquidator sued the bank. It was held by the House of Lords that there was no duty on the bank to inquire whether the directors and the secretary were properly appointed. The fact was that the persons making the representations were those who, under the constitution of the company were entitled to appoint the directors and the secretary. They had actual authority to make representations as to who the officers were.

In this case it was held that the bank was not affected by these internal irregularities and that there was no duty on the bank to enquire whether the directors and the secretary had been really appointed. Lord Hatheler stated - when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the Articles of Association, then those dealing with them, externally, are not affected by any irregularities which may take place in the internal management of the company. The banker need not "pierce the corporate veil".This rule is sometimes known as the Doctrine of Indoor Management or the rule in *Turuquand's case* as it was first laid down in the *Turuquand's case*. It is also referred to as the rule in *Mahany's case*.

In *Turuquand's case*, the company was authorised by its deed of settlement (Memorandum and Articles of Association), to borrow money through its directors, such sums as might be authorised by a resolution passed at a general meeting of the company. The company arranged to borrow 2000 pounds from the plaintiff bank and gave the bank a bond for the amount, under seal and signed by two directors. The bank sued the defendant as the official manager of the company, to recover the loan. It was contended for the company that there was no resolution passed in the general body meeting and that the bank cannot recover.

It was held by the Court of Exchequer Chamber that as the power to borrow money on bonds was not inconsistent with the provisions in the deed of settlement, banks were entitled to assume that the necessary resolution has been passed by the share holders. The relationship between the bank and the company is contractual.

The rule in *Turuquand's case* is important when the bank opens an account for a company, and accepts the company as its customer, and later on when the company repudiates the power of the persons who opened the account for the company. However, there are many exceptions to this rule.

1. The rule is not applicable in cases of forgery. In *Ruben v. Great Finga*[(1960)- A.C. - 439] it was held that when a document purported to be signed or executed by the company is a forgery, the rule is not applicable as the forged certificate is a pure nullity.
2. In *Kredit Bank Cassel v. Shenkers Ltd*[(1927) 1 Q.B. 826] it was held that the rule in Turuquand's case may not apply if a document signed by a person was purporting to be on behalf of the company, is signed in excess of his actual or ostensible authority.
3. In cases where the circumstances are such that the person dealing with the company has been put to enquiry and should have made the inquiry but fails to do so, the rule will not apply.

A limited company is a legal entity. It has no body or soul of its own. It is an artificial personality. It may be a private limited company or a public limited company, it may be a company limited by guarantee, a Govt, company, a company incorporated under statute.

In case the company becomes a borrower of the bank, the banker has to satisfy that the company has power to borrow and that the directors do not act *ultra vires* the Memorandum and Articles.

The Companies Act provides that certain charges should be registered with the Registrar of Companies. Banks may conduct a search in the books of the Registrar of Companies to find out the existence of any previous charge and, if so, the nature of the charge.Any change in the operation of the accounts with the bank should be supported by proper resolutions.

Partnership firm

The law relating to partnership is dealt with in detail in the Indian Partnership Act. That Act deals with the relationship, the rights and duties of the partners *vis a vis* themselves and *vis a vis* the outside world. For the sake of brevity it is not proposed to deal in detail that Act. At this juncture, the salient features of the Act laid down that the liability of the partners of a firm is joint, several and not limited to the extent of capital invested by the partner.

In case a partnership firm approaches a bank to open an account, the bank generally calls for a certified copy or the original of the partnership deed and notes the salient features to the deed in their books. In some cases, all the partners may not have the right to operate the bank accounts as they will be dormant partners. The bank records in the account opening form in one column the signature of all the partners and in another column the signatures of those who are authorised to operate the bank account. In case the partnership is not reduced into writing, the banks go by the words of the partners. There are instances where the partnership is registered and it is considered advisable to obtain the original of the deed by the banks and are returned to the partners after recording the same in the books of the banks.

The important points that the bank has to note are :

1. In a firm's account, one partner has a *prima facie* right to draw cheques in the firm's name. One partner has the implied authority to bind the firm by cheques so drawn.
2. In the absence of any custom or usage of the trade to the contrary, the implied authority of a partner does not empower him to open a banking account on behalf of the firm in his own name.
3. Banks do not accept for the credit of the personal account of a partner, cheques payable to his firm. The bank can do so after enquiring with the other partners. Bank will otherwise be liable to what in law is known as "conversion".
4. One partner has the authority to stop the payment of a cheque drawn in the name of the firm by another partner.
5. The death or insolvency of a partner automatically dissolves the firm. But the partnership deed may provide that as a result of the death of a partner or on account of the insolvency of a partner, the firm may not be dissolved if there is an agreement to that effect between the partners.

A partnership is automatically dissolved.

a. by the adjudication of all the partners or of all partners but one as insolvents.
b. by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on partnership basis.

When there is a change in the constitution of the firm on account of the death or insolvency, the partners are liable for a debt incurred by the firm before the partner's death or insolvency, but not for a debt incurred after the death or insolvency. If on a date the bank has notice of the death or insolvency of a partner and there is a debit balance in the account, the banks close the account of the firm and open a fresh account as per the terms of the deed. It is the duty of the surviving partners to give notice to the bank about the death of a partner.

Account of Joint stock families

The concept of Joint Hindu Family is peculiar in India only. The concept has almost vanished after the passage of the Hindu Succession Act, 1956. However there still exist some Joint Hindu families.The banks generally follow the under noted precautions while opening such accounts.

a) A Joint Hindu Family letter is obtained and proper introduction. ,

b) The account opening form is signed by the Karta and all adult (major) coparceners.

c) If there are minors the other adult coparceners should sign for self and as guardian of the minor/ minors.

d) The Karta is given authority to operate the account by all the coparceners.

Accounts of Minor

As per the Indian Contract Act, a minor is under a legal disability to enter into a contract in his own name. There are various laws for the protection of the minor. However, an account can be. opened on behalf of a minor by the natural guardian or a guardian appointed by the court. The Contract Act provides that a minor may draw, endorse, deliver and negotiate such instrument so as to bind all the parties except himself.The bank insists on knowing the date of birth of the minor and diarises the same, and records the same in the account opening form.

The capacity thus conferred on a minor to draw a valid cheque provides an exception to the general rule that in India a minor's contract is *ab initio void.*

A person is a minor till he attains the age of 18 years. A person whose person or properties are in the superintendence of a person appointed as a guardian by the Court of Wards, then the person is deemed to have attained majority only when he completes 21 years.

In India banks open accounts for minors. In the present day many bank branches operate in colleges or have their Extension Counters in the campus. Accounts are opened for students who stay in hostels, for studies.

The following points are note worthy:

1. A minor can open and operate a bank account.
2. The bank should make clear the implications of opening an account to a minor. And should exercise sufficient carewhile the minor operates the account.
3. The bank should not permit the minor to overdraw his account.
4. The banker should exercise caution while credit for large sums and debits for large sums are transacted in the minors account.
5. A minor can validly draw a cheque and if there is a wrongful dishonour or wrongful payment for example payment of a forged cheque, the minor can sue the bank for wrongful dishonour and for damages.
6. The age of majority of a non-domiciled minor is decided by the law of the country where the minor is domiciled.
7. The practice relating to secrecy of customers account equally apply to minor's accounts also.
8. With the limited capacity of the minor to contract, there must be ability to comprehend, before the bank can safely accept him as a customer. At what age this comprehension is present on a minor depends on the individual, but the burden of proof would be probably on the bank to show that requisite conditions were present.

Accounts of Illiterate person

In a vast country like India which ranks as the world's second largest in population, there will be a large number of illiterates. Such persons approach the banks to open accounts, and the illiteracy is not considered as incapacity to open bank accounts. The banks in India particularly after nationalisation of the major banks have embarked upon various loan schemes for the upliftment of the illiterate rural folk. The precautions taken of the bank include-

1. Obtainment of left hand thumb impression of the account holder in place of specimen signature.
2. The bank affixes the photograph of the customer on the customer's pass book as well as in their ledgers.
3. The account should be conducted by the illiterates in person.
4. Thumb impression is obtained in all pay-in-slips, withdrawal forms, cheques etc., as in the case of signature for literate accounts.

Trust Accounts

Banks permit the opening of trust accounts. A certified copy of the trust deed is obtained and kept along with the other formalities file relating to the account. The bank calls for the original of the trust deed and enters the salient features of the trust deed in their books. The bank opening the trust account should be conversant with the provisions of the Indian Trusts Act 1882.

Banks permit the operation of the trust account by some or all trustees; if the trust deed provides specifically for such operations or confers general authority on the trustees to delegate their powers to some or one of them. In the absence of such a provision all trustees have to operate the account jointly. Some banks permit the operation by some or one of the trustees after obtaining suitable indemnity from the other trustees if the trust deed does not have such a provision regarding the operation.

Banks take more than ordinary care in the conduct of Trust Accounts. The banks have to ensure that they do not become a party to any breach of trust. When the bank becomes a party to a breach of trust, it becomes answerable to the beneficiary of the trust.An account even if it is not opened as a trust account, if there are indications to the bank that the balance in the account is held by the depositor as a trustee, the account becomes mulcted with trust. Cases may arise when one or some of the trustees have overdraft accounts at the bank where the trust account is also maintained. Bank has no right of set off between the personal account and trust account.

A trustee has to deal with the trust property with the sole purpose of fulfilling his obligations according to the terms and conditions of the trust and as carefully as a prudent man would deal with his own property. Violation of his duty is termed breach of trust and the beneficiary can hold the trustee personally liable for any loss that he may suffer due to such breach.

A trust deed may be written or oral, may be express or implied, may be specific or constructive. Generally, a trust deed is translated into writing. Sometimes an inference of a trust may be made from the circumstances. The person who creates the trust is called the author of the trust and the trustees are those on whom the author reposes confidence, that they will execute the terms of the trust without any breach.

When the trust account is opened the trustees become bank's customer and such a relationship starts with the bank. The bank should take care to see that the account is opened and operated as per the terms of the trust deed.

To open a bank account, the trustees should pass a resolution specifically and submit it to the bank.In case the trust deed contains a specific provision that prohibits the operation of the bank account on the death of one of the trustees, the bank should stop operations immediately on receipt of the information of the death of the trustee. However, in cases where the trust deed does not contain such a provision and the deed is silent, the bank can allow the surviving trustees or the last surviving trustee to operate the account.

Appointment of several trustees by the author of the trust is to ensure that the trust properties are managed under a combined control. A trustee has also no authority to delegate the powerhe derives from the trust deed. The authority of the trustees to borrow is also limited. In case the borrowings by the tr are *ultra vires* the deed, the bank loses the right of recover

A will or trust deed will give authority to the trustee to earn, a business for the benefit of the beneficiaries of the trust, trustees may borrow for the said purpose and charge the assets forming part of the trust estate. Unless the trustees have fulfilled their duties as executors and paid the debts of the testator, the latter's creditors will rank before both the indemnity of the executors (the right to be exempt from the liability of their act in continuing the business) and the mortgages of the estate. It is essential therefore, where bankers are asked to lend against assets of the estate for the purpose of enabling the executors to carry on a business that they ensure that the debts of the testator have been paid. This applies only to the creditors of the testator, not to those of the trustees, and only where the business is carried on for the purpose of effecting a sale for winding up. Nevertheless, the executors have the power to borrow and mortgage for purposes of winding up.

Accounts of Executors and Administrators

In law, the succession can be testamentary or intestate. In cases of testamentary succession, a person executes a will and prescribes in the will how his properties after his death will have to be partitioned or dealt with. In many cases the will provides that certain person or persons should execute the terms of the will after his death. The persons authorised to execute the will are called the executors of the will. Where no executor is mentioned in the will, the court will appoint one of the beneficiaries' .of the will as administrator. The executor and administrator of the will, as the case may be, may have to open a bank account after the death of the testator, either in the name of the trust or in their own names in their personal capacities. They have to make it clear that the accounts are opened and operated for and on behalf of the deceased. In case of doubt as to the genuineness of a will or the persons claiming to be executors or administrators, the banker may demand to be shown the probate or letter of administration, as the case may be. On application by an executor, court issues a probate are proving the will and a letter of administration confirming appointment c: the administrator. The executors and administrators have no power to delegate their authority. But they can appoint attorneys or other professionals to do their work or for some professional services. In case the bank knows that the funds deposited belong to a trust and are being misapplied, the bank cannot escape the liability.

Banks follow the under mentioned precautions: A proper introduction to open the account.

1. The will should be properly examined to ensure the terms; and powers of the executors and administrators.
2. All the executors must sign the account opening form and give a clear mandate for the operation of the account.
3. The cheques and instruments tendered to the bank should contain the style of the account and should contain a notation that it is and on behalf of "........ ".

4. The particulars of the will or probate should be recorded in the banks' books.

5. The trust accounts should not be opened in the personal names of the executors or administrators.

6. The banks should ensure that they do not become parties to a breach of trust.

7. The cheques drawn by one of the trustees can be stopped * by another.

8. The banks have no right to set off the credit balance in the trust account against any dues from the administrators or executors.

9. The executors account is for a limited period that is till the terms are executed.

Accounts of Unincorporated bodies, Clubs,societies and Committees, etc.

These bodies are pot legal entities as limited companies are. Nevertheless, banks open accounts for them. These bodies have their own bye-laws and have their executive committees or boards elected by the members. For opening account for a co-operative society, the permission of the Registrar of Co -operative Societies is essential. The following formalities are observed by banks while opening accounts.

1. An introduction before opening the account.

2. Account opening form for the account duly filled up.

3. Copy of the resolutions of the committee or governing body, signed by the Chairman, for opening the account.

4. Copy of the bye laws.

The bank has to stop the operation of the account when it receives a countermand order. Where one of the signatories dies, bank suspends the operation of the account till a new member is elected and his signature recorded at the bank.

In this connection, it is interesting to recall a quote by Lord Lindley in *Wise v. Perpetual Trustee Co.* [(1903)A.C. 139]"Clubs are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member".

It is upon this fundamental condition, not usually expressed, but understood by everyone, that clubs are formed; and this distinguishing feature has often been judicially recognised.

Joint Accounts

Generally banks permit the opening of Joint Accounts. Over the years, on account of the changes in the bank's policy for and a shift from class banking to mass banking, several problems have arisen for the banker and customer. In case of joint accounts, banks are strongly advising the customers to make such accounts as 'Either or Survivor' or 'Former or Survivor'.

In the case of ordinary joint accounts, without 'Either or Survivor' or 'Former or Survivor' clause, the difficulties start after the death of one of the joint account holders. Although the bank may be right in paying to the survivor, the legal heirs of the deceased can create problems. Further, the Indian judicial system, an inheritance of the colonial rule literally denies justice by delaying justice. Even in the case of individual single accounts, banks suggest the customers to make them 'Either or Survivor' or 'Former or

Survivor'. This is on account of the practical difficulty in obtaining a succession certificate from the courts. Such delays have resulted in bank's losing good customers. In case of individual accounts, 'Either or Survivor' or 'Former or Survivor' clause may prove beneficial. Now take an example of A & B who are neither related* nor executors or trustees, but just ordinary men who for their own reasons want to open and operate a bank account. They are not related and are not partners. What precautions the bank should take? What happens in the event of the death or insolvency of one of them?

1. The bank must obtain proper introductory reference, in the same way as for opening an account for a stranger. It is well established that failure to obtain proper introduction will be construed as negligence on the part of the bank. There may be instances where one of the joint account holders is already a customer of the bank and in that case introduction by him for the other joint account holders will be sufficient.

2. Any one of the joint account holder may remit money to the bank. But it is necessary that withdrawals will have to be made jointly, in the absence of instructions to the contrary.

3. No mandate is necessary if A & B decide to sign jointly for withdrawals. But in practice, banks obtain clear instructions in writing embodying at the same time directions for security and safe custody transaction, and providing for their several liability in the event of any overdraft. So a mandate letter is generally taken.

4. Banks do not obtain a valid discharge if a person pays a cheque drawn by one joint account holder without the authority of the other.

5. Generally, banks do not encourage the opening of accounts when there are more parties than two in a joint account. Banks warn them of the difficulties which may arise if all of them want to jointly sign on cheques. If all the members operate jointly, one of them may be unavailable (on tour or may be sick) so that he cannot sign, when withdrawals have to be made. The bank advises that it will be better that the signing powers are given to two of them and obtain a suitably worded mandate to that effect. Any attempt by the joint holders to introduce a complicated mandate permitting only certain of them in certain combinations is also discouraged. It would be difficult, for example, to keep in step with a mandate in an active joint account of ABCD and E which enables A and B or B and D or A and C to sign but not A and E or C and D etc, as such combinations which are complicated would require special examination in the case of each withdrawal.

6. One joint holder can stop the payment of a cheque drawn by another or others; but the removal of countermand should be signed by all parties or in accordance with the terms of the mandate.

7. One joint account holder cannot delegate his power to an agent or power of attorney to operate on the joint account and such authority must be signed by all parties.

8. Any mandate for a joint account is automatically determined in the case of death, insolvency or mental incapacity of other or any party.

9. It is a general rule that on the death of the joint account holder, the balance devolves on the survivor or survivors; unless the joint holders indicate otherwise. But claims and counter claims from the heirs will often arise. Therefore the mandate should be carefully worded.

   These difficulties have given birth to the "Nominee" accounts^ In the case of nominee accounts, banks obtain a legally drafted nomination form from the account holders to pay the balance in the account, upon the death of one or all of them to another person/persons called nominee. The nominee facility is available to single individual accounts also. This facility removes the difficulty of succession certificates etc. The nomination facility prevents claim by the personal or legal representations.

10. In the case of death of one of the joint account holders, there is no obligation on the part of the bank to pay the estate duty.

11. On the insolvency of one of the joint account holders, the mandate is automatically determined and the operations in the account should be immediately stopped because a portion of the balance in the account may belong to the Official Receiver and the bank cannot apportion the money between the solvent and insolvent.

12. Similarly, the death of one of the joint account holders also determines the mandate.

In case of loans in joint accounts, the banks should include the joint and several liability clause in the mandate. With joint liability there is only one right of action, but with joint and several liabilities there are as many rights of actions as there are parties. The joint and several liabilities enable the bank to set off any joint indebtedness against the credit balances in the individual accounts of any of the joint account holders.

Liquidators Accounts

Liquidators are appointed by the courts to liquidate the assets and liabilities of the insolvent or bankrupt customer. Various laws such as Companies Act, The Presidency Towns Insolvency Act, and Provincial Insolvency Act deal in detail with the appointment of a Liquidator or Court Receiver. The liquidator or official Receiver is an officer of the court and the bank opens the account in their names. The mode operations in the account are advised by the Liquidator/Receiver by production of court orders and have the sanctity as if it is given by the court. Banks should exercise caution to verify the terms of the court order and should not aid or abet the Liquidator or Receiver to commit a breach of trust.

Mercantile Agents

A mercantile agent may be defined as an agent having in the customary course of business as such agent, authority either to sell goods or to consign goods for the purpose of sale or to buy goods, or to raise money on security of goods. The authority that the mercantile agent derives from his principal is a limited authority.

A mercantile agent is personally liable for a breach of warranty for any loss or damage sustained by a third party if such agent makes a representation to the third party that he has the requisite powers to make such representation. The liability arises when the third party acts upon such representation, even if the agent believes or has an impression that he has the authority.

The bank who is authorised by a principal to operate his account by an agent should suspend operations in the account immediately on receipt of the information about the death or insolvency of the principal. An agent should make it clear that he signs for and on behalf of his principal.

Banker should not allow the agent to overdraw the account without the express authority of the principal.

Banker also should not be a party to conversion if the agent credits his personal account by debit to his principal's account through the bank.

Non Resident Indian Accounts

During the early eighties, the remittances from persons of Indian origin and employed abroad started pouring in and even acted as an aid to the Government to meet a portion of the balance of payments deficit. The Government and Reserve Bank of India issued instructions to commercial banks to open accounts for the Non Resident Indians (NRIs). These Non Resident Indian accounts are of two types viz. Ordinary NRI account denominated in Indian rupees or Foreign Currency Non Resident accounts. The NRIs are permitted to open fixed deposit accounts and Savings Bank accounts under the scheme. In the Ordinary NRI account, the bank pay higher rate of interest than the domestic deposits. The banks convert the foreign currency amount of the remittance at the rate applicable for the day and credit the customer's account with Indian Rupees.

Foreign Currency Non-Resident accounts can be opened only in Sterling Pounds, U.S. Dollars, German Marks (D.M) or Japanese Yen. The amounts will be held in the books of the bank in India in foreign currency.Such accounts will be opened with an introduction from the Indian embassy abroad, or from a branch of an Indian bank abroad or from the correspondent banks. The Indian passport particulars of the Non resident are also noted in the account opening form and the bank ledger. The customer can repatriate the amount held in such accounts in the same currency.

The opening and operation of the accounts are similar to other accounts. However these accounts are regulated by the ReserveBank of India, through instructions and clauses in the Exchange Control Manual.

Accounts of Foreigner

Commercial Banks are designated by the Reserve Bank of India as Authorised Dealers of Foreign Exchange. The banks have to obtain permission from the Reserve Bank to open accounts for foreigners.

This permission is granted by the Reserve Bank of India quickly. The bank branch obtains a form known as QA 22 from the foreigner and submits to the Reserve Bank of India. The operation of the account is controlled by the Reserve Bank of India.

Detailed instructions are available in the Exchange Control Manual published by the Reserve Bank of India.

Bankers Duty to Maintain Secrecy

1. General Duty of Banker

Between an ordinary debtor and creditor there is no duty of secrecy. When a shirt is stitched by a tailor, the tailor is under no obligation to preserve the secrecy regarding the cloth. If the tailor discloses the details of the cloth to any of his other customers, there is no breach of contract. But a bank cannot disclose the details of his customer's account without just and proper reason. The duty to maintain secrecy is an added obligation or an exception to the general rule that the relationship between a banker and the customer is that of a debtor and creditor.

All the employees and officers of the bank have to sign and submit a Declaration of Fidelity and Secrecy at the time of their joining the service.The law on the subject has been clearly and comprehensively laid down by banks, L.J. in *Tournier v. National Provincial and Union Bank of England* , [(1924) 1 K.B. 461)]. The following proposition can be drawn from this case.

"The duty of maintaining secrecy is a legal one, arising out of contracts, not merely amoral one. Breach of it, therefore gives a claim for nominal damages, or for substantial damages if injury has resulted from the breach. It is, however not an official duty, as has been contended, but qualified, being subject to certain, if not essential exceptions. The obligation to secrecy does not end even with the closure of the customer's account".

Tournier banked at the Finsbury Pavement branch of the National Provincial Bank, where his account was overdrawn, and arrangements had been made for reductions of one pound per week. When these agreed deductions were not made, the acting manager of the bank telephoned Tournier at the address of his employer. But unfortunately Tournier was not available in the office, and the acting manager discussed the matter with the employer of Tournier. In the course of conversation, the bank manager revealed the state of the account and that the cheques had been presented payable to book makers. As a result of this disclosure, Tournier was discharged by his employers and he sued the bank for damages. The case went to appeal and the ruling of banks L.J. provides a basis for future dealings of this nature. It was stated that the duty of secrecy is a legal one arising out of contract and the duty is not absolute, but qualified. The duty continues

after the customer has closed the account and the confidence is not limited to information derived from the account itself.Atkin L.J. Said :

"I further think that the obligation extends to information obtained from other sources than the customer's actual account if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers - for example, with a view to assisting the bank in conducting its customer's business, or, in coming to decisions as to its treatment of its customers".

It is therefore clear that the practical banker must always exercise the greatest care to observe his duty of secrecy. Any inadvertent disclosure made during the rush of routine business may have serious consequences.

Disclosure:

The circumstances when the disclosure of a customer's affairs may be made, and where the obligation to maintain secrecy is not absolute have again been laid down in *Tournier's case* by banks L.J. The occasions when disclosure would be justified are –

1. Where the disclosure is under compulsion of law.
2. Where there is a duty to the public to disclose.
3. Where the interests of the bank require disclosure.
4. Where the disclosure is made with the express or implied consent of the customer.

Compulsion of Law

1. The exception may arise where evidence has to be given by a bank in a court. It does not, however, permit disclosure, without the express permission of the customer, to a detective or police officer investigating a case or to an Income Tax Inspector. An order must be served on the bank before any party can demand to inspect the books. Bankers Book of Evidence Act (1891) allows certified copies of the entries to be produced in legal proceedings in which the bank is not a party. This provision is again useful to the bankers as they can avoid attendance in courts with the actual books of accounts.

2. As the Central Bank of the country, the Reserve Bank of India has the powers to collect information from bankers. The Reserve Bank of India may furnish such information to any other banking company. But the information so furnished shall not disclose the name of the bank which forwarded such information.

   In *Shankarlal Agarwalla v. State Bank of India*[AIR 1987 Cal 29], the customer tendered for credit of his account 261 notes of Rs.1000 denomination to State Bank of India with a declaration form prescribed by The High Denomination Bank Notes (Demonetisation) Act 1978. The bank made available this information to the Income Tax Department, who issued a notice under the. Income Tax Act to the customer. The department's order also attached the amount.

   The court held that the disclosure by the bank in this case falls within the exception to the general rule and the bank has the right in disclosing the information. In this case, the disclosure was made under directions from the Reserve Bank of India and the Finance Ministry.

4. The Banking Regulation Act, 1949, requires that every banking company shall submit a return of unclaimed deposits to the Reserve Bank of India within 30 days of the close of each calendar year. The return should contain all accounts in India which have not been operated for ten years.

4. The Foreign Exchange Regulations Act, 1973, empowers the Director of Enforcement or the Reserve Bank of India to inspect the books of accounts of any authorised dealer.

5. Similar provision is contained in the Companies Act, 1956, when the Central Government appoints inspectors to investigate the affairs of a company.

DUTY TO THE PUBLIC TO DISCLOSE:

This exception rarely arises. But it is more relevant in a time of National Emergency. During the World War II it was incumbent upon a bank to make suitable disclosure if he had evidence of a customer trading with the enemy. The bank should be sure of this ground before venturing any revelation for this reason.

DISCLOSURE IN THE INTERESTS OF THE BANK:

Pointing to this exception there is only one case law in U.K. That is the case of *Sutherland v. Barclays Bank*- [The Times- Nov.25-1938;5LDB 163]. In this case, the customer, a woman, issued a cheque to her dress maker. The bank dishonoured the cheque as there were insufficient funds in the account. The bank knew of the customer's bookmaking transactions and did not wish to allow any overdraft on the account. The customer protested about the dishonour to her husband, a doctor, and he told her to take up the matter with the bank. She did so, by telephone, and after a while, the husband interrupted the conversation to add his own protest. The bank then disclosed to him that the cheques had previously been drawn payable to bookmakers. Upon the wife's bringing an action against the bank for breach of duty in making this disclosure, the bank contended that the conversation with the husband was a continuation of that with the wife and that they had her implied consent to the disclosure. This the wife denied. It was held that on the facts of the case that the bank must succeed; the disclosure being in their interests, and is within the terms of the qualifications on the duty of secrecy in Tournier's case.

EXPRESS OR IMPLIED CONSENT OF CUSTOMER:

For implied consent, the case discussed in the above paragraph i.e., Sutherland's case itself is an example.

A customer may expressly authorise his bank to advise his accountant, the balance of his account and provide him a copy of the monthly statements. This may be to enable the accountant to draw up the customer's balance sheet. Such information is given on the basis of a letter in writing by the customer, which is filed away as evidence in case of need.

In India also, banks do not generally divulge the balance in the customer's account over telephone. All prudent bankers all over the world discourage customers from making telephonic enquiries concerning the state of their account. But in these days of ease of communications, it is helpful for the bank or customer to communicate through telephone. The need for care is essential. Banks convey the information to the customers only and only after satisfying themselves that the voice is that of the customer. In no case, third parties are given the status of a customer's accounts.

STATUS OPINION OR OPINION REPORTS GIVEN BY BANKERS

It is an accepted practice among bankers, which is generally described as 'Common Courtesy', whereby one bank enquires from another bank about a proposed borrower, surely, guarantor or of an acceptor of a bill. Sometimes customers also require the status report on their out station purchaser or supplier. The customers cannot get such a report directly from another bank. So he approaches his banker to obtain the report from the outstation bank. This is more relevant in foreign exchange transactions, where a customer in India may not have seen at all his buyer/seller abroad. In such cases the banks furnish a carefully worded and confidential report. The phrase commonly used are - considered 'excellent', 'good' or 'satisfactory'.

This report is furnished to the other bank without any responsibility on the part of the issuing bank or its officers. The reports contain only general information. It is presumed by the banks that it has^ the implied consent of the customer.In the ever expanding financial market the abstention of such reports help the lending bank and its officials when they are hauled upon to answer a charge of negligence.But the modern trend is to get a rating from credit agencies such as S&P, MOODYS or CRISIL, who analyses the financial position of business houses and give a rating.

Banker's Lien and Set off

When we talk of bank and banking, the term banker's lien and bankers right to set off are talked about. The lien has its origin in English law. A lien is the right of a creditor in possession of goods, securities or any other asset belonging to the debtor, to retain the same till the repayment of a loan, subject to any contract to the contrary. The Indian Contract Act deals with liens. But it is not exhaustive and we have to depend on English case law.

A lien may be, possessory, equitable or maritime. Bankers are concerned only with possessory lien. Possessory lien may be either general or particular. A particular lien applied only to a particular transaction and its scope is limited to the particular security and the particular transaction.

Bankers lien is a general lien. A lien does not require any special agreement, written or oral. It arises by operation of law and should fall within the following broad spectrum.

a. The creditor should be in possession of the goods and securities, and they should have come to his possession in the ordinary course of business.

b. The owner of the goods and securities has a lawful debt to pay to the person in possession.

c. There should not be any contract, express or implied to the contrary.

Following the English law, a banker's lien is sometimes called implied pledge. According to Sir John Paget - 'Lien' being the right to retain another man's property until a debt is paid, property and lien cannot coexist in the same person with regard to the same article. The lien peculiar to a banker, with regard to negotiable securities, is defined in *Brandao v. Barnett* [(1846) 12 Cl & F 787] as an 'implied pledge'; but assuming this to be the case, absolute property is as inconsistent with the rights of a pledgee as it is with those of a person having a lien.

In *Barclays Bank v. Astley Industrial Trust Ltd* [(1970) 2 QB 527], banks were held to have obtained a lien on the cheques that had been paid in for collection. But the idea had already been questioned. Thus, Paget has argued that money paid into the bank becomes the property of the bank, which thereafter owes a corresponding debt to the customer, and a debt is not suitable subject for lien.

Hales Owen Press Wrok[(1917) 1 QB 46] Buckley L.J. tock the same view. The money or credit which the bank obtained as a result of clearing the cheques becomes the property of the bank, not the property of the company. No man can have tan. Hen on his own property and consequently no lien can have arisen affecting that money or that credit. It has of course long been recognised that a banker has a general lien on all securities deposited with him as a banker by customer unless there is an express contract or circumstances that show an implied contract inconsistent with the lien. The term "Securities" is no doubt used here in a wide sense, but does not; extend to banker's own indebtedness to the customer.Therefore, the question of a general lien arises where the bank is the lender and the customer is the borrower.

Any property which is handed over to a bank for an express purpose cannot be subject to lien, even when the purpose has failed. In an old case, *Lucas v. Dorrien*[(1817) 7 Taunt 278] deeds were handed over to a bank as security for an advance. The advance was not granted. The deeds were not taken back by the depositor. It was held that they could not be subject to lien in the banker's hands.

The general principles of law governing 'lien' can be described as-

A) Banker's lien is the right of retaining things delivered into his possession as a banker and if and so long as the customer to whom they belonged or also had the power of disposing of them when delivered is indebted to the banker on the balance of account between them, provided the circumstances in which the banker obtained possession do not imply that he has agreed that this right shall be excluded. Banker's lien can be properly said to arise only in respect of any securities held by the bank. If the customer deposits certain securities and ultimately there is a sum due to the bank, the bank has a lien over these securities and it could hold them against the amount due by the customer.

B) The ownership of the thing in possession of the bank should be with the customer otherwise the question of lien does not arise;

C) Banker's lien differs from the right of set off'. A lien is confined to securities and property in the bank's custody. 'Set off' relates to money and may arise from a contract or from mercantile usage, or by operation of law. The banker's lien does not extend over the credit balance of a partnership account for the amounts due to him from one of the partner's in his individual capacity.

D) A bank may not be able to exercise any right of lien over the money deposited by the customer, as the bank itself becomes the owner of that deposit. But still he has a right to adjust such amounts against any debts due to the bank- from the customer. The purpose of the lien in such case is achieved by the right of 'set off'.

E) The banker's lien is subject to any contract to the contrary. The existence of such a contract must be proved by the person who alleges the same.

Judicial Interpretation – when the banker has no lien.

Safe Custody Deposits: When a customer deposits with his bank his securities and documents of title for safe custody there is no lien. The deposit in this case is for a specific purpose and under an express contract. The issue of the safe custody receipt by the bank itself constitutes a contract to the contrary to assume against the existence of any lien. In the case of safe custody, the banker is a bailee.

When the bailor has no title to the securities and valuables deposited, the bailee cannot exercise any right of lien, and if it can be shown that the bailor had stolen or misappropriated the securities deposited, the banker holding them will be compelled to return them to the true owner, even without getting back the safe custody receipt.

The banker has no lien on bills of exchange or other documents entrusted to it for special purpose.On the dishonour of a documentary bill, the bank is not entitled to apply the security accompanying the bill, to any other debt due from the customer for whom the bank discounted the bill. Where a customer deposited a life insurance policy with the bank accompanied by a memorandum of charge to some overdrafts not exceeding 4000 pounds together with interest, commission and charges, it was held that the banker's lien was limited to the amount specified.

Credit and liability must be in the same rights. No lien arises on the current account balance or the deposit account of a customer in subject of an debt due from a firm, as the credit on the one hand and the liability on the other does not exist in the same right.

There is no lien in respect of separate accounts where in one, the customer is a trustee and the other account is held by him in his personal capacity.Title deeds of immovable property: Customers deposit with the

bank title deeds either for safe custody or as collateral security for loans by way of an equitable mortgage. A title deed cannot be sold by the bank. No lien attaches to the title deeds.The banker's right of lien is not barred by the law of limitation. The effect of limitation is only to bar the remedy and not to discharge the debt.To conclude the topic of lien, the student is advised to refer to the provisions of the Indian Contract Act particularly sections 171 and 176 and the Banking Regulation Act Sections 5 & 6.

Right to Set off

The banker's power to combine different accounts is called the right to set off. Between an ordinary debtor and creditor, there is an undoubted right to set off amounts due to and from each other in the ordinary course of business. For example, A buys cement from B, a trader for Rs. 10,000/-. Later, A sells to B steel worth Rs.5000/-. B is perfectly entitled to set off the cost of steel against his liability for cement and need to pay only Rs.5000/- in settlement of the net debt.

There are cases where a customer may be having 3 or 4 accounts in the same bank. Some may be deposit accounts and other/s borrowal accounts. The implied right of the banker at any time to combine the balances in order to arrive at the net amount due to or from the customer is known as the banker's right to set off. But this is not always easy as one thinks and is hedged with qualifications.

The important requirements for set off are: All the funds must prima facie belong to the customer. We have discussed under lien that a bank has no right of lien on the monies held in the bank by the same customer as an individual in one account and a member in a partnership account or as a trustee in another account in the same bank. This rule applies with equal force in the case of set off also. Notice of such a trust may be actual or constructive. An overdraft in the individual current account of A cannot be set off against the credit balance of a Trust account in which A is a trustee. However, if A has two accounts styled as A No.I Account, and A No.II Account or where A has a Current Account and Savings Bank account, in such cases the bank can exercise the right to set off.

Unless the partner has contracted to be severally liable for the indebtedness of the firm, the bank cannot set off the credit balance on the private account of the partner against the overdraft of the partnership. Even in such cases there must be some precise authority from the partner in the absence of the happening of any event to determine the position. Likewise in the absence of express agreement, there is no set off between the joint and separate debts. The overdraft on the joint account of A & B cannot be set off against the substantial credit balance on the current account of B, unles, of course, B expressly agrees or A and B have specifically contracted for several as well as joint responsibility for their joint overdraft.

Not only must the accounts be in the same rights but the liability must be accruing due. A credit balance due on current account or deposit account cannot be held against a contingent liability on bills discounted. The position is however altered by the bankruptcy of the customer, which in effect determines the position and gives the banker the right of set off. *Baker v. Lloyds Bank*[(1920) 2 K.B. 322].

A reference may also be made to the full bench decision in*Issac v. Palai Central Bank*(in Liquidation) [(1963) 33 Comp. Case 799]. In this case Issac, the appellant deposited a sum of Rs. 13500/- with the Palai Central Bank Ltd. on 13th January 1959 repayable on 13th January 1961. On June 23, 1959, he executed a Demand Promissory Note for Rs. 10,000/- in favour of the bank. The Promissory Note was delivered to the bank along with the fixed deposit receipt, duly discharged by him. A letter of delivery also was submitted by him to the bank. This letter stated *inter alia*, that the proceeds of the fixed deposit should on maturity be credited to the loan account in respect of which the promissory note was executed. The bank went into liquidation on 05.12.1960. The official liquidator filed a suit against Issac for recovery of the dues on the loan account. Issac claimed a right of set off of the fixed deposit against the dues to the bank.

The full bench of the High court held that Issac was entitled to claim the right to set off. Merely because he handed over the fixed deposit receipt to be kept by the bank as security for the loan will not affect his position to claim the right. It was further held:

1) that a question of set off should be considered normally without reference to the existence of any security;

2) that the arrangement between the customer and banker in such a case itself was to affect a set off on the maturity of the fixed deposit;

3) that the fact that the deposit had not matured when the winding up commenced is not of material consequence ;

4) that the effect of the bank's insolvency was to accelarate the date on which the set off should be effected and to make the commencement of the winding up the time for that purpose;

5) that in the light of what has been stated, the appellant's claim to a set off should be admitted.

In the case of *Radha Raman Choudhary v. Chota Nagpur Banking Association Ltd*[(1945) Comp.Cas 4] the distinction between a right of lien and a right of set off was clearly laid down. The banker's right of lien is part of the law merchant. It can only attach to money so long as it remains an earmarked sum of money. Where it ceased to be such a separate earmarked sum, and is represented only by a balance of account or debt due from the bank, no lien can continue to attach to it, though the rights of the bank by way of set off will not thereby be affected. A clear distinction between lien and set off in the light of Section 171 of the Indian Contract Act was made in this case. It was held that the banks have a right to combine one or more accounts of the same customer but a bank cannot combine a customer's personal account with a joint account of the customer and another man.

In the question relating to the rule of set off to be applied, courts have drawn a distinction between the Indian Law and the English Law in I.S. Machado v. Official Liquidator of Travancore National and Quilon Bank Ltd. [1941 - 11 Comp. Cas 221], In India, if a debt is incurred by the members of a partnership, they will be jointly and severally liable. So far as the amounts due to the members of the firm are concerned, the claim will be a joint claim both in England and in India. Consequently, if X and Y, who are the members of a firm sue Z, Z cannot set off a debt due by X alone, whereas if Z sues X & Y, X can set off a debt due by Z.

The rule of set off in bankruptcy, does not rest on the same principles as the right of set off between solvent parties. In (Machado's case) an amount was due to a firm A by the Travancore National and Quilon Bank and the amount was due to the bank by another firm B consisting of the firm of A (Machado's firm) and another person. The bank went into liquidation. On the demand made by the bank against the firm B, A firm claimed to set off the amount due to them by the bank due by B to the bank. It was held that the liability of the members of the Firm B was joint and several and that the set off must be allowed. In a claim to enforce the joint and several liability it was pen to A to set off the debt due to them.

This judgement relates to principles governing claims of set off as between separate debts and a joint and several debts. The general rule is that a debt owed by the creditor to one of the debtor. If however the joint debtors liability is not merely joint but also several a right of set off is available to the debtor.

The position of law is however different in India and England. In England, the liability of a joint debtor is only joint, unless the contract provides otherwise. Similarly the liability of partners in respect of debt of the partnership is joint, not joint and several. On the other hand, in India joint promise is related as a joint and several promise on account of Section 43 of the Indian Contract Act and unless the agreement provide

otherwise, joint debtors are jointly and severally liable to the creditors; the liability of the partners is also joint and several. In Machado's case, it was held that a partner can claim a set off a debt due from his partnership to a bank against the credit balance on a deposit account in his name with the bank.

The general principle of equity applicable both in England and in India is that in the case of a voluntary conveyance of property by a person, without declaration of a trust, there is a resulting trust in favour of the grantor; unless it can be proved that an actual gift was intended. An exception has been made in English Law and a gift to a wife is presumed, where money belonging to the husband is deposited at a bank in the name of the wife, or where a deposit, is made, in the joint names of both husband and wife. This exception has not been admitted in the Indian Law on account of the different conditions attached to family life, and where relationships are entirely of a different nature.

In England, whenever money is deposited by a husband in a bank account in the name of his wife or in the joint names of himself and his wife, there is a presumption that the husband has gifted the money to his wife. Such presumption is not permitted in India. In the absence of evidence to the contrary, money deposited by a husband in the joint names of himself and his wife and payable to Either or Survivor, must be presumed to belong to the husband.

The right of immediate set off is undoubted where the position is determined and the net figure due to or from the banker has to be determined.

In the event of the death or insolvency of a customer, all balances due to or from him in the same right have to be combined to decide how much is due net to or from the estate. Same is the case in the liquidation of a company. In all such cases, the immediate need to combine the balances is obvious and the power to set off without notice is undoubted.

Although such is the legal position, generally the banks in India give notice to the customer before exercising the right of set off.

Any implied right of set off with which the banker may be endowed must be subject to the obligation to honour cheques drawn properly by the customer.

In practice, where the customer has more than one account in the same right, banks obtain an express letter from the customer to set off the balances in the accounts. In short, the right to set off can be exercised when –

1. the debts are amounts certain;
2. the debts are due and to the same parties;
3. the debts are in the same right; and
4. there is no contract express or implied to the contrary.

Garnishee Order

The obligation of a banker to honour his customer's cheques is extinguished on receipt of an order of the Court, known as the Garnishee order, issued under Order 21, Rule 46 of the code of Civil Procedure, 1908. If a debtor fails to pay the debt owed by to his creditor, the latter may apply to the Court for the issue of a Garnishee Order on the banker of his debtor. Such order attaches the debts not secured by a negotiable instrument, by prohibiting the creditor the creditor from recovering the debt and the debtor from the making payment thereof. The account of the customer with the banker, thus, becomes suspended and the banker is under an obligation not to make any payment from the account concerned after the receipt of the Garnishee Order. The creditor at whose request the order is issued is called the judgement- creditor, the debtor whose money is frozen is called judgement- debtor and the banker who is the debtor of the judgement debtor is called the Garnishee.

The Garnishee Order is issued in two parts. First, the Court directs the banker to stop payment out of the account of the judgement- debtor. Such order, called Order Nisi, also seeks explanation from the banker as to why the funds in the said account should not be utilized for the judgement- creditor's claim. The banker is prohibited from paying the amount due to his customer on the date of receipt of the Order Nisi. He should, therefore, immediately inform the customer so that dishonour of any cheque issued by him may be avoided. After the banker files his explanation, if any, the Court may issue the financial order, called Order Absolute where the entire balance in the account or a specified amount is attached to be handed over to the judgement- creditor. On receipt of such an order to the banker is bound to pay the garnished funds to the judgement- creditor. Thereafter, the banker liabilities towards his customer are discharged to that extent. The suspended account may be revived after payment has been made to the judgement- creditor as per the directions of the Court. The following points are to be noted in this connection:

II. The amount attached by the order. A garnishee order may attach either the amount of the judgement debtor with the banker irrespective of the amount which the judgement- debtor owes to the creditor or a specified amount only which is sufficient to meet the creditor' claim from the judgement-debtor. In the first case, the entire in the account of the customer in the bank is garnished or attached and if banker pays any amount out of the same which is in excess of the amount of the debt of the creditor plus cost of the legal proceedings, he will render himself liable for such payment. For example, the entire to the credit of X, the principal debtor, ' 10,000 is attached by the Court while the debt owed by him to his creditor Y is only ' 6,000. If the banker honours the cheque of the customer X to the extent of' 5,000 and thus reducing the balance to ' 5,000 he will be liable for defying the order of the Court. On the other hand, if he dishonours all cheques, subsequent to the receipt of the Garnishee Order, he will not be liable to the customer for dishonouring his cheques.

It is to be noted that the Garnishee Order does not apply to the amount of the cheque marked by a bank as a good for payment because the banker undertakes upon himself the liability to pay the amount of the cheque. On the other hand, if the judgement debtor gives to the bank a notice to withdraw, it does not amount withdrawal, but merely his intention to withdraw. The Garnishee Order will be applicable to such funds. In the second case, only the amount specified in the order is attached and the amount is excess of that may be paid to the customer by the banker.

For example, X is customer of SBI and his current account shows a credit balance of' 10,000. He is indebted to Y for' 5,000. the latter applies to the Court for the issue of a Garnishee Order specifies the amount (? 5,000) which is being attached, the banker will be justified in making payment after this amount, i.e., the balance in the customer's account should not be reduced below ' 5,000. Usually in such cases, the attached amount is transferred to a suspense account and the account of the customer is permitted to be operated upon with the remaining balance.

III. The order of the Court restrains the banker from paying the debts due or accruing due. The word 'accruing due' mean the debts which are not payable but for the payment of which an obligation exists. If the account is overdrawn, the banker owes no money to the customer and hence the Court Order ceases to be effective. A bank is not a garnishee with respect to the unutilized portion of the overdraft or cash credit facility sanctioned to its customer and such utilized portion of cash credit or overdraft facility cannot be said to be an amount due from the bank of its customer. The above decision was given by the Karnataka High Court in Canara Bank v. Regional Provident Fund Commissioner. In his case the Regional Provident Fund Commissioner wanted to recover the arrears of provident fund contribution from the defaulters' bankers out of the utilized portion of the cash credit facility. Rejecting this claim, the High Court held that the bank cannot be termed as a Garnishee of such unutilized portion of cash credit, as the banker's position is that of creditor. For example, PNB allows it as customer to overdraw to the extent of' 5,000. The customer has actually drawn (? 3,000) cannot be attached by a Garnishee Order as this is not a debt due from the banker. It merely indicates the extent to which the customer may be the debtor of the bank.

The banker, of course, has the right to set off any debt owed by the customer before the amount to which the Garnishee Order applies is determined. But it is essential that debt due from the customer is actual and not merely contingent. For example, if there is an unsecured loan account in the name of the judgement-debtor with a balance of 5,000 at the time of receipt of Garnishee Order, such account can be set off against the credit balance in the other account. But if the debt due from the judgement- debtor is not actual, i.e., has not actually become due, but is merely contingent, such set off is not permissible. For example, if A, the judgement- debtor, has discounted a bill of exchange with the bank, there is contingent liability of A towards the bank, if the acceptor does not honour the bill on the due date. Similarly, if A has guaranteed a loan taken from the bank by B, his liability as surety does not arise until and unless B actually makes default in repaying the amount of the loan.

The banker is also entitled to combine two accounts in the name of the customer in the same right. If one account shows a debit balance and the other a credit one, net balance is arrived at by deducting the former from the latter.

IV. The Garnishee Order attaches the balance standing to the credit of the principal debtor at the time the order is served on the banker. The following points are to be noted in this connection:

(a) The Garnishee Order does not apply to: (1) the amounts of cheques, drafts, bills, etc.., sent for collection by the customer, which remain uncleared at the time of the receipt of the order, (2) the sale proceeds of the customer's securities, e.g., stocks and shares in the process of sale, which have not been received by the banker. In such cases, the banker acts as the agent for the customer for the collection of the cheques or for the sale of the securities and the amounts in respect of the same are not debts due by the banker to the customer, until they are actually received by the banker and credited to the customer's account. But if the amount of such uncleared cheque, etc., is credited to the customer's account, the position of the banker changes and the garnishee order is applicable to the amount of such uncleared cheques. Similarly, if one branch of a bank sends its customer's cheque for realization to its another branch and the latter collects the same from the paying banker before the receipt of the Garnishee Order by the first branch, the amount so realized shall also be subject to Garnishee Order, even though the required advice about realization of cheque is received after the receipt of the Garnishee Order. Giving this judgement in *Gerald C.S. Lobo v. Canara Bank* (1997) 71 Comp. Cases 290, the Karnataka high Court held that the branch which collects money on behalf of another branch is to be treated as agent of the latter and consequently the moment a cheque sent for collection by the other branch has been realized by the former, the realization must be treated as having accrued to the principal branch.

(b) The Garnishee Order cannot attach the amounts deposited into the customer's account after the Garnishee Order has been served on the banker. A Garnishee Order applies to the current balance at the time the order is served, it has no prospective operation. Bankers usually open a new account on the name of customer for such purpose.

(c) The Garnishee Order is not effective in the payments already made by the banker before the order is served upon him. But if a cheque is presented to the banker for payment and its actual payment has not yet been made by the banker and in the meanwhile a Garnishee Order is served upon him, the latter must stop payment of the said cheque, even if it is passed for payment for payment. Similarly, if a customer asks the banker to transfer an amount from his account and the banker has already made necessary entries of such transfer in his books, but before the intimation could be sent to the other account-holder, a Garnishee Order is received by the banker, it shall be applicable to the amount so transferred by mere book entries, because such transfer has no effect without proper communication to the person concerned.

(d) In case of cheques presented to the paying banker through the clearing house, the effectiveness of the Garnishee Order depends upon the fact whether time for returning the dishonoured cheques to the collecting banker has expired or not. Every drawee bank is given specified time within which it has to return the unpaid cheques, if any, to the collecting bank. If such time has not expired and in the meanwhile the bank receives a Garnishee Order, it may return the cheque dishonoured. But if the order is received after such time over, the payment is deemed to have been made by the paying banker and the order shall not be applicable to such amount.

(e) The Garnishee Order is not applicable to:

(i) Money held abroad by the judgement- debtor ; and

(ii) Securities held in the safe custody of the banker,

(f) The Garnishee Order may be served on the Head Office of the bank concerned and it will be treated as sufficient notice to all of its branches. However, the Head Office is given reasonable time to intimate all concerned branches. If the branch office makes payment out of the customer's account before the receipt of such intimation, the banker will not be held responsible for such payment.

Application of the Garnishee Order to Various Types of Account

(a) Joint Accounts:

A joint account is opened in the names of two or more persons. *If only one of them is a judgement -debtor, the joint account cannot be attached.* But, if both or all the joint account- holders are joint judgement-debtors in any legal proceedings, the joint account can be attached. For example, if A owes a debt of' 1,000 to B in his personal capacity, the latter cannot pray for the attachment of a joint account in the names of A and C. But if A and C are jointly responsible for the debt, their joint account may be attached. But the reverse is possible, i.e., in the case of a debt jointly taken by two or more joint judgement-holders, their individuals accounts with the banks may be attached because each one of them is jointly and severally liable for the loans jointly taken by them.

(b) Partnership Account:

In case of debt taken by a partnership firm, the personal accounts of the partners can also be attached in addition to the account in the name of the firm because the liability of partners is both joint and several. But the reverse is not possible. If a partner is a judgement-debtor, only his individual account may be attached and not that of the firm or those of other partners.

(c) Trust Accounts:

A trustee hold the funds or property of some else for the benefit of the beneficiary. An account opened in the personal name of the Trustee, in his capacity as such, cannot be utilized for paying his personal liabilities. The banker should, therefore, inform the court that the account is a Trust account and in the meanwhile stop payments from the account and instruct the Trustee.

Rights of the Attaching Creditor

When the garnishee deposits the attached amount in the Court, the attaching creditor (or judgement-creditor) becomes a secured creditor. In *Rikhabchand Mohanlal Surana v. The Sholapur Spinning and Weaving Co. Ltd.* (76 Bombay Law Reporter 748) the High Court held that -

"While the attachment is only by a prohibitory order then the attaching creditor has no rights in the property attached, but once the property or moneys come into the possession of the Court for the attaching creditor. The Court does not hold the money for the debtor more so when the garnishee obtains complete discharge by making payment in Court."

Attachment Order Issued by Income- Tax Authorities

The credit balance in the account of a customer of a banker may be attached by the Income-Tax authorities, if the former defaults in making payment of the tax due from him. Section 226 (3) of the Indian Income-Tax Act, 1961, authorizes the Income- Tax Act, 1961, authorities the Income Tax Officer "to require by notice in writing any person from whom money is due or may become due the assessee or any person who holds or may subsequently hold money for a or account of the assessee, to pay to the Income-Tax Officer an amount equal to or less than the amount of such arrears." Thus, the order of the Income-Tax Officer may attach (i) any debts due and payable, (ii) debts due but not payable on the date of the receipt of the notice, and (iii) any amount received subsequently. Balances lying in a joint account may also be attached even though the notice is issued on a single account. The share of the joint holders in such account shall be presumed, until contrary in proved, to be equal. Thus the amount to the credit of a joint account may be attached pro rata irrespective of the fact that the joint account is payable to 'either or survivor' or otherwise.

This section makes it obligatory for every person to whom such notice is issued to comply with such notice. In case of a banking company, it shall not be necessary for any pass book or deposit receipt or any other document to be produced for the purpose of any entry, endorsement, etc., before payment is made. After making payment as required under this section, the banker shall be fully discharged from his liability to the assessee to the extent of the discharged from his liability to the assessee to the extent of the amount so paid. But if he fails to make payment, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realization of such amount. The banker should, therefore, comply with such order. His obligation towards his customer is reduced to that extent.

UNIT - III

LAWS RELATING TO LOANS, ADVANCES AND INVESTMENTS BY BANKS

CONTENTS

I. Safe deposit Lockers

II. Banker's Role and obligations regarding locker facility

III. RBI guidelines on locker facility

IV. Vicarious Liability of Bank as Trustee

V. Embezzlement committed by bank employee

Safe deposit lockers facility

Release of contents of safety lockers.(s. 45-ZE)

(1) Where an individual is the sole hirer of a locker from a Banking Company, whether such locker is located in the safe deposit vault of such Banking Company or elsewhere, such individual may nominate one person to whom, in the event of the death of such individual, the Banking Company may give access to the locker and liberty to remove the contents of the locker.

(2) Where any such locker is hired from a Banking Company by two or more individuals jointly, and, under the contract of hire, the locker is to be operated under the joint signatures of two or more of such hirers, such hirers may nominate one or more persons to whom, in the event of the death of such joint hirer or hirers, the Banking Company may give, jointly with the surviving joint hirer or joint hirers, as the case may be, access to the locker and liberty to remove the contents of such locker.

(3) Every nomination under sub-section (1) or sub-section (2) shall be made in the prescribed manner.

(4) The Banking Company shall, before permitting the removal of the contents of any locker by any nominee or jointly by any nominee and survivors as aforesaid, prepare, in such manner as may be directed by the Reserve Bank from time to time, an inventory of the contents of the locker which shall be signed by such nominee or jointly by such nominee and survivors and shall deliver a copy of the inventory so prepared to such nominee or nominee and survivors.

(5) On the removal of the contents of any locker by any nominee or jointly by any nominee and survivors as aforesaid, the liability of the Banking Company in relation to the contents of the locker shall stand discharged.

(6) No suit, prosecution or other legal proceeding shall lie against a Banking Company for any damage caused or likely to be caused, for allowing access to any locker, and liberty to remove the contents of the locker, in pursuance of the provisions of sub-section (1) or sub-section (2), as the case may be.

Section 45-ZE, of Banking Regulation Act, 1949, does not confer on a nominee any title in the locker or in its contents. Section 45-ZE provides that access may be given to the nominee to the locker alongwith liberty to remove the contents to enable the nominee to deliver vacant possession of the locker and the relevant law cannot be expected to vesting or transmission of interest in such contents in the nominee. Where the petitioner has the duly constituted nominee in respect of safety locker in bank, which was hired by her husband and the bank had not disputed the validity of nomination, the bank could not deny her access to the locker unless she produced as succession certificate in support of her right.

45-ZF. Notice of claims of other persons regarding safety lockers not receivable.--No notice of the claim of any person, other than hirer or hirers of a locker, shall be receivable by a Banking Company nor shall the Banking Company be bound by any such notice even though expressly given to it:

Provided that where any decree, order, certificate or other authority from a court of competent jurisdiction relating to the locker or its contents is produced before the Banking Company, the Banking Company shall take due note of such decree, order, certificate or other authority.

STATUTORY PROVISIN REGARDING SAFETY LOCK:

SUGGESTED BY BANKING COMMISSION

(i) to empower the Central Government to frame rules specifying the periods of preservation of records and instruments by a Banking Company (Section 45-Y).

(ii) to enable a Banking Company to return at the request of a customer (including Government Departments and statutory corporations) a paid instrument, before the prescribed preservation period, only after making and keeping in its possession a true copy thereof made by mechanical process (Section 45-Z).

(iii) to empower a Banking Company to make payment to the nominee of a depositor or the person appointed under sub-section (3) of the new Section 45-ZA of the amount to his credit, in the event of the death of the depositor (Section 45-ZA).

(iv) to protect a Banking Company against any claim of the third party to the deposit (Section 45-ZB).

(v) to enable a Banking Company to return the articles kept by a person in its safe custody to thenominee or the person appointed under sub-section (2) of new Section 45-ZC in the event ofthe death of the person leaving the articles in safe custody, after making inventory of the articles in the manner directed by the Reserve Bank, the inventory being signed by the person receiving the articles (Section 45-ZC).

(vi) to protect a Banking Company against any claim, to any articles, made by any person otherthan the person who placed the article in safe custody with the Banking Company (Section 45-ZD).

(vii) to enable a Banking Company to release the contents of a safety locker to the nominee orsurvivor of the hirer of such locker in the event of the death of the hirer, by making an inventory of the contents of a safety locker in the manner directed by the Reserve Bank, the inventory being signed by the nominee or the survivor as also to protect the Banking Company against any liability for so releasing,the contents of the locker (Section 45-ZE).

(viii) to protect a Banking Company against any claim to the contents of a safety locker, made byany person other than the hirer of such locker who placed the articles in the safe custody with the company (Section 45-ZF).

Procedure for Locker facility:

Banks offer customers the facility of Safe Deposit Lockers. These lockers are generally installed in the strong room of the bank and therefore, they offer complete security against burglary and theft and the prospect of being relatively safe in conditions of civil commotion and unrest. Each locker is rented to the customer and has a separate number and is fitted with a double key lock which cannot be opened except with the two keys, one of which is kept by the customer and the other by the bank.

Access shall be had to the locker by the renter and in case of joint renters by all of them together or by such one or more of them as they may indicate by special instructions to be given in writing by all of them from time to time, and which instructions anyone of them may cancel, in which case access will only be allowed to all of them together. Access may also be allowed to a duly appointed agent of a renter or of joint renters together, provided that the authority in favour of such agent is duly recorded in the books of the bank and in the case of joint renters such authority may be revoked by anyone of them at any time.

In the case of the death of one or more of the joint renters, the survivors or the survivor of them according to instructions given to the bank by all the renters-including the deceased and recorded by the bank in the life time of the deceased shall be entitled, after proving such death to the satisfaction of the bank to have access to the locker. The heirs or representatives of the deceased joint renter shall have no power to cancel or vary such instructions and shall not be recognised by the bank except under the order of a court of competent jurisdiction. In the absence of such instructions the consent or authority of an executor or administrator of the deceased shall be required before access may be had to the locker by the survivors of such renters.

In the case of the death of a sole renter or of the last survivor of the joint renters the bank may at its option (and on production of such evidence which it may call for) permit any person or persons claiming to be the legal representatives of the deceased to inspect the contents of the locker and on the registration of the succession certificate, or other proof of title, probate or letters of administration the successors, heirs, trustees, executors, or administrators named therein shall have power to deal with the contents of the locker and be deemed to be renters of such locker in place of such deceased renter. The bank may, in appropriate cases and on such conditions as it may think fit dispense with such succession certificate, Probate or Letters of Administration. The bank has to keep proper records including specimen signatures of the persons entitled to open the lockers and information about the dates and time when the lockers have been operated. Contents of the locker not in joint possession [Ss. 148-49, Contract Act, 1872].

Exclusive possession has to be given to the bailee and only then a bailment is constituted. The hirer of a locker cannot open it by himself. The bank's master key is necessary for operation. But this does not amount to joint possession. The bank was held not liable for locker robbery. The fact of robbery was not in itself a presumption that the locker was not manufactured and built in accordance with prescribed specifications. Even if bailment were established there would have been no liability on the part of the bank because there was no negligence or lack of care on its part.

Service Charges

Every account holder is not supposed to visit the bank each and every day to read the general notice in the premises of the bank. Whenever there is change in rule, particularly increase in minimum balance subjecting to service charges, information is to be sent by the bank to every consumer personally. Impugned order for directions to credit the amount of service charges debited in the account upheld.

a. *Cheque—Service charges for not maintaining minimum* balance.—Complainant had credit balance of Rs. 2 on 30-3-2002 and Rs. 4,916 was deposited by him on 2-5-2002. After debiting Rs. 10 for not maintaining minimum balance, remaining balance of Rs. 4,908 was insufficient to pay cheque amount of Rs. 4,916 cheque rightly dishonoured.

b. *Transfer of loan—prepayment charges.—Complainant* was sanctioned housing loans of Rs. 2,50,000 from the appellant corporation. The moot point to be determined was whether the amount of Rs. 34,849 levied as pre-payment charges was in accordance with the terms and conditions of the agreement. It was the admitted case of both the parties that 2 per cent pre-payment charges were levied by other home loan financing institutions. Respondent was liable to pay 2 per cent pre-payment charges on outstanding amount of Rs. 2,54,597. District Forum relying in letter of another bank with regard to charging of 2 per cent on outstanding loan for pre-payment directed opposite party to refund Rs. 29,757 out of penalty of Rs. 34,849.[53]

c. *Permission to operate locker.—The* locker holder died intestate. Her sister sought permission for operation of the locker. She was granted a succession certificate by a civil court in respect of other securities of the deceased. She was allowed to operate the locker subject to the directions which were necessary for protecting bank's interest.

Banker obligation regarding locker

The bank is not bound or concerned to know the contents of a locker, unless required by special circumstances stated in (2) below.The bank is concerned with the contents of a locker in the following cases:

(a) When a renter having a locker in his single name dies and a personrequests the bank to allow him to take an inventory of its contents to enable him to apply for legal representation;

(b) When the bank has to break open a locker because of the non-payment of the rent by the renter;

(c) When a Police Officer or any other officer or person duly authorised by any law to carry out search and seizure, requires the bank to open or break open a locker.

1. In case of 2(a) above, the person making the request should be properly indentified as one entitled to apply for a grant of legal representation; such identification by a lawyer acting for the person should normally be sufficient. The inventory should be allowed to be taken in the presence of the lawyer or other credible-preferably independent-witness, and should be signed by all present. The contents can be delivered only on the production of a proper grant of legal representation.

2. In case of 2(b) above, it would be advisable to have inventory in the presence of two independent witnesses, in addition to the bank employees.

3. In case of 2(c), normally, the officer of the law enforcing search or seizure himself brings independent witnesses. However, the bank officer should also remain present and sign the inventory of the goods seen or seized.

4. Normally, the banks allow the operation by a person having a simple mandate from the renter. Such mandate however comes to an end on the renter's death.

5. A locker may be rented to joint renters and operation thereon can be allowed by "either or survivor" or "former or survivor"; but both the renters should sign the agreement for hire.

6. The relation between the bank and the renter is in the nature of a bailor and bailee, although the bank has no knowledge of the contents of the locker, and the definition of "bailment" in Section 148 of the Contract Act does not strictly apply. The bank should exercise ordinary care and take reasonable precaution for the protection of the vault and the lockers.

Bankers role in provision of locker facility

Bankers as gratuitous bailee

In accepting articles for safe custody the banker's position is that of a bailee, *i.e.,* a person to whom goods are delivered in trust under a contract, and who is responsible for the custody and safe return of the articles deposited, according to the terms of the bailment. The modem English law on the subject of the liability of a gratuitous bailee in respect of the goods bailed to him, is thus enunciated in the under mentioned case: "That he is bound, to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description".[55] It has been further held that a gratuitous bailee is bound in respect of the goods bailed to use such skill as he really possesses *Wilson v. Brett*. It must, however, be submitted that the case quoted in support of the position of a "gratuitous bailee" are very old ones and a recent ruling based on existing practices might well be different.

Banker as bailee for reward.—The standard of care required of a bailee for reward does not appear to be any higher except in respect of common carriers and inn-keepers *Dearle v. Lakebick*. The law in India expressly does away with the distinction between the liability of a gratuitous bailee and that of a bailee for reward. Section 151 of the Indian Contract Act, 1872 demands a uniform standard of care, namely, "as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed" in all cases of bailment. Section 152 of the same Act exempts a bailee from liability in respect of loss, destruction, or deterioration of the goods bailed, when he has taken the amount of care prescribed by Section 151, and when no special contract exists between him and the bailor to make his liability absolute, that is, unaffected by any amount of care. Though the liability of a bailee can thus be enhanced by a special contract, there is difference of judicial opinion on the question whether it can either be reduced below the standard laid down by Section 151, or be completely negatived by a special contract. While, according to Sankaran Nair, J., in *Sheikh Mohamed case.*

The British India Steam Navigation Co. Ltd., a bailee may by special contract undertake a greater liability, he cannot by such means reduce the liability imposed by this section. It was held in a Calcutta case *Jellicoe v. British India Steam Co.*, that it is open to the parties, by express contact, to restrict this liability even to the extent of wholly relieving the bailee from it. According to the English law a bailee for reward must show that degree of care which would ordinarily be expected of a person in that particular line of business or profession. The care which is ordinarily expected of a banker is certainly a high one, *e.g.,* the provision of an adequate strong room, taking of precautions to prevent thefts and frauds and care in the engagement of staff so as to ensure as far as possible that the bank employees are honest. The distinction between a bailee for reward and a gratuitous bailee loses its importance if it can be proved, as no doubt it can be done, that a banker impliedly undertakes this service and is therefore a bailee for reward. It has already been discussed in the Chapter relating to pledge of goods that the bailee can contract out of the liability imposed by Section 151.

Banker's liability for negligence

Negligence, as we have already seen in an earlier part of this work, is an omission to do something which a reasonable man, guided by the ordinary considerations which regulate the conduct of human affairs, would do, or is the doing of something which a reasonable person, similarly circumstanced, would not do. It may arise in many forms. Just as a doctor professing himself to be specially qualified in the art of healing others, can be held liable for negligence if he fails to show adequate skill or knowledge when attending a patient, similarly, a banker who is a professional caretaker of his customer's valuables will be liable to him for any loss resulting from his negligence in safeguarding the articles.

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A banker will render himself liable if the safe deposit vault is not strong enough and loss occurs from burglary, larceny or theft. Similarly, for loss arising from some mistake on his part, as for instance, when the entrance to the vault is left unlocked, or the arrangement for the guarding of it is unsatisfactory, or access to the vault is allowed to all and sundry. If the situation of the vault is unsafe or is exposed to danger from fire from a neighboring chemical laboratory, workshop or a store of explosives or ammunitions, the banker will become liable for failure to take due precautions against such accidents. It may be mentioned, also, that when a banker holds for safe custody, such bonds as are periodically drawn for payment and which he has undertaken to collect, he will be answerable for any loss arising, should he fail to present them for collection at the right time. He will incur no liability if they have been placed in a sealed envelope or in a safe deposit locker, the key of which is with the depositor and in respect of which the banker gave no undertaking to collect.

In any case, the banker will be liable only when loss results from negligence on his part. He cannot, ordinarily, be held responsible for any loss or damage occurring to goods left with him for safe custody on account of their deterioration due to long storage. When a bank employee who has access to valuable documents deposited for safe custody steals them, the bank will be held liable for the loss. Where an agent or representative of the customer is asked to be allowed access to the vault occasionally to examine or take out some of the valuables, the banker should accompany him to see that he does not act beyond the customer's authority.

Liability for conversion.—Conversion is an unauthorised act of dealing with goods and chattels which are the property of another person. In other words, it is the performance of an unauthorised act which deprives another of his property whether temporarily or permanently. A banker who, without authority, delivers to some third person, goods placed with him for safe custody can be sued for conversion unless he can successfully plead an estoppel against the customer. Consequently, before handing over valuables to a third party, the banker should satisfy himself that the person is duly authorised by the customer to receive them. He can verify the genuineness of the customer's signature by comparing it with his specimen signature on the counterfoil of the receipt, issued to him at the time of the deposit. When he has some ground for suspecting the genuineness of the order demanding delivery of the articles, he should withhold their delivery for a reasonable period, in order to make the necessary enquiries. The danger of a wrong delivery can, however, be obviated, if the banker insists upon sending the articles through a member of the bank staff, to the customer's own residence or place of business. In case the property deposited turns out to be stolen the banker may safely deliver it to the true owner, even without the customer's authority, after, of course, fully satisfying himself as to the third party's title thereto. Difficulties may arise on the death, lunacy or bankruptcy of the depositor and more so when the customer was one of the joint depositors.

General Precautions.—The banker must conduct and operate his safe deposits business in such a manner as will preclude his depositors from attributing to him the responsibility for any loss or damage to their deposits. Care must be taken to avoid negligence or absentmindedness on his own part as well as on the part of his agents or deputies. He should consequently take all such precautions as are necessary to protect the deposits against destruction, deterioration or unauthorised interference by outside persons. Such measures are calculated to help the banker to avoid liability for damages, which he may otherwise be required to pay. The following are some of the general precautions which a banker may do well to adopt in his safe custody business.

To ask for declaration of contents

The first important precaution a banker should take when he receives articles for safe custody is to ask the customer to declare the contents of the box or envelope together with their approximate value. Such an inventory acts as a check upon a customer against his alleging any loss of articles not shown in the inventory.

This will prevent him from exaggerating, in case of loss, the value of the articles lost. Ordinarily, any loss in the contents of a box or parcel deposited with a banker may be attributed to the persons who handled them or who were given access to the deposit vault of the bank. If it can be proved, however, that in the discharge of certain services the bank employee had access to the articles in safe custody, or could handle them in any manner, at any time, during the period of their deposit, the loss may then plausibly be attribute` to the bank.

In this case, if the bank remained uninformed of the description, quantity and value of the things originally deposited, it will find it difficult to disprove the error or the falsity of the claim. The bank may and presumably will claim that under its careful watch and arrangement for preventing access to its vaults and under its rigid rules and system of management, none of its employees had ever had any access to, or were ever associated in the handling of safe custody articles: all the same, the bank will find it hard to repel any false claim, if preferred regarding the contents and value of its safe custody deposits and, therefore, it is necessary to obtain the information referred to above. If, on the other hand, the bank is possessed of such knowledge by means of an inventory regularly kept in the course of the business, it would become easy for it to refute all false claims.

To have exclusive possessionpreferably the banker should try to have the exclusive possession and custody of the property left with him for safe custody, and also the sole right of access to it during the period of its deposit with him, like an ordinary custodian, warehouseman or a bailee. If the depositor is vested with the right of access to the custody, possession and control of valuables left in the bankers' vault, the banker should avoid rendering those services which involve his handling them; but should he agree to do so, it is absolutely essential that he should take scrupulous care in safeguarding the valuables. Especially, when the customer deputes an agent for the purpose of removing specific articles from the box, the banker should see that the agent does not take away things other than those particularly authorised by the customer.

To ask for complete instructions for dispatch of safe custody articlesWhen a banker decides to accede to the request of a customer who changes his residence from the city where he has rented a safe deposit locker in which he has placed valuables or deposited his box for safe custody and who without attending the bank in person, asks the bankers to send the contents of his locker or the box to his new residence, the banker should insist on the customer giving in writing a detailed list and value of the contents of the box if the customer has not already done so together with complete instructions as to the manner in which they are to be sent and the amount for which they are to be insured during transit.

On receipt of the customer's necessary declaration and information, the banker may open the box, make an inventory of the contents, pack them carefully, all in the presence of a witness if possible, and send the package in accordance with the customer's instructions. A mere verbal message or communication on the telephone from the customer will not suffice and in no case should a banker offer to handle and assume even temporary custody of valuables, the amount and description of which he has no knowledge. In addition to the general precautions stated above, a banker has to take certain other measures to avoid any risks that may arise when he is dealing with certain special types of customers.

Care in case of joint deposits.—When the articles are deposited by two or more persons jointly, the banker should get the specimen signatures of each of them on the counterfoil of the safe deposit receipt. Some bankers have a special form for the purpose, requiring the persons, to whom access is authorised, to append specimens of their signature; these persons may be the representatives of those whose rights of access may, either jointly or severally be dependent on the joint rental contract which the bank is obliged, at its peril, to carry out explicitly. Upon proper proof of the death of one or more of the joint renters, the bank will incur no liability in delivering the valuables to the survivors or survivor, if it has no notice that the parties held them as trustees.

Articles held on behalf of joint trustees.—If the articles deposited by trustees are under their joint control, the banker will act upon instructions signed by all the trustees. In *Mendes v. Guedalla,* (1862) 2 J&H 259 where one of the three trustees having the key of the box, containing bearer securities lodged with the bank for safe custody in the name of all the three trustees, had been authorised by his co-trustees to cut off the coupons half-yearly in order to present them for payment, removed certain other articles from the box, it was held that, as the box was kept with the banker in trust of all the three trustees, "they ought not to have parted with it, or allowed more than the coupons to be taken out, without the authority of all the three trustees". The banker should take particular care to obtain the authority of all the trustees before he parts with, or disposes of in any way the property deposited with him.

Delivery on death of depositor.—In case of the death of the party depositing the valuables the banker may deliver them to the personal representatives of the deceased on their producing probate or letters of administration and obtain receipt from them. But when the Will along with other valuables or documents, happens to be in the box lodged for safe custody, the banker may open it in the presence of a near relative of the deceased and hand over the Will only to the executors, against their receipt. The remaining contents of the box should not be delivered to them, pending production of the probate or the letters of administration.

Now the person leaving articles in the safe custody or the hirer of a safety locker may nominate one person to whom in the event of the death of the person the articles may be returned or the contents of the locker may be released [Sections 45-ZC and 45-ZE of the Banking Regulation Act, 1949, as inserted by the Banking Laws (Amendment) Act, 1983 (1 of 1984), w.e.f. 29.3.1985.

The other service offered by the banker is to provide a locker facility to the Customers and others who require it, the Reserve Bank of India. The locker arrangements are covered by the guidelines suggested by the Committee on Procedures and Performance Audit of Public Services (CPPAPS) RBI/2006-2007/325 DBOD.No.Leg.BC.78 /09.07.005/2006-07.

Allotment of Lockers

Linking of Allotment of Lockers to placement of Fixed Deposits

The Committee on Procedures and Performance Audit of Public Services (CPPAPS) observed that linking the lockers facility with placement of fixed or any other deposit beyond what is specifically permitted is a restrictive practice and should be prohibited forthwith. We concur with the Committee's observations and advise banks to refrain from such restrictive practices.

Fixed Deposit as Security for Lockers

Banks may face situations where the locker-hirer neither operates the locker nor pays rent. To ensure prompt payment of locker rent, banks may at the time of allotment, obtain a Fixed Deposit which would cover 3 years rent and the charges for breaking open the locker in case of an eventuality. However, banks should not insist on such Fixed Deposit from the existing locker-hirers.

Wait List of Lockers

Branches should maintain a wait list for the purpose of allotment of lockers and ensure transparency in allotment of lockers. All applications received for allotment of locker should be acknowledged and given a wait list number.Banks are also advised to give a copy of the agreement regarding operation of the locker to the locker-hirer at the time of allotment of the locker.Security aspects relating to Safe Deposit LockersOperations of Safe Deposit Vaults/Lockers

Banks should exercise due care and necessary precaution for the protection of the lockers provided to the customer. Banks should review the systems in force for operation of safe deposit vaults / locker at their branches on an on-going basis and take necessary steps. The security procedures should be well-documented and the concerned staff should be properly trained in the procedure. The internal auditors should ensure that the procedures are strictly adhered to.

Customer due diligence for allotment of lockers / Measures relating to lockers which have remained unoperatedIn a recent incident, explosives and weapons were found in a locker in a bank branch. This emphasises that banks should be aware of the risks involved in renting safe deposit lockers. In this connection, banks should take following measures:

(i) Banks should carry out customer due diligence for both new and existing customers at least to the levels prescribed for customers classified as medium risk. If the customer is classified in a higher risk category, customer due diligence as per KYC norms applicable to such higher risk category should be carried out.

(ii) Where the lockers have remained un operated for more than three years for medium risk category or one year for a higher risk category, banks should immediately contact the locker-hirer and advise him to either operate the locker or surrender it. This exercise should be carried out even if the locker hirer is paying the rent regularly. Further, banks should ask the locker hirer to give in writing, the reasons why he / she did not operate the locker. In case the locker-hirer has some genuine reasons as in the case of NRIs or persons who are out of town due to a transferable job etc., banks may allow the locker hirer to continue with the locker. In case the locker-hirer does not respond nor operate the locker, banks should consider opening the lockers after giving due notice to him. In this context, banks should incorporate a clause in the locker agreement that in case the locker remains un operated for more than one year, the bank would have the right to cancel the allotment of the locker and open the locker, even if the rent is paid regularly.

(iii) Banks should have clear procedure drawn up in consultation with their legal advisers for breaking open the lockers and taking stock of inventory.

Access to the safe deposit lockers / return of safe custody articles to Survivor(s) / Nominee(s) / Legal heir(s)

We invite a reference to our Circular DBOD.No.Leg. BC.95/2004-05 dated June 9, 2005 wherein we had advised banks to deal with the issue of handing over the proceeds of deposit accounts. A similar procedure should be adopted for return of contents of lockers / safe custody articles to Survivor / Nominee / Legal Heirs.Access to the safe deposit lockers / return of safe custody articles (with survivor/nominee clause)

If the sole locker hirer nominates a person banks should give to such nominee access of the locker and liberty to remove the contents of the locker in the event of the death of the sole locker hirer. In case the locker was hired jointly with the instructions to operate it under joint signatures, and the locker hirer(s) nominates person(s), in the event of death of any of the locker hirers, the bank should give access of the locker and the liberty to remove the contents jointly to the survivor(s) and the nominee(s). In case the locker was hired jointly with survivorship clause and the hirers instructed that the access of the locker should be given over to 'either or survivor', 'anyone or survivor' or 'former or survivor' or according to any other survivorship clause, banks should follow the mandate in the event of the death of one or more of the locker-hirers. However, banks should take the following precautions before handing over the contents:

(a) Bank should exercise due care and caution in establishing the identity of the survivor(s) / nominee(s) and the fact of death of the locker hirer by obtaining appropriate documentary evidence;

(b) Banks should make diligent effort to find out if there is any order from a competent court restraining the bank from giving access to the locker of the deceased; and

(c) Banks should make it clear to the survivor(s) / nominee(s) that access to locker / safe custody articles is given to them only as a trustee of the legal heirs of the deceased locker hirer i.e., such access given to him shall not affect the right or claim which any person may have against the survivor(s) / nominee(s) to whom the access is given.

Similar procedure should be followed for return of articles placed in the safe custody of the bank. Banks should note that the facility of nomination is not available in case of deposit of safe custody articles by more than one person.Banks should note that since the access given to the survivor(s) / nominee(s), subject to the foregoing conditions, would constitute a full discharge of the bank's liability, insistence on production of legal representation is superfluous and unwarranted and only serves to cause entirely avoidable inconvenience to the survivor(s) / nominee(s) and would, therefore, invite serious supervisory disapproval. In such case, therefore, while giving access to the survivor(s) / nominee(s) of the deceased locker hirer / depositor of the safe custody articles, the banks should desist from insisting on production of succession certificate, letter of administration or probate, etc., or obtain any bond of indemnity or surety from the survivor(s)/nominee(s).Access to the safe deposit lockers / return of safe custody articles (without survivor/nominee clause)

There is an imperative need to avoid inconvenience and undue hardship to legal heir(s) of the locker hirer(s). In case where the deceased locker hirer had not made any nomination or where the joint hirers had not given any mandate that the access may be given to one or more of the survivors by a clear survivorship clause, banks are advised to adopt a customer-friendly procedure drawn up in consultation with their legal advisers for giving access to legal heir(s) / legal representative of the deceased locker hirer. Similar procedure should be followed for the articles under safe custody of the bank.

Banks are advised to be guided also by the provisions of Sections 45 ZC to 45 ZF of the Banking Regulation Act, 1949 and the Banking Companies (Nomination) Rules, 1985 and the relevant provisions of Indian Contract Act and Indian Succession Act.

Banks should prepare an inventory before returning articles left in safe custody / before permitting removal of the contents of a safe deposit locker as advised in terms of Notification DBOD.NO.Leg.BC.38/ C.233A-85 dated March 29, 1985. The inventory shall be in the appropriate Forms set out as enclosed to the above Notification or as near thereto as circumstances require. A copy of the above Notification is shown as Annex I of this circular.

3.7 Further, in case the nominee(s) / survivor(s) / legal heir(s) wishes to continue with the locker, banks may enter into a fresh contract with nominee(s) / survivor(s) / legal heir(s) and also adhere to KYC norms in respect of the nominee(s) / legal heir(s). Banks are not required to open sealed/closed packets left with them for safe custody or found in locker while releasing them to the nominee(s) and surviving locker hirers / depositor of safe custody article.

Simplified operational systems / procedures

The Indian Banks' Association (IBA) has already formulated a Model Operational Procedure (MOP) for settlement of claims of the deceased depositors, under various circumstances. We have advised IBA to formulate a similar Model Operational Procedure for giving access to lockers / return of safe custody articles under various circumstances. We also advise banks to undertake a comprehensive review of their extant systems and procedures relating to settlement of claims of their deceased constituents (locker-hirers / depositors of safe-custody articles) with a view to evolving a simplified policy / procedures for the purpose. The review should be made with the approval of their Board and take into account the applicable statutory provisions, foregoing instructions as also the MOP to be formulated by the IBA.

Banks should give wide publicity and provide guidance to locker-hirers / depositors of safe custody articles on the benefits of the nomination facility and the survivorship clause. Illustratively, it should be highlighted in the publicity material that in the event of the death of one of the joint locker-hirer / depositor of safe custody articles, the right to the contents of the locker or the articles under safe custody does not automatically devolve on the surviving joint locker-hirer / depositor of safe custody articles, unless there is a survivorship clause.

Banks should place on their websites the instructions along with the policies / procedures put in place for giving access of the locker / safe custody articles to the nominee(s) / survivor(s) / Legal Heir(s) of the deceased locker hirer / depositor of the safe custody articles. Further, a printed copy of the same should also be given to the nominee(s) / survivor(s) / Legal Heir(s) whenever a claim is received from them. We also advise the banks to ensure that identification Code of the bank / branch is embossed on all the locker keys with a view to facilitate Authorities in identifying the ownership of the locker keys.

Vicarious Liability of Bank as Trustee

The first of the principles governing vicarious liability of an employer is that the employer is not liable for the act of the servant, if the cause of the loss or damages arose without such employer's actual fault or privity, and without the fault or neglect of his agents or servants in the course of their employment.

This principle has been illustrated by the decision of the House of Lords in *Leesh River Tea Co. Ltd. v. British India Steam Navigation Co. Ltd.* The facts of that case were that during her voyage a ship called at an intermediate port to discharge part of her original cargo and load some fresh cargo. The ship-owners engaged a stevedore company to discharge and load. A servant of the stevedore company stole a brass plate, which was a cover that could be removed to give access to a storm valve. Its removal rendered the ship non-seaworthy as seawater could enter when the ship rolled. The resulting hole in the ship was concealed by part of the fresh cargo loaded. On her voyage after leaving the port the ship encountered heavy weather. Water entered through the hole and damaged part of the original cargo. In an action for damages by the owners of the damaged cargo, the ship-owners contended that they were exempted from liability by *Art. IV Rule 2(q)* of The *Hague Rules,* because the cause of the damage arose without their actual fault or privity and "without the fault or neglect of the agents or servants" of the ship-owners.

Dealing with this argument, Danckwerts, LJ.observed: "It seems to me that the vital point in the case is whether the theft of the brass plate was made by the stevedore, at Port Sudan, in the course of his employment by the ship-owners. He was to be regarded as the agent of the ship-owners for the purpose of unloading and loading cargo. There is no doubt that this gave him the opportunity to effect the theft of the plate, but the stevedore was concerned with cargo and not with the ship or parts of the ship. When he deliberately stole the plate he was acting in a way, which was completely outside the scope of his employment on behalf of the ship-owners. The theft could not have been prevented by any reasonable diligence of the ship-owners through the officers and crew of the ship."

Salmon L.J., speaking in a similar strain, emphasised that the fact that the thief's employment on board presented him with the opportunity to steal does not suffice to make the ship-owners liable. The conclusion drawn was: For an employer to be liable, however, it is not enough that employment merely afforded the servant or agent an opportunity of committing the crime. It must be shown that the damage complained of was caused by any wrongful act of his servant or agent done within the scope or course of the servant's or agent's employment, even if the wrongful act amounted to a crime. For this proposition, Salmon, L.J. referred to *Lloyd v. Grace, Smith & Co.*[64]

In *United Africa Company Ltd. v. Saka Owoade,* the Privy Council laid down that a master is liable for his servant's fraud perpetrated in the course of master's business, whether the fraud was for the master's benefit

or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment.

In that case, the appellant-company, general merchants, had expressly committed to the servants of the respondent, a transport contractor, at his request, goods for carriage by road. The servants stole the goods, and the evidence established that conversion took place in the course of their employment. The respondent was held liable to the appellants for the value of the goods. The rule in *Lloyd v. Grace Smith & Co., ibid,* was applied.

In *Officer Commanding v. State Bank of India,* AIR 2004 NOC 165 : (2003) 3 Cur CC 12 (J&K).Plaintiff bank agreed to give cash credit facilities to defendant against cloth bales upon certain terms. Defendant needed an amount for purchasing cloth allotted to it. The bank agreed to advance the amount on condition that it would not be paid to the defendant but would be paid to the wholesaler directly by the bank and the cloth bales would be retained as further security. Defendant drew a cheque which was encashed but the money was entrusted by the bank to its servant who accompanied the defendant to the place where the money was to be paid. The servant, however, absconded with the amount with the result that the money was not paid to the wholesaler. The bank sued the defendant for recovery of money paid on the cheque relying on Ss. 85 and 118 of the Negotiable Instruments Act.

The defendant denied the liability contending that the money was never paid to it, having remained throughout with the bank's servant. It was stated by the bank that even assuming that its servant misappropriated the money, it was not responsible for the loss as the servant's act was criminal, and was entitled to recover the money from the defendant.

It was, *held:* (*i*) that the money not having passed into actual custody of the defendant or that of the custody of a person who was its servant or agent, the defendant could not be held liable for it. S. 85 of the Negotiable Instruments Act did not apply as before the provisions could assist the bank, it had to be established that payment had in fact been made to the defendant or to a person on behalf of it. Payment to a person who had nothing to do with the defendant or a payment to an agent of the bank would not be a payment to the defendant. S. 118 also did not apply. AIR 1926 Bom 262, Disting; (*ii*)The principle of vicarious liability was not attracted. Vicarious liability could in appropriate cases, rest on the master with respect to his servant's act but it could not rest on a stranger with respect to the criminal acts of a servant of another. That principle could have no application for founding a liability against a stranger from whom the servant could in no sense be regarded as deriving any authority : (1964) 1 SCR 842 : AIR 1964 SC 377.

Embezzlement committed by Bank employee

In *State Bank of India v. Shyama Devi,* the Supreme Court held that the principle governing vicarious liability of an employer for the loss caused to a customer through the wrongful act of an employee or agent is that the employer is liable for fraud perpetrated in the course of employer's business whether the same is done for the benefit of employer or not.

In this case respondent's husband issued a crossed cheque for Rs. 4,000 and made payable to "self" and that cheque was deposited by the respondent for being credited to her account. No receipt for the deposit of this cheque was obtained. Another cheque issued by her husband for Rs. 7,000 for transferring the sum to her account was also deposited by her. No receipt or voucher was taken from the bank. The employee was at the relevant time in charge of the savings bank counter. The employee made false entries in the pass-book in his handwriting, but embezzled the amounts. Held that the bank was not liable as the employee had not acted within the scope of his employment with the bank and the respondent had not discharged the onus on

her to show that she paid the amount to an employee of the bank and that the amount was received by that employee in the course of his employment. The false entry about the deposit of the amount in the pass-book could not shift the onus on to the bank to prove to the contrary.

In *Bank of Bihar v. Mahabir Lal*, a cheque for Rs. 35,000 endorsed to "self" was drawn by a firm and in accordance with an arrangement arrived at between the firm and the manager of the bank, the manager passed the cheque to an employee of the bank who might pay the money to the supplier directly and take delivery of the goods and bring them to the premises of the bank. The employee disappeared with the money. The Supreme Court held that the manager intended to constitute the employee the bank's agent. Therefore, the bank as a master was liable.

In *United Bank of India Ltd. v. Muhammad Shamsuddin*, the Patna High Court while considering the liability of the bank for act of the accountant held that in order to fix up the liability of a master, the plaintiff has only to show that the agent was working within the scope of his authority. It is not necessary to show that the impugned act was also for the benefit of the master.

In The *Secretary, Nanguneri Peace Memorial Co-operative Urban Banks Ltd. v. Alamelu Ammal*, the Secretary of the bank issued forged fixed deposit receipts to customer. As per the bye-laws the secretary had no right nor even apparent authority nor ostensible authority to issue fixed deposit receipts. The Secretary did not act within his authority or in the course of his employment. The Madras High Court held that where he issued such receipt under his signatures and forged on them the signatures of the members of the Board of Directors, who were authorised to sign, the bank is not liable on such FDRs.

The fact that the deposit receipts are in a proper form and delivered by Secretary in the ordinary course of duty does not operate as representation of genuineness and stop the bank from denying its liability. The principle that strangers are entitled to assume that all things connected in the transactions and pertaining to the internal management of a company have been validly done, has no application to fraud and forged instruments, as forged instruments are simply null and void. If the Secretary is shown to have either express authority or by a course of dealing the company would be liable. In other words if he is acting within the scope of his authority the actions of the Secretary will bind the company even if done fraudulently and even though they ensure not for the company's benefit but for the Secretary himself.

UNIT - IV

WINDING UP OF COMPANIES

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III. Reasons and procedure for Insolvency in India

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V. Salient features of SARFEASI Act

VI. Winding up of Banking Company

Resolving Insolvency is an important aspect in the business process. Non Performing Assets of the banks also increased sharply to 4.6 per cent in March 2016, from 2.8 per cent in September 2015. The Public sector banks' net NPA was 6.1 per cent, while the ratio for private sector banks was 4.6 per cent. (RBI AQR, July 2016). The legislative history and committees constituted would give a detailed about the Government legislative approach to deal with the Bankruptcy and Insolvency procedure in India.

Table of Legislative history of Insolvency in India

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In addition to municipal laws on insolvency the cross border insolvency is settled invoking UNCITRAL Model Law on Cross-Border Insolvency, 1997

Various committee's on Insolvency

1. Shri Tiwari Committee, 1981
2. Justice V.B. Balakrishna Eradi Committee, 1999
3. N L Mitra Committee, 2001
4. Mr.JJ Irani Committee, 2005
5. Dr. T. K. Vishwanathan committee, 2015

Insolvency

"is the state of one who has no property sufficient for the full payment of his debts" (Law lexicon) An individual, corporation, or other organization cannot meet its financial obligations for paying debts as they are due. Insolvency can occur when certain things happen, some of which may include: poor cash management, increase in cash expenses, or decrease in cash flow. A finding of insolvency is important, as specific rights are enabled for the creditor to exercise against the insolvent individual or organization. For example, outstanding debts may be paid off by liquidating assets of the insolvent party. Prior to proceedings, it is common for the insolvent entity to meet with the creditor in order to attempt to arrange an alternative payment method. It is possible that a business may be "insolvent" in cash flow, yet still solvent on the balance sheet. These cases may involve illiquid assets, which help the balance sheet's solvency but not the cash flows. This can also work the other way around with negative net assets (balance sheet insolvency), yet a positive cash flow. In this case, the flow of cash is simply enough to pay off debts, despite the fact that the business has more liabilities than assets.

Bankruptcy

Bankruptcy is a condition in which a firm (or individual) is unable to meet its (his) obligations and, hence, its (his) assets are surrendered to a court for administration Bankruptcy is not exactly the same as insolvency. Technically, bankruptcy occurs when a court has determined insolvency, and given legal orders for it to be resolved. Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency. Insolvency describes a situation where the debtor is unable to meet his/ her obligations. Bankruptcy is a legal maneuver in which an insolvent debtor seeks relief.

In *Yenamulla Malludora v. P.Seetharatnam* (AIR 1966 SC 918), Supreme Court of India observed, 'The object of the law of insolvency is to seize the property of an insolvent before he can squander it and to distribute it amongst his creditors. It is however not every debtor who has borrowed beyond his assets or even one whose property is attached in execution of his debts, who can be subjected to such control. The jurisdiction of the Court commences when certain acts take place which are known as acts of insolvency and which give a right to his creditor to apply to the Court for his adjudication as an investment.'

Reasons for Insolvency

1. Market - Company did not recognize the need for change
2. Bad debts - obviously money owed by customers
3. Management - failure to acquire adequate skills, imprudent accounting, lack of information systems
4. Finance - loss of long term finance, over gearing or lack of cash flow
5. Knock on effect - i.e. from other insolvencies
6. Other - for example excessive overheads etc

Procedure for Insolvency in India

1. Insolvency/ Liquidation process essentially encompasses aspects of recovery, revival, reconstruction and winding up and therefore the process has to be seen in a holistic manner with all such aspects in sight.

2. No Separate Unified Insolvency Code covering all the above aspects in one place is present. Therefore the process is complicated, time consuming and ineffective.

3. The present Legal and procedural framework relating to Corporate Insolvency apart from several other special provisions like debt recovery laws, is laid out by 4 major legislations, namely:

   i. The Companies Act, 2013

   ii. Sick Industrial Companies (Special Provisions) Act, 1985 [SICA]

   iii. Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act)

   iv. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) Act, 2002

Recovery of Debts due to Banks and Financial Institutions

Keeping in line with the international trends on helping financial institutions recover their bad Debt quickly and efficiently, the Government of India constituted Debt Recovery Tribunals. . The Debts Recovery Tribunal Act- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has been established by the Government of India under an Act of Parliament for expeditious adjudication and recovery of debts due to banks and financial institutions. The Debts Recovery Tribunal is also the appellate authority for appeals filed against the proceedings initiated by secured creditors under the Securatisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act.

The objective of the Act was to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental to it.

"bank" means—

(i) banking company;

(ii) a corresponding new bank;

(iii) State Bank of India;

(iv) a subsidiary bank; or

(v) a Regional Rural Bank;

"debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank of a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;

"financial institution" means—

(i) a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956);

(ii) such other institution as the Central Government may, having regard to its business activity and the area of its operation in India by notification, specify;

Establishment of Tribunal

(1) Under the act, the Central Government would establish one or more Tribunals, to be known as the Debts Recovery Tribunal, to exercise the jurisdiction, powers and authority conferred on such Tribunal .

(2) The Central Government shall also specify, the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it.[Section 3]

Procedure

Application to the Tribunal

(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—

   (a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

   (b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

   (c) the cause of action, wholly or in party, arises.

(2) Where a bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under subsection (1) and against the same person another bank or financial institution also has claim to recover its debt, then, the later bank or financial institution may join the applicant bank or financial institution at any stage of the proceedings, before the final order is passed, by making an application to that Tribunal.

(3) Every application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee as may be prescribed: Provided that the fee may be prescribed having regard to the amount of debt to be recovered:

   Provided further that nothing contained in this sub-section relating to fee shall apply to cases transferred to the Tribunal under sub-section (1) of section 31.

(4) On receipt of the application under sub-section (1) or sub-section (2), the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.

(5) The defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence.

(6) Where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

(7) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

(8) A defendant in an application may, in addition to his right of pleading a set-off under sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

(9) A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

(10) The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Tribunal.

(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit.

(12) The Tribunal may make an interim order (whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permission of the Tribunal.

(13) (A) Where, at any stage of the proceedings, the Tribunal is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him,—

(i) is about to dispose of the whole or any part of his property; or

(ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Tribunal; or

(iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest, the Tribunal may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the certificate for the recovery of the debt, or to appear and show cause why he should not furnish security.

(B) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt.

(14) The applicant shall, unless the Tribunal otherwise directs, specify the property required to be attached and the estimated value thereof.

(15) The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under subsection (14).

(16) If an order of attachment is made without complying with the provisions of sub-section (13), such attachment shall be void.

(17) In the case of disobedience of an order made by the Tribunal under sub-sections

(12) (13) and (18) or breach of any of the terms on which the order was made, the

Tribunal may order the properties of the person guilty of such disobedience or breach to be attached an may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release

(18) Where it appears to the Tribunal to be just and convenient, the Tribunal may, by order—

(a) appoint a receiver of any property, whether before or after grant of certificate for recovery of debt;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver;

(d) confer upon the receiver all such powers, as to bringing and defending suits in the courts or filing and defending application before the Tribunal and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal thinks fit; and

(e) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof.

(19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956) the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of theCompanies Act, 1956 and to pay the surplus, if any, to the company.

(20) The Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order, including the order for payment of interest from the date on or before which payment of the amount is found due up to the date of realization or actual payment, on the application as it thinks fit to meet the ends of justice.

(21) The Tribunal shall send a copy of every order passed by it to the applicant and the defendant.

(22) The Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

(23) Where the Tribunal, which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is situated:

Provided that in a case where the Tribunal to which the certificate of recovery is sent for execution finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it.

(24) The application made to the Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application finally within one hundred and eighty days from the date of receipt of the application.

(25) The Tribunal may made such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.]

Procedure for filing applications

(1) The application u/s 19 or sec. 31A, or u/s. 30(1) of the Act may be presented as nearly as possible in Form-I, Form-II and Form-III respectively annexed to these rules by the applicant in person or by his agent or by a duly authorised legal practitioner to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar.

(2) An application sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar the day on which it was received in the office of the Registrar.

(3) The application under sub-rule (1) shall be presented in two sets in a paper book along with an empty file size envelope bearing full address of the defendants and where the number of defendant is more than one, then sufficient number of extra paper- books together with empty file size envelopes bearing full address of each of the respondents shall be furnished by the applicant.

Presentation and scrutiny of applications

(1) The Registrar, or, as the case may be, the officer authorised by him, shall endorse on every application the date on which it is presented or deemed to have been presented under Rule 4 and shall sign endorsement.

(2) If on scrutiny, the application is found to be in order, it shall be duly registered and given a serial number.

(3) If the application, on scrutiny, is found to be defective and the defect noticed is formal in nature, the Registrar may allow the party to rectify the same in his presence and if the said defect is not formal in nature, the Registrar, may allow the applicant such time to rectify the defect as he may deem fit.

(4) If the concerned applicant fails to rectify the defect within the time allowed in sub-rule (3), the Registrar may by order and for reasons to be recorded in writing, decline to register the application.

(5) An appeal against the order of the Registrar under sub-rule (4) shall be made within 15 days of the making of such order to the Presiding Officer concerned in chamber whose decision thereon shall be final.

Review

(1) Any party considering itself aggrieved by an order made by the Tribunal on account of some mistake or error apparent on the face of the record desires to obtain a review of the order made against him, may apply for a review of the order to the Tribunal which had made the order.

(2) No application for review shall be made after the expiry of a period of sixty days from the date of the order and no such application shall be entertained unless it is accompanied by an affidavit verifying the application..

(3) Where it appears to the Tribunal that there is no sufficient ground for a review, it shall reject the application but where the Tribunal is of opinion that the application for review should be granted, shall grant the same:

PROVIDED that no such application shall be granted without previous notice to the opposite party to enable him to appear and to be heard in support of the order, a review of which is applied for.

Place of filing application

The application shall be filed by the applicant with the Registrar within whose jurisdiction—

(a) the applicant is functioning as a bank or financial institution, as the case may be, for the time being, or

(b) the defendant, or each of the defendants where there are more than one, at the time of making application, actually or voluntarily resides, or carries on business, or personally works for gain, or

(c) any of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain, or

(1) the cause of action, wholly or in part, arises. Every appliction under section 19(1), or section 19(2), or section 19(8), or section 30(1) of the Act, or interlocutory application or application for review of decision of the Tribunal shall be accompanied by a fee provided in the sub-rule (2) and such fee may be remitted through a crossed Bank Demand Draft drawn on a bank or Indian Postal Order in favour of the Registrar of the Tribunal and payable at the place where the Tribunal is situated.

(2) The amount of fee payable shall be as follows—

Appeal before Debt Recovery Tribunal (DRT)

Any person aggrieved by any measure taken by secured creditor or his authorised officer may file an appeal to Debts Recovery Tribunal, within 45 days from date on which such measure was taken. i.e. action of taking possession of asset, takeover of management of business of borrower, appointing person to manage secured asset etc. is taken by the creditor.

Does not exceed Rs.1,00,000/-

1. Filing simple suit for recovery before Civil Court;

2. Filing of summary suit under Order XXXVII of CPC, 1908

3. Filing mortgage suit for foreclosure of mortgage; &Arbitration proceedings if Arbitration Agreement exists.

.7

Debt amount Exceeds Rs.1,00,000 but does not exceed Rs.10,00,000

In addition to above, in case the security interest has been created in specific movable / immovable property provisions of the Securitization Act may be invoked to re-possess the mortgaged property, without intervention of the Court, and sell the same.

Exceeds Rs.10,00,000

Original Application is to be filed before the DRT for recovery of dues. Civil Court / Arbitrator will not have jurisdiction to entertain such claim.

Conditions to appeal before DRT

When a borrower files an appeal, the appeal cannot be entertained unless; the borrower deposits 75% of the amount claimed in the notice by secured creditor.

Exceptions:

a. Waiver: The DRT can waive or reduce the amount required to be deposited. The amount is not required to be deposited at the time of filing appeal, but appeal will not be heard till the amount is deposited. The borrower while filing the appeal should also file an application requesting the Debt Recovery Tribunal to admit the appeal without deposit of any amount. If the DRT orders partial deposit of the amount and the same is not deposited, appeal can be dismissed.

b. The 75% deposit is only required if the appeal is filed by the borrower. If some other aggrieved person (e.g. guarantor, shareholder) files it the deposit is not required.

DEBT RECOVERY APPELATE TRIBUNAL

If a person is aggrieved by the order of the DRT, it can file an appeal to the Appellate Tribunal within 30 days from date of receipt of the DRT order.

If the DRT or Appellate Tribunal holds that possession of assets by the secured creditor was wrongful and directs the secured creditor to return asset to concerned borrower, the borrower shall be entitled to compensation and costs as may be determined by DRT or Appellate tribunal.

(iii) The Tribunal can also direct return of asset, if the secured creditor had already sold or transferred the asset to a third party.

Enforcement of security interests

"Security interest" means right, title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes any mortgage, charge, hypothecation or assignment. Enforcement of security interests, and enforcement of claims of special creditors is dealt with by several statues in India, including the SARFAESI Act, 2002 in case of secured creditors being banks, Recovery of Debts due to Banks & Financial Institutions Act 1993 in case creditors being banks or financial institutions, and State Finance Corporations Act, 1951 in case of creditors being State Finance Corporations, etc.

Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights mentioned below:

(a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset: PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Special Purpose Companies -

The Securitisation Act proposes to securitise and reconstruct the financial assets through two special purpose vehicles viz. 'Securitisation Company ('SCO')' and 'Reconstruction Company (RCO)'. SCO and RCO ought to be a company incorporated under the Companies Act, 1956 having securitisation and asset reconstruction respectively as main object. The Securitisation Act requires compulsory registration of SCO and RCO under the Securitisation Act before commencing its business. Further a minimum financial stability requirement is also provided by requiring SCO and RCO to possess owned fund of Rs.2 crore or up to 15% of the total financial assets acquired or to be acquired. The RBI has the power to specify the rate of owned fund from time to time. Different rates can be prescribed for different classes of SCO and RCO.

The Act deals with three aspects.

1. Enforcement of Security Interest by secured creditor (Banks/Financial Institutions)

2. Transfer of non- performing assets to Asset Reconstruction Company, which will then dispose of those assets and realize the proceeds.

3. To provide a legal framework for securitisation of assets.

Enforcement of Security Interest -

Under the Act security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provision of this Act. (Notwithstanding anything contained in section 69 or section 69(A) of the Transfer of Property Act, 1882)

Section 13(2)

Where any borrower, who is under a liability to a secured creditor under a security under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor with in sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)

(1) In case the borrower fails to discharge his liability in full within the period specified in sub-section(2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset.

(b) • take over the management of the assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset.

(c) • appoint any person to manage the secured assets the possession of which has been taken over by the secured creditor.

(d) • require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money any money is due or may become due to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt.

Under section 69 of Transfer of Property Act, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only in case of English mortgage. In addition mortgagee can take possession of mortgaged property where there is a specific provision in mortgage deed and the mortgaged property is situated in towns of Kolkata, Chennai or Mumbai. In other cases possession can be taken only with the intervention of court. Therefore till now Banks/Financial Institutions had to enforce their security through court. This was a very slow and time-consuming process.

(English Mortgage is where mortgagor binds himself to repay the mortgaged money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer the property to the mortgagor upon payment of the mortgage money as agreed.)

Under the SARFAESI Act, if a loan becomes a non-performing asset ("NPA") i.e. if a borrower is in default in respect of payment of interest or any instalment of the principal, beyond a period of 90 days of such amount becoming due then secured creditors are entitled to enforce the security interest created in their favour in accordance with the provisions of the SARFAESI Act. The secured creditors are required to give the borrower a notice of 60 days describing the default and the measures proposed to be taken. The borrower is given an opportunity to make representations to the secured creditors and the secured creditor may, after giving reasons for rejecting the representations of the borrower, take measures referred to in Section 13(4) of the SARFAESI Act, such as taking over possession of the secured assets or taking over the management of the business of the borrower etc., without the intervention of courts to enforce its security interest.

According to Section 2 (o) of the Act, Non Performing Asset means an asset or account of a borrower which has been classified by the bank or financial institution as sub-standard doubtful or loss asset.-

a) In case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to the asset classifications issued by such authority or body;

b) In any other case, in accordance with the directions or guidelines relating to assets classifications issued by the reserve bank.

Exception to the Securitisation Act (Sec.31)

The provisions of this Act will not apply to—

(a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of1872; or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force;

(b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872 (9 of 1872);

(c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934 (24 of 1934);

(d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958);

(e) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;

(f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930 (3 of 1930);

(g) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908 (5 of 1908);

(h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;

(i) any security interest created in agricultural land;

(j) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

Winding up of Banking Company

i. Suspension of Business and Winding Up:

A banking company which is temporarily unable to meet its obligations may apply to the High Court under Section 37 of the Banking Regulation Act for staying the commencement or continuance of any proceedings against it. Such stay will be for a fixed period and subject to any terms and conditions imposed by the High Court as it may think fit. The total period of such moratorium shall not exceed six months. An application for moratorium shall be supported by a report of the Reserve Bank indicating that the banking company will be able to pay its debts if the application is allowed. The Court, for sufficient reasons, may grant the relief, even if the application is not supported by the Reserve Bank's report. In that case, a report will be called for and the order, may be modified or rescinded based on the report. On passing of moratorium order the court may appoint a special officer to take custody and control of the assets, books, etc., of the banking company in the interests of the depositors. If the Reserve Bank is satisfied that the affairs of a banking company under moratorium as above, are being conducted in a manner detrimental to the interests of the depositors, it may apply to the High Court for winding up of the company. Thereafter, the High Court shall not extend the period of moratorium.

ii. Winding Up by High Court:

1. The High Court shall order the winding up of a banking company in the circumstances mentioned in Section 38 of the Banking Regulation Act. They are:

   (i) The banking company is unable to pay its debts;

   (ii) An application for winding up has been made by the Reserve Bank under Section 37 or Section 38 of the Act.

2. The Reserve Bank is bound to make an application for winding up under Section 38, if directed by the Central Government under Section 35(4) of the Banking Regulation Act. The Central Government may issue such direction under Section 35(4) when, on consideration of the report of inspection or scrutiny made by the Reserve Bank at the direction of the Central Government, it is of opinion that the affairs of the bank are being conducted to the detriment of the interests of the depositors. However, before giving such direction, the banking company has to be given an opportunity to make a representation in connection with the report of inspection or scrutiny.

3. It is open to the Reserve Bank to apply for winding up of a banking company in certain other cases as follows:

   (i) failure to comply with the requirements of Section 11 regarding minimum paid-up capital and reserves;

   (ii) bank being not entitled to carry on banking business in India under Section 22 of the BR Act by reason of rejection or cancellation of licence;

   (iii) prohibition to accept fresh deposits under Section 35(4) of the BR Act or Section 42 (3A)(b) of the Reserve Bank of India Act;

   (iv) failure to comply with the requirements of the BR Act other than Section 11 and continuance of such failure or contravention beyond the period or periods specified by the Reserve Bank in this behalf and after notice in writing of such failure or contravention. In addition to the above, the Reserve Bank may apply for winding up of a banking company if it is of the opinion that:

      (a) a compromise or arrangement sanctioned for a banking company cannot be worked satisfactorily with or without modification; or

      (b) the returns, statements and information given by the bank under the Act show that it cannot pay its debts; or

      (c) the continuance of the banking company is prejudicial to the interests of the depositors.

A banking company shall be deemed to be unable to pay its debts if it has refused to meet any lawful demand made at any of its offices or branches within the stipulated time and the Reserve Bank certifies in writing that the banking company is unable to pay its debts. If the demand is made at a place where the Reserve Bank has an office, branch or agency, the time limit is two days and in other cases five days. When the Reserve Bank makes an application for winding up, the court is bound to allow the application. As held by the Supreme Court in the Palai Central Bank case (AIR 1962 SC 1371 at 1383), as between the Court and the Reserve Bank, the momentous decision to wind up in the interests of depositors may reasonably be left to the Reserve Bank.

iii.Official Liquidator: Section 38A of the BR Act provides for a liquidator to be appointed by the Central Government, attached to respective High Court, for conducting the winding up proceedings relating to banking companies. Such a liquidator need not be appointed where enough cases of winding up of banking companies are not available in any High Court.

iv. Reserve Bank as Liquidator: Although there is a provision for an official liquidator as above, if the Reserve Bank applies to the Court under Section 39 of the Act, the Reserve Bank, State Bank or any other bank notified by the Central Government in this behalf or any individual stated in the application may be appointed as the official liquidator. The remuneration of the liquidator and other costs and expenditure of winding up shall be borne by the banking company. All provisions of the Companies Acts, which are not inconsistent with the Banking Regulation Act shall be applicable to such liquidator. The liquidator has to make a preliminary report to the High Court within two months the winding up order on the availability of assets for making preferential payments under Section 530 of the Companies Act and for discharging liabilities to depositors and other creditors. Wit' fifteen days of the winding up order, the liquidator has to give notice calling for claims for preferential payment and other claims; for *every* secured *and* unsecured creditor. Under Section 43 of the Act, if depositors need not make claims. The claim of every depositor of a banking company is deem to have filed for the amount as shown in the books of the banking company standing to his credit.

v.Preferential Payment: In the winding up proceedings, the liquidator of a banking company has to make certain preferential payments under Section 43 A of the Banking Regulation Act. Accordingly the preferential payments referred to in Section 530 of the Companies Act, in respect of which claims have been made within one month of service of notice, get the first preference. After that, depositors in savings bank account up to Rs. 250 and then other depositors up to Rs. 250 get priority over all other creditors. After making these payments, the balance available will be utilised for payment to general creditors and then for payment of further amounts due to the depositors. The provision for preferential payment by liquidator will not apply to depositors covered by the DICGC Act.

vi.Voluntary Winding Up: Apart from the provision for compulsory winding up as above, Section 44 provides for voluntary winding up by banking companies. However, no such winding up will be permissible unless the Reserve Bank certifies that the bank will not be able to pay in full all its debts as they accrue. It is open to the High Court to order during voluntary winding up of a banking company that it shall continue, subject to the *supervision of the* Court. The High Court may also order winding up by Court either on its own motion or on the application by the Reserve Bank, if during voluntary winding up it becomes clear that the company is not able to meet its debts as they accrue or if continuing voluntary winding up or winding up under supervision of the court may be detrimental to the interests of depositors.

Banking Ombudsman Scheme

The banking ombudsman was established by introduction of Banking Ombudsman Scheme, 2006. To resolve complaints, the RBI specify the territorial limits, the salient features of the schemes are as follows,

Objects

The scheme was introduced with the following objectives:

a. *To resolve* complaints relating to banking services and to facilitate the satisfaction or settlement *of such complaints.*

b. Resolve disputes between a bank and its constituents as well as amongst banks, process of conciliation, meditation and arbitration.

c. The scheme extends to the whole of India. It is applicable to the banks in India. TheRBI has the authority to suspend the operation of the scheme fully or partly for such period as specified in the order. Such suspension, may be general or in relation to any specified b period of suspension can be extended if deemed fit by the Reserve Bank.

Definitions

'Banking Ombudsman' means any person appointed under Clause No. 4 of the scheme.

"Bank' means,

- a banking company,
- and includes a corresponding new bank,
- a Regional Rural Bank,
- State Bank of India and its Subsidiary banks as defined in Part I of the Banking Regulation 1949,
- and also includes a scheduled primary co-operative bank and included in the second to the RBI Act, 1934 having a place of business in India.

'Authorised Representative' means a person duly appointed and authorised by a com; act on his behalf and represent him before a banking ombudsman, for consideration of his complaint.

'Complaint' means a representation in writing or through ELECTRONIC MEANS con grievance, alleging deficiency in banking service.

'Settlement' means an agreement reached by the parties either by conciliation or mediation the Scheme.

'Award' means an award passed by the banking ombudsman in accordance with this scheme.

'Appellate Authority' means the Deputy Governor in charge of the department of the implementing the scheme.

Appointment and tenure

The RBI may appoint one or more of its officers in the rank of Chief General Manager or Manager to be known as the banking ombudsmen to carry out the functions entrusted to them order the scheme. This appointment may be made for a period not exceeding three years at a time.

Territorial Jurisdiction

The RBI shall specify the territorial limits to which the authority of each of the banking ombudsman shall extend office of the banking ombudsman will be located at such places as may be specified by the RBI. The banking ombudsman may hold sittings at such places within his area of jurisdiction as may be considered necessary and proper by him, in respect of a complaint or reference before him.

General powers of banking ombudsman

The banking ombudsman shall have the following powers and duties: receive complaints relating to banking services consider such complaints relating to the deficiencies in the banking and other services and bate their satisfaction or settlement by agreement through conciliation and mediation between dank and the aggrieved parties or by passing an award in accordance with the scheme.

Grounds of Complaint

1, A complaint on any of the following grounds alleging deficiency in banking service may with the banking ombudsman having jurisdiction:

- i. non-payment/inordinate delay in the payment or collection of cheques, drafts, bills.
- ii. non-acceptance, without sufficient cause, of small denomination notes or coins for any purpose, and for creating a charge of commission in respect thereof;
- iii. non-payment or delay in payment of inward remittances;
- iv. failure to issue or delay in issue of drafts, pay orders or bankers cheques;
- v. failure to honour a guarantee or letter of credit commitments;
- vi. failure to provide or delay in providing a banking facility (other than loans and promised in writing by a bank or its direct selling agents;
- vii. delays, non-credit of proceeds to parties accounts, non-payment of deposit or non observance of the Reserve Bank directives, if any, applicable to rate of interest on deposits savings, current and other account maintained with a bank;
- viii. delay in receipt of export proceeds, handling of export bills, collection of bills exporters provided that the said complaints pertain to the bank's operations in
- ix. complaints from non-resident Indians having accounts in India in relation to their from abroad, deposits and other bank related matters;
- x. refusal to open deposit accounts without any valid reason for refusal;
- xi. levying of charges without adequate prior notice to the customer;
- xii. non-adherence by the bank or its subsidiaries to the instructions of Reserve Bank « Debit card operations or credit card operations;
- xiii. non-disbursement or delay in disbursement of pension (to the extent the grieve attributed to the action on the part of the bank concerned, but not with regard to its employees);
- xiv. refusal to accept or delay in accepting payment towards taxes, as required *la* Bank/Government;
- xv. refusal to issue or delay in issuing, or failure to service or delay in servicing or re of Government securities;
- xvi. forced closure of deposit accounts without due notice or without sufficient reason

xvii. refusal to close or delay in closing the accounts;

xviii. non-adherence to the fair practices code as adopted by the bank;

xix. any other matter relating to the violation of the directives issued by the Reserve Bank of India in relation to banking services.

Complaints concerning loans and advances may also be filed, only in so far as they relate to the wing:

i) non-observance of Reserve Bank of India directives on interest rates.

ii) delays in sanction, disbursement or non-observance of prescribed time schedule for disposal of loan applications.

iii) non-acceptance of application for loans without furnishing valid reasons to the applicant. Irv) non-observance of any other directions or instructions of the Reserve Bank of India, as may be specified by it from time to time. Banking ombudsman may also deal with such other matter as may be specified by the Reserve of India from time to time in this behalf.

Complaint filing procedure

1. Any person who has a grievance against a bank relating to the banking services for reasons as led above, may himself or through his authorised representative other than an advocate make complaint to the banking ombudsman within whose jurisdiction the branch or office of the bank complained against is located. Complaints arising out of the operation of credit cards shall be filed before the banking ombudsman within whose jurisdiction the billing address of the complainant is located.

2. complaint shall be in writing, duly signed by *the* complainant or his authorised representative, complaint shall be in a form specified in Annexure - A of the scheme and shall state clearly following particulars:

a. The name and address of the complainant

b. The name and address of the branch or office of the bank against which the complaint is made

c. The facts giving rise to the complaint

d. The nature and extent of the loss caused to the complainant |

e. The relief sought from the banking ombudsman

3. No complaint to the banking ombudsman shall lie unless

(a) the complainant had before making a complaint to the banking ombudsman made a written representation to the bank and either the bank had rejected the complaint or the complainant had not received any reply within a period of one month after the bank concerned received his representation or the complainant is not satisfied with the reply given to him by the bank;

(b) the complaint is made not later than one year after the cause of action has arisen as per Clause (a) above;

(c) the complaint is not in respect of the same subject matter which was settled through the office of the banking ombudsman in any previous proceedings;

(d) the complaint does not pertain to the same subject matter, for which any proceedings before any court, tribunal or arbitrator or any other forum is pending or a decree or award or a final order has already been passed by any such competent court, tribunal, arbitrator or forum;

(e) the complaint is not frivolous or vexatious in nature; It is made before the expiry of the period of limitation prescribed under the Indian Li Act 1963 for such claims.

Power to call for information

1. The banking ombudsman may require the bank named in the complaint or any other related provide any information or furnish certified copies of any document relating to the subject of the complaint that is or is alleged to be in the possession of such bank. In the event of the of a bank to comply the requisition without any sufficient cause, the banking ombudsman draw the inference that the information, if provided or copies if furnished, would be unfavorable to such bank.
2. The banking ombudsman shall not disclose any information or document to any person with the consent of the person furnishing such information or document. However, the ombudsman may disclose information or document furnished by a party in complaint to the side of the complaint, to the extent considered by him to be reasonably required to comply with the principles of natural justice and fair play in the proceedings.

Settlement of complaint by agreement

The banking ombudsman has to serve a notice of the receipt of complaint along with a copy complaint to the branch or office of the bank named in the complaint. He has to attempt settlement of the complaint by an agreement between the complainant and the bank through conciliation or mediation.For the purpose of promoting a settlement of the complaint, the banking ombudsman may such procedures as he may consider appropriate and he shall not be bound by any legal evidence.The proceedings before the banking ombudsman shall be summary in nature.

Award

1. If a complaint is not settled by agreement within a period of one month from the date of received the complaint or such further period as the banking ombudsman may consider necessary, he pass an award after affording the parties a reasonable opportunity to present their case. He s guided by the evidence placed before *him by* the parties, the principles of banking law and p directions, instructions and guidelines issued by the Reserve Bank of India from time to time such other factors which in his opinion are necessary in the interest of justice.
2. The award passed under the sub-clause above shall state the direction(s), if any, to the bank specific performance of its obligations in addition to the amount to be paid by the bank to complainant by way of compensation for the loss suffered by him and may contain any dir to the bank.

   The banking ombudsman shall not give any direction(s) in the award under sub-clause a regarding payment of compensation in excess of that which is necessary to cover the loss, suffered by the complainant, as a direct consequence of the commission or omission of the bank, or for amount exceeding Rs. 10 lakh whichever is lower.
3. In case of complaints relating to credit card operations, the banking ombudsman shall take i account the loss of complainant's time, expenses incurred by the complainant, financial los harassment and mental anguish suffered by the complainant, while determining the amount compensation.

a copy of the award shall be sent to the complainant and the bank named in the complaint. Ar. award shall not be binding on a bank against which it is passed unless the complainant furnishes to it within a period of fifteen days from the date of receipt of copy of the award, a letter of acceptance of the award in full and final settlement of his claim in the matter. If the complainant does not accept the award passed by the banking ombudsman and fails to furnish his letter of acceptance within such time, without making any request for extension of time to comply with such requirements, the award shall lapse and be of no effect.

The bank shall within one month from the date of receipt by it, of the acceptance in writing of the award by the complainant comply with the award and intimate the compliance to the banking ombudsman.

Grounds for rejection of complaints

1, The banking ombudsman may reject the complaint at any stage if it appears to him that the complaint made is:

(i) frivolous, vexatious, mala-fide; or

(ii) without any sufficient cause; or

(iii) that it is not pursued by the complainant with reasonable diligence; or

(iv) prima facie, there is no loss or damage or inconvenience caused to the complainant; or

(v) beyond the pecuniary jurisdiction of the banking ombudsman under the scheme

2, The banking ombudsman may reject a complaint at any stage, if after consideration of the complaint and evidence produced before him the banking ombudsman is of the opinion that the complicated, nature of the complaint requires consideration of elaborate documentary and oral evidence and the proceedings before the banking ombudsman are not appropriate for adjudication of such a complaint. The decision of the banking ombudsman in this regard shall be final and binding on the complainant of the bank.

Proceeding before the appellate authority

1. Any person aggrieved by the award has the right to prefer an appeal against the award before the appellate authority within forty-five davs form the date of receipt of the award. The appellate authority is empowered to allow a further period not exceeding thirty days on his being satisfied that the appellant had sufficient cause for not preferring the appeal in time. In case the appeal is by the bank, the filing of appeal should have been with the previous sanction of the Chairman or in his absence the Managing Director or Executive Director or the Chief Executive Officer or any other officer of equal rank.

2. The appellate authority after giving the parties a reasonable opportunity of being heard, may pass the following orders:dismiss the appeal; or allow the appeal and set aside the award; or remand the matter to the banking ombudsman for fresh disposal in accordance with such directions as the appellate authority may consider necessary or proper; or modify the award and pass such directions as may be necessary to give effect to the award so *modified; or* pass any other order as it may deem fit. The appellate authority has also the same effect as that of the award of the banking an.

Display of Scheme for common Knowledge of the public

1. The banks covered by the scheme shall ensure that the purpose of the scheme and the n address of the banking ombudsman to whom the complaints are to be made by the aggrieved party are displayed in all the branch/office premises.

2. The banks covered by the scheme are required to ensure that a copy of the scheme is available with the designated officer of the bank for perusal in the office premises of the There should be a notice displayed at each office of the bank about the availability of the the scheme with such a designated officer. The banks covered by the scheme are required to appoint nodal officers at their Regional/ offices and inform the respective office of the banking ombudsman. The nodal officer shall be responsible for representing the bank and furnishing information to the banking ombudsman in respect of complaints filed against the bank.

UNIT - V

NEGOTIABLE INSTRUMENTS

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Negotiable Instruments

The word 'negotiable' might owe its origin to the French word *negoce'* meaning business, trade or management of affairs. Black's Law Dictionary defines the term negotiable as something which is 'legally capable of being transferred by endorsement or delivery[1], and negotiability is the legal character of being negotiable. 'Instrument' on the other hand may be defined as a written document; or a formal or legal document in writing such as a contract or a will. Thus, taken together a 'negotiable instrument' means 'a written document capable of being transferred by endorsement or delivery'. Section 13 of the Negotiable Instruments Act, 1882 provides as under:

"Negotiable Instrument" - A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i) - A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words, prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii) - A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.

Explanation (iii) - Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option.

A negotiable instrument may be payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A negotiable instrument is an object of rights, i.e., it gives to the person in lawful possession of such an instrument certain rights which other instrument do not give him. Further, a negotiable instrument represents money and possesses the same characteristics as that of money, namely, (i) it is not tainted by any defect in title at the source so long as its acquisition is lawful, i.e., even if the maker of the instrument commits a fraud or a forgery, a bonafide payee of the *instrument is not affected by* such fraud or forgery; (ii) it passes by delivery like cash does and the person in lawful possession of it can sue on such instrument in his own name. A negotiable instrument also embodies some of the basic principles of contract, because it is either an undertaking or promise or an order to pay money. Capacity of the parties to such an instrument, their rights and liabilities etc., are all governed by the basic principles of contract. A negotiable instrument is one, therefore which when transferred by delivery or by endorsement and delivery, passes to the transferee a good title to payment according to its tenor and irrespective of the title of the transferor, provided he is a bonafide holder for value without notice of any defect attaching to the instrument or in the title of the transferor; in other words the principle *'nemo dat quod non habit'* does not apply. It is this element of negotiability which makes a contract founded upon paper thus adapted for circulation different in many particulars from other contracts known to law.

In *Raephal v. Bank of England*[(1855)104 RR 638:25 LJCP 33], some bank notes of the Bank of England were stolen. The Bank immediately prepared and circulated a list of the stolen notes. The plaintiff being a money changer in Paris also received such a list. After a year of his receiving this notice, a man came to the plaintiff for exchanging a Bank of England note. The plaintiff having forgotten the year old notice encashed the note, which was one of the stolen ones. The Bank of England refused payment to the plaintiff. It was held that the plaintiff, having taken the note in good faith, was entitled to its payment. He was no doubt somewhat negligent, but he had acted honestly. But the principle of *'nemo dat quod non habet'* applies only to negotiable instruments and a holder of an instrument which is non-negotiable cannot take this defence.

For example, in *Whislter v. Forster*[143 ER441], one G fraudulently obtained a cheque from the defendant Forster. The cheque was made payable to G or order. G gave the cheque to the plaintiff as payment for his debt, but forgot to endorse the cheque. Till then, he had no notice of the fraud but before the plaintiff could get G's endorsement on the cheque, he became aware of the fraud. It was held that the plaintiff could not get a good title. Erie CJ observed: "According to law merchant, the title of a negotiable instrument (payable to order) passes by endorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value and without notice of any fraud. The plaintiff's title here, therefore, was to be rendered valid by endorsement; but at the time he obtained the endorsement, he had notice that the bill had been fraudulently obtained by G from the defendant." This brings us to an interesting question, what are the essential elements or requirements of a negotiable instrument or when does an instrument become negotiable?

To understand the essential characteristics of a negotiable instrument it is important to keep in mind the resemblance of these instruments to money. In the words of Parsons, "the most characteristic of money as distinguished from other species of property is the facility and freedom with which it circulates. Any one taking it, therefore, in the course of business, need look no further than to the face of the coin and the possession of the person from whom he receives it. These are the qualities which every representative of money must possess in order to answer its purpose effectively." In simpler words what characterizes money is the certainty which it denotes i.e., certainty of denomination and of possession.

A negotiable instrument thus should be very certain as to the amount being promised or ordered to pay. Further since the instrument also incorporates principles of contract it should also be clear, unambigous

and concise and should also specify the names of the person to whom it is being made payable as also the person making the payment. Thus, a negotiable instrument should be certain as to:

(i) persons making the payment; (ii) persons receiving the payment; (iii) the amount payable; (iv) the time and place of payment and (v) conditions of liability (if any). According to Black's Law Dictionary, for an instrument to be negotiable within the meaning of Article 3 of U.C.C. it must - (1) be in writing and signed by the maker or drawer; (2) containing an unconditional promise or order; (3) to pay a specified amount; (4) either on demand.or at a definite time; (5) to the bearer of the instrument or to order, and (6) not contain any other promise, order, obligation or power given by the maker or drawer except as authorized. Apart from these general characteristics each kind of negotiable instrument has its own set of essential requirements, but these will be dealt with at appropriate places.

Need for Negotiable Instruments

You may now ask a very pertinent question - the law dealing with negotiable instruments seems to be very complex, so why should we deal with it? More importantly why do we need negotiable instruments in the first place, why can't be do away with them?

The answer to the first question is very simple. Negotiable instruments form the backbone of today's complex commercial world. Tradesmen prefer to use cheques, drafts, promissory notes etc., in their day to day transactions, rather than ready cash. In fact even the common man has become addicted to the use of cheques and drafts. These instruments are used as a mode of payment along with application forms, for filing of tenders, for payment of salary....you name a transaction involving money and you will find a negotiable instrument in some form or other exchanging hands. It is because of this widespread popularity and usage of these instruments that in depths study of these instruments becomes essential for every user of these instruments.

Negotiation and Indorsement

Negotiable instruments have a characteristic feature of easy transferability to a third party by a process called 'negotiation'. As mentioned earlier a negotiable instrument contains either a promise or an order to pay A or his order, or to pay B or bearer. It is this provision for alternative payment i.e. to one or other that makes these instruments really negotiable.

Negotiation may take place in one of the following two ways, viz;

(i) When the instrument is payable to bearer it is negotiable by delivery of it to the third party.

(ii) When the instrument is payable to order, then negotiation can be done by firstly 'indorsing'it and then delivering it by the holder.

'Payable to order' means that the maker may not only specify the person to whom the money is to be paid say a Mr., but also order that the money be paid to any person Mr. orders it to be paid to. So every instrument may have a series of parties each making the money payable to the next succeeding person or to his order. For example, a bill may be made by A to pay 'to B or his order'; B may by indorsing make it payable 'to C or his order'; C making it payable to 'D or his order' and so on and *so forth. This* stream will continue till the bill is ultimately cashed and the amount realized. It may be possible that an instrument gets circulated so rapidly that it becomes so covered with indorsements that there is no place for any more fresh indorsements. In such a situation it is permissible to attach a piece of paper called an *allonge* to the bill, and this *allonge* can be used for further indorsements.

The question now arises, what is an indorsement? An 'indorsement' in simple words may be defined as the signing on the instrument for the express purpose of negotiation, and negotiation takes place when the indorsed instrument is delivered to any person so as to make him the holder of the instrument. The person signing the bill is known as the 'indorser' and the person in whose favour indorsement is made is known as the 'indorsee'. The same person may take on the character of both the indorser and the indorsee as for example, if A indorses a bill in favour of B, and B indorses the bill in favour of C, then B is an indorsee with respect to A and he is an indorser with respect to C. Once a bill is indorsed and delivered, the indorsee not only acquires the property in the instrument but also the right to further negotiating the instrument to other persons. What is essentially required in cases of indorsement is the intention to pass the property in the bill. Nowadays a question that is becoming increasingly important is, how to sign an indorsement, because the protection of a banker who' either pays or receives an indorsed instrument is dependent on the form of the endorsement.

Indorsements are of two kinds, viz :

(i) indorsements in blank' ie where the indorser merely signs his name without specifying as to the identity of the indorsee; *and*

(ii) indorsement in full' ie where the indorser specifies the person or indorsee to whom or on whose order the payment is to be made.

An instrument with blank indorsement is negotiable by mere delivery, just as if it was an instrument payable to the bearer. A blank indorsement may be converted into a full indorsement by the holder, by writing above the indorser's signature a direction to pay to any other person. The advantage of pursuing such a course of action is that the holder does not incur the liabilities of an indorser. The holder may also exclude his liability by indorsing the instrument *'sans recourse'* or he may make his liability conditional. He may also restrict the right of the indorsee to further negotiate the bill by appropriate wording of the indorsement, as for example, by saying 'pay B only' or 'pay B or C'.

The indorsement to be valid must be of the entire bill i.e. you cannot keep part of the bill and indorse the remaining. You may indorse the bill 'in toto' or realize it 'in toto'. A partial indorsement or a transfer to two or more indorsees severally does not operate as negotiation of the bill; but if the bill has been partly paid then a note to that effect can be made on the indorsement and it may then be negotiated for the balance.

Who can indorse?

An indorsement can be done only by the lawful holder of the instrument. Every single maker, drawer, payee, indorsee etc or if there are more then all of them jointly can indorse an instrument provided he or they are in lawful possession of the instrument. A stranger i.e. someone who is not a holder cannot indorse an instrument so as to convey a title to the indorsee. An agent of the indorser can indorse the instrument provided he signs as an agent of the indorser and not as an indorser.

The Act deals only with transfer of instruments according to Law Merchants, does not deal with transfer by operation of law. An important consequence of negotiation envisaged by the Law Merchants is that, a person taking an instrument bonafide and for value acquires a good title to it, *regardless of the defects in* the title of the transferor. It is this characteristic combined with its transferability by delivery like cash, which determines the negotiability of the instrument. In case of ordinary transfers, for example, in assignment of a debt, the transferee gets a right to see in his own name, but he does not get a better title than what his transferor has. But in case of negotiable instruments, title of the transferee is dependent upon the manner of his acquisition of the instrument rather than the title of the transferor. In this respect they resemble the coin of the realm which may pass from hand to hand without being tainted by the title of the transferor.

Kinds of Negotiable Instruments

The Act itself deals with only three kinds of negotiable instruments viz: promissory notes, bill of exchange and cheques. But this does not mean that these are not other kinds of instruments. The Act specifically saves or excludes from its operation local usages in respect of all instruments in an oriental language unless an intention is expressed in any such instrument that it would be governed by the Act (sec. 1). But the usage has to be established by the party alleging its existence, otherwise it will be governed by the provisions of the Act regardless of the language it is written in, i.e. a negotiable instrument need not necessarily be in English it can also be written in the oriental languages. The basic condition differentiating a negotiable instrument from a non negotiable one is not the language in which the instrument is written, but is the intention to make a negotiable instrument for the purpose of recording in writing to pay money to a specified person at a specified time. Hence, receipts etc, are not a negotiable instrument even if such receipt is coupled with a promise to pay. We will now deal with these various kinds of negotiable instruments along with their salient characteristics and their distinction from one another.

Promissory Notes

Section 4 of the Act defines promissory note as "an instrument in writing containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument." The essential ingredients of a promissory note are as follows:

(1) It must be in writing and signed by the maker

(2) It must contain an unconditional and definite promise to pay a certain sum, and nothing more.

(3) It must be payable either on demand or after the efflux of a fixed or determinable time in future, as for example 'after 6 months'.

(4) It must be payable to, or to the order of a specified person named in the note or to the bearer of the note.

(5) Most importantly, an instrument to be regarded as a promissory note must show a prima facie intention to make such a note and it must be delivered.

Thus before a document can be treated as a promissory note, two things have to be ascertained: (a) an acknowledgement of indebtedness and (b) a promise to pay the debt. The illustrations appended to the section make the meaning clear, and are being reproduced below.

1.I acknowledge myself to be indebted to B for Rs. 1000 to be paid on demand for value received.

2. Mr. B, I.O.U. Rs. 1000.

The first is a promissory note whereas the second is not, because in the second illustration though there is an acknowledgement of indebtedness there is no corresponding promise to pay. In *Raghunath v. Seetaram* [1972 Mys. 344] certain tests to ascertain whether the given document was a promissory note or not were laid down. The Court observed:

"The controlling element in determining the question whether an instrument is a promissory note or not is the intention of the parties in drawing up that instrument as a promissory note. A document might comply with the terms of this section and yet it may not be a promissory note. For instance, a mere receipt even if coupled with a promise to pay is never intended to be a promissory note, and so a deposit note containing words "we promise to pay the said sum". But a document does not become a promissory note merely because the parties intended it to be a promissory note unless it fulfills the terms of this section. However,

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if a promissory not falling under section 4 of the Act and therefore under section 2(22) of the Indian Stamp Act, 1899, is *attested and not* payable *to* order *or bearer it* would fall under section 2(5)(b) and would amount to a bond for the purposes of the Act. The description of the instrument as a promissory note, the language of the instrument taken as a whole, the circumstances under which it came to be executed, the intention of the parties manifest from the face of the document and the surrounding circumstances have all a cumulative bearing on a proper construction of the instrument whether it is a promissory note or not." There is another requisite for a promissory note to be valid and that is that the note should be properly stamped as per the requirements of the Indian Stamp Act, 1899, but in case of a pro note executed in the State of Jammu & Kashmir must be affixed with requisite stamps prescribed under the J & K Stamp Act, [Gulam Nabi v. Lai Mohammed, AIR 1975 J & K. 50J

Kinds of Promissory notes

Section 4 recognises three kinds of promissory notes :

(1) A note containing a promise to pay a certain sum of money to a person. Originally this was not considered as a negotiable instrument in India, but it was perfectly valid between the parties to the document, and it was capable of being assigned as an ordinary chose-in-action though not by negotiation [*Udayar v. Muthia* 7 MLJ 231] but Act VIII of 1919 made such instruments also negotiable, unless in the instrument words like "only to" are included.

(2) A note containing a promise to pay a certain sum to the order of a certain person. Such notes are however payable only to the person named or by his order.

(3) A note containing promise to pay the bearer, but such notes was declared invalid under the Paper Currency Act and now under the Reserve Bank of India Act.

There is another special kind of promissory note viz:

Government Promissory notes - These are issued by the Government (either Central or State), for loans raised by them, and are made payable to order or a bearer bond payable to the bearer. Though these notes are in the form of negotiable instruments, their transfer by indorsement and the liability of the transferor and the renewal, are now regulated by Public Debts Act, 1944. A transfer of such promissory notes will not be valid unless it conveys the full title to the security or if it is of such a nature as to affect the manner in which the security is to be held as expressed by the Government.

The definition u/sec.4 specifically excludes the following notes, viz:

Bank notes - A bank note may be defined as any bill, draft or note issued by a banker, promising to pay a certain sum to the bearer on demand, and whic entitles the bearer or holder of the instrument to the payment of the amount without further indorsement. In its nature it is like cash and differs from bonds and other securities which are only evidence of money being due and are not money itself.

Currency notes - A currency note issued by the Government incorporates an undertaking by the Government to pay the bearer of the note on demand the specified sum. Though bank notes and currency notes satisfy all the requirements of promissory notes, they are themselves money and legal tender for the amount represented by them, and hence excluded from the purview of the Act. Bank notes differ from currency notes in that they are not issued by the Government & sec.26 of the Paper Currency Act, 1923, prohibits the issue of these notes in the country, and only RBI has the right to issue bank notes and also has the right to issue currency notes for a period fixed by the Central Government. All provisions which apply to bank notes would also apply to currency notes.

Parties to a promissory note

There are in general two parties to a promissory note - the maker (i.e. the one who acknowledges this indebtedness and expressly promises to pay) and the 'payee' (ice the person to whom such payment is to be made). Where a promissory note is made by 2 or more persons we may have 2 or more 'makers' and if it is made to 2 or more persons than we have 'joint payees'. The rights and liabilities which attach to such maker and payee will be dealt with in a later chapter.

Bill of exchange

A bill of exchange has been defined by sec.5 as, "an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument. A promise or order to pay is not "conditional" within the meaning of this section and section 4, by reason of the time for payment of the amount or any installment thereof being expressed to be on the lapse of a certain period after the occurence of a specified event which, according to the ordinary expectation of mankind is certain to happen, although the time of its happening may be uncertain.

The sum payable may be "certain" within the meaning of this section and section 4, although it includes future interest or is payable at any indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an installment, the balance unpaid shall become due. The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person" within the meaning of this section and section 4, although he is misnamed or designated by designation only".

The above definition is the result of a number of English decisions on the topic. A brief of exchange (or BOE) is sometimes called as a 'draft' drawn by a bank on another or by itself on one of its other branches.

The essential requirements of a BOE may be said to be as follows:

1. Written: An oral BOE can neither be made nor if made will it be valid. A BOE being a negotiable instrument should be in writing and executed by the maker.

2. Order to pay: A BOE must always contain an order to pay. In whatever form the order be framed it should be imperative. Thus in *Ruff v. Webb*[(1974) 5 RR 773], the plaintiff a servant of the defendant, was dismissed from his services by the latter. For the wages due to him the defendant gave him a draft in the following words : "Mr. Nelson will much oblige Mr. Webb by paying to J.Ruff or order, twenty guineas on his account". It was held that the "paper ... was a bill of exchange, that it was an order by one person to another to pay money to the plaintiff or his order. It is quite apparent that the language of the draft was very polite, but it has been said that "the introduction of the terms of gratitude does not destroy the promise (or order) to pay". But where no such order to pay can be ascertained from the language it will not be a BOE. Thus, in *Little v. Slackford*[(1882)31 RR 726], the defendant issued a paper to the plaintiff containing the following words : "Mr. Little, Please to let the bearer have seven pounds, and to place them to my account, and you will oblige. Yours humble servant, R. Stackford. It was held that, "the paper does not purport to be a demand draft made by a party having a right to call on the other to pay. The fair meaning is you will oblige by doing it".

3. Unconditional: The order to pay on the BOE must be unconditional i.e., the payment must be made under all circumstances and it should not be dependent on any contingency. The reason for this was explained in *Carlos v. Fancourt*[(1794)5 TR 482] as, "it would perplex the commercial transactions of mankind and diminish and narrow their credit and negotiability if paper securities of this kind were issued

out into the world, encumbered with conditions and contingencies, and if the person to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to certainty. And hence the general rule is that the bill of exchange (or note) always implies a personal general credit not limited to, or appreciable to particular circumstances and events which cannot be known to the holder in the general course of negotiation." Thus a BOE payable only on contingency is *void ab initio,* but such contingency or defect should be apparent on the face of it. In such cases, even the happening of the contingency cannot make the BOE valid. A BOE is riot based on contingency merely because there is an uncertainty regarding the person having the right to enforce it under particular circumstances.

4. Payment of money: The BOE must incorporate an order to pay and the payment should only be in the form of money i.e. payment in cash not in kind. The same condition also applies to a promissory note. Further, the amount to be paid must be certain i.e. you cannot have a BOE with words like pay "any amount" or "little amount" or "a certain amount" etc. The exact amount to be paid must be stated clearly. In *Smith v. Nightingale*[(1818)20 RR 694], a promissory note was made in the following words : "I promise to pay to JE ... the sum of £65 with lawful interest for the same, three months after the date, and also all other sums which may be due to him". It was held that "the instrument was too indefinite to be considered a promissory note. It contained a promise to a pay interest for a sum not specified and not otherwise ascertained than by reference to the defendant's books." It is to be noted that wherever in an instrument the rate of interest is specifically mentioned, the interest is to be calculated at that rate from the due date to date of debt realisation. But where the interest rate is not specified in the instrument it is to be calculated at the rate of 18% according to sec.80 of the Act.

5. Time of payment: The BOE must indicate clearly the time of payment. Thus in *Williamson v. Rider*[(1962)2 All ER 268 (CA)] a promise to pay 'on or before' December 31, 1956 was held not to be a promissory note payable at a fixed or determinable future time within the requirement of section 11 of the Bills of Exchange Act because the option to pay at an earlier date creates an uncertainty or contingency in the time of payment'.

6. Parties: The names or identities of the parties to the BOE must be certain. A BOE showing ambiguity regarding the identity of the persons concerned will not be a valid BOE.

7. Stamp duty: A BOE should be affixed with stamps for required amount as Specified under the Stamp Act, 1899. In *Bank of Bengal v. Radhakissen*[3 M.I.A. 19] it was held that 'an instrument which is bad as a bill, note or cheque by reason of the inclusion thereon of a condition or any other stipulation may be used as evidence of an agreement, if properly stamped".

BOE it should contain (i) sum to be paid in cahs; (ii) unconditional order to pay ; (iii) maker or drawer should be certain and (iv) payee and draweee should be certain.

<u>Distinction of a BOE from a promissory note</u>

Though both are negotiable instruments, there exists three basic distinctions between the two viz

(i) In a promissory note there are only two parties the maker and the payee; whereas in a BOE there are three parties viz the drawer, drawee and payee.

(ii) A promissory note acknowledges an indebtedness of the maker to the payee; whereas no such acknowledgement of debt is there in a BOE.

(iii) In a promissory note the maker or executant makes a promise to repay the debt himsef; where as in a BOE the executant directs a third party to pay.

Parties to a BOE

As mentioned earlier, there are three parties to a bill of exchange, namely, the 'maker' or executant of the bill, the 'drawer' who is ordered to pay and the 'payee' to whom the money is to be paid on order. The rights and liabilities attaching to each of these parties will be discussed in detail in a later chapter.

CHEQUES

Section 6 of the Act defines cheque as " a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand".A cheque being a kind of BOE it must fulfill all the requirements of a BOE. Thus in *Bevins v. London & Smith Western BankLtd*[(1900)1 KB 270], acompany issued a cheque on its bankers with a receipt appended to it, and ordering the banker to make the payment "provided the receipt form at foot hereof is duly signed, stamped, and dated". The cheque was held to be invalid because its payment was made conditional upon signature of the receipt. .

A cheque is always drawn on a banker. The question now arises, who is a banker ? This question was answered in *R. Pillai v. S. Ayyar*[(1920)43 Mad 816]. Here, a District Board had its funds in the Government Treasury and used to withdraw money from that fund by issue of orders in form of cheques. One such unconditional order being issued the question arose as to whether it was a cheque. It was held that, 'Treasury is not a bank. A banker is one who in the ordinary course of his business honours cheques drawn upon him by persons from and for whom he receives money on current accounts". Thus, the order was held not to be a cheque u/sec.6 but a BOE u/sec.5 of the Act.

Distinction between cheque and BOE:In *Ram Charun Mullick v. Luchmee Chand Radakissen* [14 ER 215] it was observed, "a cheque is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance, in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of graceCiting this passage in *Bank of Baroda v. Punjab National Bank* [(1944) AC 177] Lord Wright made a further contribution to the distinction between cheques and BOEs and observed : "In addition it is to be noted, a cheque is presented for payment, whereas a bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance, this is not so in the case of a cheque. These essential differences (besides others) are sufficient to explain why in practice cheques are not accepted. Acceptance is not necessary to create liability to pay as between the drawer and the drawee bank. The liability depends on contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular if the customer has sufficient funds or credit available with the bank, the bank is bound either to pay a cheque or to dishonour it at once... It is different in case of an ordinary bill; the drawee is under no liability on the instrument until he accepts; his liability on the bill depends upon the acceptance of it".

The distinction between a cheque and BOE can be briefly stated as below:

a) A cheque is always drawn on a bank or banker; whereas a BOE is made to a drawer who is merely a definite or identifiable person.

b) A cheque is payable immediately on demand without days of grace; whereas a BOE may be payable on demand or a future fixed date or at sight or at presentment etc.

c) A cheque requires no acceptance apart from prompt payment; whereas a BOE in the first instance has to be presented for acceptance.

d) There is no privity of contract between the banker and the payee and so the later cannot sue the banker on his dishonouring the cheque without sufficient cause; whereas since a drawer of BOE accepts the liability to pay he can be sued by the payee if he dishonours the BOE i.e. there is a privity of contract between the drawer and payee.

e) A cheque is supposed to be drawn upon funds in the hands of the banker belonging to the maker i.e. if there are no funds the cheque cannot be honoured.

f) A cheque is not noted or protested for dishonour unlike a BOE.

g) In case of crossed cheques a protection is given to the banker which is unique only to cheques. This will be discussed later.

Parties to a Cheque

Like in other BOEs a cheque also involves three parties namely; the executant or maker of the cheque; the drawee' who is always the bank and the 'payee' in whose favour the cheque is made.

HUNDIS

As observed earlier though the Act itself recognizes only three kinds of negotiable instruments by name, it also accepts certain instruments having wide-spread commercial usage. One such instrument having a popular usage in India is the 'Hundi'. The word hundi is derived from the Sanskrit word 'hund' meaning 'to collect' and explains clearly the purpose for which hundis are use. Hundis have been in use in India long before the advent of the Act, and a lot of usages attach to them - the usages themselves differing from locality to locality. Thus for examples in Murshidabad interest on hundis drawn payable so many days after sight is allowed [*Dhanput Singh v. Maharaja Jugut Indur*, 4 W.R. 85]; in Dacca the usage is for the gurnastas (i.e. munshis or clerks) to draw hundis on their principals without thereby incurring liability for the defection of their principals i.e. the gurnastas themselves incur no liability [*Muree Mohan v. Krishna Mohun*, 17 W.R. 442]; among the shroffs of Bombay the usage was that a shroff to whom a hundi was sent for collection by his customer gave him credit for the amount and then he acquired all the rights of a holder in due course (*Sugan Chand v. Mulchand*, 1 Bom 23]; in Punjab there is a usage that where a hundi is dishonoured and returned,and a conditional payment is made,the hundi is to be presented again within four days or else the amount should be refunded [*Surajaml v. Kashiprasad*, 1933 Mag 389]; etc,. The names in the brackets indicate the cases where these customs have been upheld by the courts as binding on the parties. A hundi when paid and cancelled is called a "Khokha".

Kinds of Hundis

The very fact that usages attaching to a hundi differ from place to place proves that there are various kinds of hundis each having its own specific characteristics, i.e. some may be payable on sight; some after the elapse of a definite period; some are payable only to a specific person; etc. We will now discuss these various kinds of hundis in brief.

(i) Darshini hundi - This is a hundi which is payable on 'darshan' i.e. at sight or presentment.

(ii) Mudati or Thavani hundis - These are hundis which become payable at a certain period after date or sight.

(iii) Shah Jogi hundi - This is a hundi payable only to a respectable holder, i.e. a man of worth and substance known in the bazar [*Lall Mai v Kesho Das*, 26 All 493]. There has been a division of opinion on the question, whether a shah jogi hundi is a negotiable instrument ? Some courts held that it is not a negotiable instrument since the payee is an indeterminate person; whereas some other courts held that the word 'shah' is not indeterminate and vague, and that it may be treated as payable to the drawee or to several payees.

In *Daulatram v. Bulakidas* [(1861) 6 B.H.C.R.] the Bombay High Court held that at its inception it was a hundi that passes from hand to hand by delivery and requires no indorsement. The same Court in *Champaklal v. Keshrichand* [50 Bom 765] held that, the hundi may pass from hand to hand till it reaches a Shah who, after making due enquiries to secure himelf presents it to the drawee for acceptance or payment; then its negotiability ceases. The drawee before paying has to satisfy himself that the person demanding payment is a Shah, for the payment is made only on the responsibility of that person [*Ganeshdas v. Lachminarayan*, 18Bomb570], A minor may be the holder of a Shah Jogi hundi and a payment to him will certainly be recognised [*Ramprasad v. Shrinivas*, 1925 Bom 527] Though a Shah Jogi hundi does not technically fall within the definition of a negotiable instrument under the Act, it is nevertheless a negotiable instrument. The Act does not apply to it though many of the provisions which apply to it are similar to that of provisions applicable to those of instruments covered under the Act, though that is because of the mercantile usage and not by virtue of a Act.

(iv) Jokhxni hundi - This is a hundi drawn against the goods shipped on the vessel named in the hundi by the consignor on the consignee of the goods. The drawer of the hundi is enabled to get funds by negotiating the hundi and at the same time effect an insurance upon the goods against loss. The buyer of the hundi is the insurer who pays the insurance money down and is entitled to recover the money if the vessel arrives safe in port. If the ship is lost then he does not have a remedy against either the drawer or drawee, and he has to bear the entire loss, while the drawer & drawee themselves are protected. This kind of transaction though similar to an ordinary insurance policy differs from it in the sense that the position of insurer and insured is reversed and the insured money is paid before hand. The term "Jokhmi" itself means "against risk" or conditional. This custom however imposes no liability on the drawee to take up the hundi, even if he takes possession of the goods consigned to him. The drawer also escapes liability if the goods against which the hundi is drawn are totally lost [*Jadovvji Gopal v. Jetha Shamji*, 4 Bom 333].

(v) Nam Jog Hundi - In contradistintion to Shah Jogi Hundi, there is what is known as the Nam Jog Hundi, that is a hundi payabele to the party named in the bill or his order. The bill may or may not be accompanied by a descriptive role of the party in whose name it is granted. When there is a descriptive role, it cannot be indorsed or transferred; but when there is no such description, it can be indorsed. The alteration of a Nam Jog into a Shah Jogi hundi is a material alteration and renders the instrument void.

(vi) Dhani Jog Hundi - Dhani Jog hundi is one payable tc Dhani or owner, i.e., a person who purchases it. It is payable to any owner, holder or bearer. It is a negotiable instrument pav able to bearer. The word "dhani" is not equivalent to 'bearer' in ::e sense it is used in the Negotiable Instruments Act. A mere bearer of a Dhani Jog hundi is not as such entitled to pa\meat It is not a negotiable instrument within the meaning of this Act. Calcutta by Ramkumar from whom please accept salutations. To wit. Pay at once on receipt of this Hundi to Dhani Jog according to the custom of hundis.

(vii) Jowabi Hundi - The transaction known by the name of Jowabi hundi is as follows A person desirous of making a remittance writes to the payee and delivers the letter to a banker who either indorses it on to any of his correspondents near the payee's place of residence or negotiates its transfer. On its arrival, the letter is forwarded to the payee who attends and gives his receipt in the form of an answer to the letter which is forwarded by the same channel to the drawer of the order. This, it will be noticed, is more in the nature of a letter of recommendation than a bill of exchange. The banker may cancel the order of payment by advice to his correspondent at any time before payment, in case the so-called drawer fails in his promise to provide the banker with the amount of thd order.

(viii) Zickri Chit - According to the usage of shroffs in the case of Marwari hundis, a hundi may be accepted for honour under what is called Zickri chit. This is a letter of protection given to a holder by some prior party to the hundi to be used by him in case the hundi is not accepted. It is generally addressed to a

person in the town where the bill is payable, asking him to take up the hundi in case of dishonour. Such usage is even now recognised by the Court, notwithstanding the fact that the provision of sections 108 and 109 of the Act are not complied

Inland and foreign instruments

Sec. 11 of the Act which defines inland instrument states as follows:

"A promissory note, bill of exchange or cheque drawn or made in India and made payable in or drawn upon any person resident in India shall be deemed to be an inland instrument".

For a negotiable instrument to be treated as an inland instrument it should fulfill one of the following two requirements, viz

(i) it must be drawn and made payable in India; or

(ii) it must be drawn in India upon some person resident in India, even though it is made payable in a foreign country. An inland instrument does not lose its character merely because it is either indorsed by a foreign national or in a foreign country because it is in circulation in a foreign country.

Sec. 12 of the Act dealing with foreign instruments states as under

"Any such instrument not so drawn, made or made payable shall be deemed to be a foreign instrument".

A foreign bill may be any one of the following viz :

i) It is drawn outside India and is made payable in or drawn upon any person resident in a country other than India;

ii) A bill drawn outside India and made payable in or drawn upon any person resident in India;

iii) Bills drawn in India upon persons resident outside India and made payable outside India.

Foreign bills are generally drawn in a set of three or in parts numbered and containing a refrence to the other parts (see the specimen foreign bill given on pg. 23). The reason for the this is to reduce or remove the danger of loss, especially when such bills are to be sent to foreign or overseas countries.

An important question which now arises is - what is meant by 'resident' in India? Although the term 'resident' has been defined both in the Income Tax Act and the Civil Procedure Code, such definitions would be extremely wide for application of these sections. So for our purpose, resident would mean or suggest a permanency of staying at a place (even if not domiciled) as opposed to a temporary stay or a visit to the country. In case of companies and firms 'residence' means 'place of business.'

Distinction between inland and foreign bills

The major difference between these two bills is that in case of inland instruments 'protesting for dishonour' is optional', whereas foreign bills must be protested if the law of the place where it is drawn so requires. Secondly, the liabilities of a drawer of a foreign BOE or maker of foreign promissory note are essentially regulated by the law of the land where they are drawn and made; and merely because such note or BOE is negotiable in its own country will not automatically make it negotiable in another country, i.e., such negotiability will be governed by the usages of such other country.

Inchoate Instruments

Section 20 of the Act deals with inchoate or blank instruments arid states that, "where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instruments, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder".

This section imposes a liability upon a person executing a blank or incomplete negotiable instrument and hence shall be strictly construed. The object and intent of this section was laid down in *Glenie v. Bruce* Smith by Fletcher Molton, L.J., as "The logical order of operations with regard to a bill, is, no doubt, that the bill should be first filled up, then that it should be signed by the drawer, then that it should be accepted, then it should be negotiated, and then that it should be indorsed by the person who become successively holders; but it is common knowledge that parties very often vary, in a most substantial manner. The logical order of those proceedings, and section 20 of the Bills of Exchange Act is intended to deal with those cases". Very often in the commercial world, persons having mercantile credit ie„ good business repute, lend it to others by signing their names on blank papers which is afterwards filled up as a BOE or promissory note over their signatures making them drawers or makers.

In *Montague v. Perkins* [(1853)22 LJ (C.P) 187] it was observed that, "By such signatures, they intend to bind themselves as drawers or makers, acceptors or indorsers, and the presence of their names on the blank paper purports to be an authority granted to the holder to fill up the blanks as a complete negotiable instrument, and when so filled up, such parties become as absolutely bound in the capacity in which they signed, as if they had signed them after the bills were written out, but till the blanks are so filled up the instrument is not a valid one and no action is maintainable on it".

The capacity in which a party to a blank bill becomesbound (i.e. whether as drawer or as indorser etc) depends on the mode and place of signature. For example, if a person signs his name beneath the word "accepted" or simply writes his name across the face of the bill he becomes liable as an acceptor; but if he signs his name across the back of the blank paper duly stamped and delivered he becomes liable as indorser. But in no case will such a person become liable, till he i.e. the person signing delivers the paper to another.

A person in possession of such a blank bill has a prima facie authority to fill up the instrument and in this manner he acts as an agent of the person delivering the blank instrument. So if the authority of the agent comes to an end before the instrument is filled, sec.20 becomes inapplicable and no rights attach to such an instrument except to a holder in due course.

Sec.20 does not give the time within which such an instrument should be filled up. The corresponding sec.20 in Bills of Exchange Act in England states that the instrument should be filled up within a reasonable time, and what is a reasonable time is a question of fact varying from case to case.

The authority to fill up the blanks is not limited to the person in possession of the instrument but also extends to those claiming under him. But this authority does not include the right to stitch up several signed stamped papers together so as to make one single instrument [*Gokuldas v. Radhakisan*, 54 I. C.3], nor can a person insert a particular place of payment before the acceptance [*Calvent v. Baker*, 150 E.R 1492], since this would amount to material alteration of the instrument. Thus, whenever a holder exceeds his authority he can derive no benefit from that instrument. Under the proviso to the section the holder in such a case is entitled to recover the sum which was intended to be paid orginally.

In *Hatch v. Searles*[(1854) 2 Sm. & G. 147] it was observed that, "as to a bonafide holder, the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance unless he can be fastened with notice of that imperfection. If the holder has notice of the imperfection, he can be in no better situation than the person who took it in blank as to any right against the acceptor or indorser who gave it in blank". Orly bonafide owners are protected under the section, and so if the holder of the instrument has taken it for betting transactions and realised the amount on it, the maker is entitled to recover the amount [*Paine v. Bevan*, (1914)19 Com.Cas 234],

Parties to promissory note

A promissory note involves only two parties, viz; the maker and the payee.

Maker ; The person who executes or makes the promissory note is called as the 'maker'. It is of paramount importance that the note should clearly indentify the person entering into the contract. All persons whose names appear as makers are primarily and unconditionally liable provided the note clearly shows an unconditional promise to pay the debt or the amount. Further the maker should put his signature across the bill. Though the Act itself does not define the word 'sign', sec.3(56) of the General Clauses Act, 1897 defines it as: "sign" with its grammatical variations and cognate expressions, shall with reference to a person who is unable to write his name, inlcude "mark" with its grammatical variations and cognate expressions. Signature may thus be briefly defined as 'the writing of his name or putting his mark across a bill by a person in order to authenticate and accept the contract specified in the bill'.

Thus by signing the pro note the maker not only executes the note but also accepts to be bound by its contents. Thus in *Block v. Bell*[(1831)1 Mor. & Rob. 149], an instrument in the form of a *promissory note without* any signature of *the* defendant, but addressed to him in the margin and 'accepted' by him was allowed to be declared as a note on the ground that the signature of the defendant though in the form of an acceptance, was an adoption of the promise contained in the instrument.

Wfieu does the liability arise *?*

A makers liability arises when:

a) lie signs the promissory note and'

b) unconditionally promises to pay Extent of liability

A maker is liable to pay only that amount which accrues to him as per the terms of the promissory note. His liability is not dependant on presentment to any other party on payment or otherwise unless such condition is expressed in the note itself.

Payee : The person in whose favour the promissory note is made i.e. the person to whom the money is to be paid is known as the payee. Just as the maker of the note has to be certain, so also should the payee be. Thus in *Obermeyer v. Barmann*[1911 T.P.D. 79] an instrument containing a promise to pay a certain sum into the bank but not naming the payee, was held out to be a promissory note. The payee may be either specified by name or designation [if by the use of the designation identification can clearly be made] or the promissory note max be made payable to a 'bearer' i.e. the person is in possession of the note lawfully and presents it for payment. If neither of these conditions is satisfied then the note is not a promissory note.

Under sec.4, a note may be made payable to alternative payees i.e. pay to 'AB or CD'. In such a case either AB or CD car present the note for payment. This is a good way of limiting your liability to pay to only the persons mentioned in the note and to no other.

A note may be issued to more than one person making them joint payees i.e., 'payable to A,B, C or their order or the majority ofthem'. Such a note may be sued upon by all of them. Where the maker executes a note in favour of a fictitious person then the note will be treated as 'payable to bearer' and a person in lawful possession can present it for payment. So also a promissory note with a blank for the payee's name may be filled up by a bonafide holder in his favour and he can claim on the note.

Rights of a payee

1. Where the note is a promise to pay, the payee can present the note for payment. If the maker defaults on the payment then the payee has the right to sue the maker on the note.
2. Where the note is in the form of 'payable to AB or order', the payee can:
   - present the note for payment.
   - sue the maker in case of default
   - indorse the note for negotiation an deliver it to the holder.

<u>Parties to bill of exchange or cheque</u>

Both a bill of exchange and a cheque have three parties to them, viz ; the drawer, the drawee and the payee.

Drawer : Drawer .is the maker of the BOE i.e. he is the person who orders a third person or promises to pay money to another.

Liability of a drawer

Section 30 of the Act deals with the liability of the drawer and states that, "The drawer of a bill of exchange or cheque is bound case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has n given to, or received by, the drawer as hereinafter vided" though the section itself is simply worded it has resulted in a of confusion especially on the interpretation of the term honour'. This is because, a BOE may be 'dishonoured by non-acceptance' (sec.91) or it may bedishonoured by non-payment' (sec.92).

It is only in the later cases that sec.93 viding for notice to the drawer comes into play. So the estion arises which kind of dishonour has been contemplated this section, in *Jagjivan v. Ranchoddas*[AIR 1954 SC 4] the Supreme Court laid down the law as, "In a bill payable after sight, there are two distinct stages firstly when it is presented for acceptance and later when it is presented for payment, section 6; deals with the later. As observed in *Rama Raviji Jambakar v. Pralhaddas Subkaran*[20 Bom 133], "presentment for .acceptance must always and in every case precede presentment for payment. But when the bill is payable on demand both the ges synchronise, and there is only one presentment which is th for acceptance and for payment. When the bill is paid, it is really dishonoured for non-acceptance: The liability of the drawer can thus be studied under the following situations, viz:

i. Where the bill is payable on sight or demandIf such a bill is not paid by the drawee when it is presented then, the drawer becomes immediately liable to pay the full amount to the payee.

ii. Where the bill is payable a certain period after sight or dateIf such a bill has not been accepted by the drawee, then the drawer becomes liable to compensate the payee provided he has presented the bill for acceptance within a reasonable time as required u/sec.61 [*Miller v. The National Bank of India*, 19 Cal. 146]

iii. Where the bill is payable on or after a fixed date

If the payee presents the bill for acceptance before such a fixed cate and the drawee refuses to accept it, it cannot be said that the bill has been dishonoured u/sec 91. The position under sec.55 (l) of the English Bills of Exchange Act is somewhat Afferent in these situations. The section provides that, 'the crawer ofa bill by drawing it is said to contract, among other things, that it shall be accepted by the drawee if presented for acceptance and that if it be dishonoured by any refusal on the cart of the drawee, he will compensate the holder or the other "arty compelled to pay it, on requisite proceedings on dishonour being taken'.

In Ram *Ravji's Jambakar's case*The Bombay High Court observed as follows : "the several sections in chapter sic)61 relating to presentment for payment appear to us to pre-suppose that the bill has not been already dishonoured by non- acceptance. When it is dishonoured by non-payment the provisions of Chapter VIII come into play. It is true that there is no such explicit declaration of the law upon the subject in the

Indian Act as in section 43, clause (2) of the English Act. But the whole scope and tenor of chapter VIII of the Indian Act appear to contemplate the same result as is there declared to follow from non-acceptance".

The position in these cases appears to be as follows :

(a) Even if the drawee refuses to accept the bill because it was presented before the due date, the payee can treat it as 'dishonoured for non payment' and claim compensation from the drawee after giving due notice to him. The advantage here is he gets the amount much earlier than what he would have done ordinarily.

(b) The payee may elect to maintain the status quo, wait till the due date, present the bill to the drawee for acceptance and if the drawee again refuses to honour it, then, claim compensation from the drawer after giving him a due notice. But in such a case he does not get a fresh cause of action on non-payment on the due date. The'cause of action remains the same ie "dishonoured for non payment".

When does the liability arise?

The liability of a drawer does not arise till he has been given a notice of the dishonour by the drawee. The purpose of notice is to make him aware of the facts. The liability of the drawer is similar to that of a principal debtor under an implied contract of indemnity. He does not undertake to fulfil the original contract but only to compensate for the loss or breach, on condition that the bill is dishonoured and he is informed of that fact. Thus in *Baijnath v. Ramkumar* [AIR 1975 Cal 286] where a hundi was stolen in transit and presented to the drawee, who paid it without detecting the forgery of indorsement it was held that the drawer's liability had been discharged and he was no longer liable. Giving of notice has been treated as so essential that any laches in giving of it releases the drawer from his liability, and is necessary in all cases except to those falling under the exceptions given in sec.98 of the Act.

In general the holder is required to give the notice within a reasonable time, but if he is unable to do so due to some reason or fails to do so then, he may take advantage of any notice of dishonour received by the drawer from any other party liable on the instrument. That means that if the drawer receives notice of dishonour from a stranger to the instrument, the drawee cannot take advantage of that fact.

Liability of drawer of a cheque

The holder of a cheque has no remedy against the drawer, till he has presented the cheque to the drawee and been refused payment on it. A cheque is presumed to be paid out of the funds deposited in the drawer's account, so he should be immediately informed of the dishonour of the cheque so that he can make inquiries

about the state of funds in his account and secure his funds. Just as in case of other BOEs, a cheque should be presented within a reasonable time (the maximum time within which it can be encashed is 6 months from the date of its making) and the drawer should be informed immediately on its dishonour.

The difference in liability of the drawer of aBOEs and of a cheque is that, in the former case if the BOE is not presented within a reasonable time or the drawer is not informed of the dishonour of the bill he is discharged from his liability but in case of cheques the drawer is not discharged from his liability in such a case unless he can prove that he has suffered damage due to non presentment or want of notice of dishonour.

Contract to contrary

The drawer's liability may be made subject to the terms of the contract i.e. he can make stipulations in the contract negating or limiting his own liability, for example, by use of words 'sans recourse' or 'without recourse to me'; or if he is the executor then by stipulating that 'payment would be out of the assets of the deceased' etc. Similarly he may also waive away the duties which the holder owes him, as for example, the notice of dishonour. But where there is no evidence of such contractual limitations or stipulations, the drawer would be deemed liable to the fullest extent under the Act, and the right of the holder against the drawer will not be lost despite the loss of any collateral security that may have been given to support the contract.

Drawee : Drawee is the person who is ordered by the drawer to pay a specified amount to a third person or on his order. According to sec.33, only a drawee can be an acceptor of a BOE except in case of need or acceptance for honour. What does this term acceptor mean ? Every BOE has to be first presented by the holder to the drawee who may agree to be bound by the BOE. Once he accepts to be bound by the BOE, you say that the bill has been honoured by acceptance. Next comes the presenting of the bill for payment and the holder can claim payment only from the person who has agreed to be bound by it. But if the person to whom the bill has been presented for acceptance, the holder can after giving notice to the drawer claim compensation from him for dishonour of the bill. In case of cheques, there is no presentment for acceptance, there is only a presentment for payment, and if the drawee refuses payment on the cheque - the holder can claim compensation from the drawer for dishonour of cheque.

Liability of a drawee

Section 30 only makes the drawer liable in case of dishonour and does not speak about the liability of the drawee. In a suit for compensation filed by the holder against the drawer, the drawee need not even be made a party to the suit. The drawee's liability can be studied under the following two situations viz ;

a) When the drawee refuses to accept the bill

In such a case no liability attaches to the drawee since the drawee becomes liable only when he accepts the BOE and not before. The holder in such cases can only sue the drawer for compensation.

b) When the drawee accepts to honour the bill, but later refuses to pay when it is presented for payment

In such situations, the holder has an option to sue either the drawer or the drawee or both of them for the bill amount, either in the same suit or in separate suits [*Basant v. Kolahal*, 1 All 392], and the drawer himself is not absolved of his responsibility merely because of a limitation bar against the acceptor [*Ramaswamy v. Sundararajam*, 26 Mad 239] or because the holder has obtained a decree against the drawee which has not been satisfied. The primary liability on dishonour of a BOE rests with the drawer and he cannot escape liability because the holder has chosen to make the drawee liable. The period of limitation for such suits is 3 years and the period begins to run from the time of refusal to accept or refusal to pay.

Liability of drawee of a cheque

The drawee in case of a cheque is always the bank. Section 33 dealing with bank's liability in case it dishonours a cheques states as follows :

"The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required to do so, and in default of such payment, must compensate the drawer for any loss or damage caused by such default".

Thus for a banker's liability to arise the following conditions must be satisfied, viz :

i) The cheque must have been properly made.

ii) It must have been duly presented within a reasonable time.

iii) There must be sufficient funds in the drawer's account to cover the cheque amount.

iv) The banker must have refused to honour the cheque without a reasonable or just cause.

If all these conditions are satisfied then the bank's liability is two folds, viz :

a) The holder of the cheque can sue him either separately or along with the drawer, for the cheque amount with interest, and

b) The drawer is entitled to sue the bank for damages in lieu of the damage or loss suffered by him. The quantum of damages awarded in these cases is decided on the principle that, lesser the amount or value of the dishonoured cheque greater is the damages awarded; greater the value of the cheque, lesser are the damages.

The reason for holding the banker liable is because of the peculiar relationships which exists between banker and customer, as was well explained by Lord Atkin in *Joachimson v. Swiss Bank Corporation* [(1921)3 KB 110 (CA)]. He observed as follows

"The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repa;.at the branch of the bank where the account is kept and duri ng banking hours. It includes a promise to repay any part of the amount due, against the written order of the customer addressee to the bank at the branch and as such written order may be outstanding in the ordinary course of business for two or three days, it is a term of contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery. I think it is necessarily a term of contract that the bank is not liable to pay the customer the full amount of his balance at which the current account is kept".

Thus a banker is entitled to refuse a cheque only when, it is not drawn up correctly or it's legal validity is doubtful; irregular or undated or unsigned; or if it is required to be stamped then in case the cheque is unstamped. But wherever the cheque is properly drawn andpresented at the appropriate place during appropriate time being, the banker is honour bound to accept the cheque for payment, else he becomes guilty of a breach of contract between himself and the drawer.

Payee: He is the person in whose favour the BOE is in the first instance made, i.e., he is the person to whom a certain amount of money is to be paid by the drawee when so ordered by the drawer. The bill may be made payable to the payee or on his order, or it might be payable on sight. When the bill is payable 'or

his order' then the payee may indorse the bill in favour of another person and once he so indorses the bill he ceases to be the payee. In case the bill is 'payable on sight' the bearer of the bill in lawful possession becomes the payee. As mentioned earlier all the parties to the BOE must-be clearly identifiable - any vagueness or ambiguity in the description of the parties and the bill becomes invalid.

Rights of a payee

(1) A payee has the right to receive money on the bill or cheque either on presentment or at the fixed time (depending on the wordings of the bill) provided that;

a) he presents the bill in the proper manner, and

b) within a reasonable time of making of the bill.

(2) He has a right to negotiate the bill further by indorsement, unless the right is curtailed by specific stipulations made by the drawer.

(3) He has the right to sue the drawer for compensation if the bill has been dishonoured for non-acceptance.

(4) He has the right to sue the drawer or the drawee or both for compensation if the drawee refuses to honour the bill by payment, after having accepted to do so.

Holder and Holder in due Course

Section 8 defines the holder of a negotiable instrument as 'any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto'.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

The first holder of an instrument is the 'payee' of that instrument and he is obviously entitled to be in possession of it. The payee has two options, viz :

a) he can himself present it to the drawee or maker for payment; or

b) he can transfer the instrument to a third person in satisfaction of his own debt. Such a transfer can be done either by ;

(i) simple delivery in case the instrument is payable to the bearer; or

(ii) by indorsement and delivery if the instrument is payable to order.

When the payee so transfers the instrument he is said to have 'negotiated' and the person to whom the instrument is delivered becomes the holder of it. As per sec. 14, 'when an instrument is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated'. Section 2 of the English Bills of Exchange Act provides that, "hob' means the payee or indorsee of a bill or note who is in possession of it or the bearer thereof". The Indian definition given u/sec.8 is similar to this definition except for the use of the phrase "entitled in his own name". This phrase originally assumed significance because of benami transactions and its importance was highlighted in the case of *Sarjio Prasad v. Rampayari Debi*[AIR 1950 Pat 493]. Here, a sum of Rs. 2,459 was advanced by the plaintiff under a hand note, which was not executed in his name but in the name of one X who was the benaminder. On maturity of the note, the plaintiff sued the defendant for recovery of the amount. The Court rejecting his claim observed that as he was not entitled to the possession of the note 'in his own name' he was not the holder.

But in the present day context the significance is somewhat lost because of Benami Transactions Prohibition Act making benami transactions of any kind illegal.

To summarise a holdee is a person who ;

a) is the bearer of the note or bill; or

b) is the indorsee under the note or bill.

A holder has the following rights-:

i) To present the note or bill for payment

ii) To negotiate the bill by delivery or indorsement unless his right to do so is restricted.

iii) To claim compensation from the drawer in case the bill or note is dishonoured by non-acceptance.

iv) To sue either the drawer or the drawee or both in case the bill is dishonoured by non-payment after the drawee's acceptance of it.

Holder in due course

According to sec.9, holder in due course means "any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title".

Thus for a person to be considered as a holder in due course the following conditions will have to be satisfied viz :

(i) Consideration

Every negotiable instrument consists of a contract between the parties and should therefore be supported by real and valuable consideration as defined under sec.^d) of the Contract Act. A person in possession of a bi! or note without having given any consideration for it cannot enforce it unless the lack of consideration falls under the exceptions given under sec. 25 of Contract Act. For easy negotiability of these instruments the doctrine of consideration has been simplified in the following manner, viz ;

a) Consideration is always presumed to have been given unless proved otherwise [*Talbot v. Van Boris*, (1911)1 KB 854].

b) It is immaterial in case of negotiable instruments to ascertain as to where or from whom the consideration has moved - what is essential is that there should be a consideration.

c) Past consideration is treated as good consideration [*J.M.S. Punto v. A.C. Rodrigues*, AIR 1976 Goa 8]

d) Once the holder acquires the instrument for good consideration the liable party will not be allowed to plead any defect and want of consideration at any earlier stage.

(ii) Before Maturity

It is essential that the holder must have acquired the instrument before its maturity date before he can be treated as holder in due course. In *Dawn v. Hailing*[(1825)KB 107 ER 1082] it was held that, "if a bill or a note or cheque be taken after it is due the person taking it takes at his peril. He can have no better title to it than the party from whom he takes it, and, therefore, cannot recover upon it if it turns out that it has been

previously lost or stolen". Section 59 of our Act embodies this principle in the following words, "the holder of a negotiable instrument, who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the right thereon of his transferor".

The question now arises, when does an instrument become mature? An instrument matures in the following situations, vizreasonable time for presenting it for payment has elapsed since its issue". But section 36(3) of the same Act also provides that a BOE "payable on demand" is deemed to be overdue, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time is a question of fact i.e. it would vary from case to case.

(iii) Complete and Regular

For a negotiable instrument to be valid it should be complete and regular in all respects, i.e. it should not contain any patent (easily visible or indentifiable) defects. An instrument may be incomplete because the drawer's name is not there or it is not dated and stamped etc. Similarly an improper indorsement can render the whole instrument irregular [*Arab Bank Ltd v. Ross*, (1952)2 QB 216], but a mere spelling mistake in the indorsee's name will note affect the indorsee and the bill remains valid [*Leonard v. Wilson*, [1834]39 RR 855],

(iv) Good faith

Last but not least is the requirement that the holder should have acted in good faith. The court is required to apply both the subjective and objective test to ascertain whether the holder had acted in good faith, i.e. the court has to find out, (i) whether he had acted honestly ? (subjective test) and (ii) whether he had acted as a reasonable and careful or prudent man would have acted in a similar situation ? (objective test)

Rights and privileges of a holder in due course

1. Presumptions (sec 118) 'Every holder is deemed prima facie to be a holder in due course", i.e. the burden of proving his title does not lie on him, and it is the other party who has to show that the holder has no title to the instrument, or that there is defect in his title. It is only when he establishes the defect that burden of proof shifts to the holder who then has to show he had acquired the bill or note bonafide and in good faith.

2. Privilege against inchoate stamped instruments (sec.20): In *Glenie v. Bruce Smith*[(1908)1 KB 263] it was observed that, "the logical order of operations with regard to a bill is, no doubt, that the bill should be first filled up, then it should be signed by the drawer, then it should be accepted, then it should be negotiated, and then it should be indorsed by the persons who become successively holders; but it is common knowledge that parties very often vary, in a most substantial manner, the logical order of those proceedings, and section 20 is intended to deal with those cases". For the section to come into operation, the defendant must have signed the blank instrument and must have voluntarily parted with it with the intention that it should be filled up and issued as such.

3. Fictitious drawer or payee [sec 42] : The acceptor of a BOE cannot allege as against the holder in due course that the parties to the bill were fictitious, i.e. persons who were either not in existence or if they did exist they were never intended by the drawer to have the payment. But where the drawer intends the payee to have payment then he is not a fictitious payee and the forgery of his signature will affect the validity of the cheque.

Thus in *North & South Wales Bank v. Macbeth* [1908)AC137], W induced M by fraud to draw a cheque payable to K or rder. W obtained the cheque, forged K's indorsement and collected proceeds of the

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cheque through his bankers. The collecting banker was held liable as K's title was derived through forged indorsement. K was not a fictitous payee because the J rawer intended him to receive the payment. The result would have been different if the payee was not a real person or was not intended to have the payment [*Chitton v. Attenborough*, (1897)AC 90],

4. Prior defects (sec.58): The person who is liable to pay on an instrument, can contend that he had lost the instrument or that it was obtained from him by means of an offence.

5. Indorsee from a holder in due course (sec 53): A holder who receives an instrument from a holder in due course gets the rights of the holder in due course, even if he had knowledge of the prior defects, provided he himself was not a party to them.

Indorser

As mentioned earlier any negotiable instrument can be negotiated further by the holder in favour of a third person by the simple method of signing the instrument in favour of a third person and delivering the instrument to him. This process of negotiation is known as indorsement and the person who transfers his right to another is known as the indorser. Section 35 dealing with the liability of an indorser states that, 'In the absence of a contract to the contrary, whoever indorsers and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provide person who transfers his right to another is known as the indorser.

Section 35 dealing with the liability of an indorser states that, "In the absence of a contract to the contrary, whoever indorsers and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided."

Every indorser after dishonour is liable as upon an instrument payable on demand.

This liability of an indorser cannot arise unless the indorser delivers the indorsed instrument to the indorsee, because no contract on the negotiable instrument is complete without such a delivery.

Indorser is estopped from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements (sec. 122). Further he cannot deny that at the time of his indorsement it was a valid and subsisting bill and that he had then a good title and right to indorse. According to sec.88, an indorser is bound by his indorsement notwithstanding any previous alteration of the instrument.

Extent of liability

An indorsers liability does not come into existence till he has been given a due notice of the dishonour of the instrument by the indorsee.. If the indorsee fails to give him a notice, then the indorser should have received a notice from some other person liable on the instrument.

The indorser is liable to not only pay the amount on the bill but also to compensate the holder in case. The instrument has been dishonoured. The quantum of compensation will be determined as per the rules laid down in sec. 117.

Section 35 does not deal with the nature or extent of an indorser's liability on a note payable on demand. In *Hemadri v. Seshama*[AIR 1931 Mad. 113] it was however held that, the holder of a promissory note payable on demand indorsed after dishonour is not entitled to a decree against the indorser (the payee) without giving him a proper notice of dishonour.

Neither the section nor the Act provides for a situation where the indorser indorses an instrument after maturity, and the instrument's not dishonoured. This situation usually arises where the indorser has committed laches in presenting for payment indorsing the instrument before the due date and indorses it only after maturity. The English and American law on this point is very clear and states that, 'such an indorser is liable as if he had indorsed an instrument payable on demand, and his liability is conditional on a presentment for payment and notice of dishonour in the event of non-payment within a reasonable time,[2] It is to be presumed that the same law would apply in India also.

Just as in the case of drawer, the indorser can also limit his liability by having a contract to the contrary. He may either exclude his liability, or limit his liability or make his liability conditional, or he may in exceptional cases even enlarge his liability.

Liability of prior indorsers

According to sec.36, 'every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied'.

The general rule is that 'as between indorsers their liability is in the order in which their names appear on the instrument'. But this rule may be rebutted by adducing evidence to show the real intention of parties. Therefore, a prior indorser may recover from a later one if he can prove that there was an agreement to that effect between them. Similarly, if a second indorser mistakenly puts his name above the name of the first indorser, then he can recover the amount from the first indorser if he is required to pay on the bill. This liability of the prior indorser to the subsequent one continues till the instrument is duly satisfied, i.e. each party pays the subsequent one.

PARTIES

Until now we have been talking of the parties to specific kinds of negotiable instruments, but haven't made any mention as to who actually can be a party to the instrument.

According to sec.26, every person capable of entering into a contract can become a party to the negotiable instrument. He "may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque".

Minor - According to sec. 11 of the Contract Act, 'every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject'.

Obviously therefore a minor or a lunatic cannot be a party to a negotiable instrument so as to be liable on it. But a negotiable instrument does not become void merely because a minor is a party to it. According to sec.26, "a minor may draw, indorse, deliver and negotiate (an) instrument so as to bind all parties except himself', i.e. the minor's rights under the instrument are not affected. The law is same for insane persons.

Corporation - The capacity of a corporation to enter into a contract vide a negotiable instrument, would depend on its memorandum and articles.

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[2] if it is payable on a fixed date or after a fixed time then at the expiry of the time; and

Agent - According to sec.27, a general authority to transact business or to receive payment or discharge debts on behalf of the principal, does not give the agent an automatic right to accept or indorse bills of exchange so as to bind his principal. Further, an authority to draw BOE does not include the power to indorse them. Thus, an agent can bind his principal only in the manner and to the extent he has been authorised. The agent should furthermore make it clear that he is acting in a representative character; else he becomes personally liable unless he can show that the parties induced him to sign in his own name by telling him that only the principal would be liable.

Partner - A partnership firm can be held liable on a negotiable instrument drawn by a partner only when the partner signs the bill in his capacity as a partner and the name of the firm appears on the face of the bill. If a bill is not made or drawn in the name of the firm the other partners cannot be make liable on it [*Rangaraju v. Devichand*, AIR 1945 Mad 439]. The signature of the firm is deemed to be the signature of all its partners be they working or dormant, based on the principle that every partner of a firm is entrusted with a general authority to do all acts beneficial for the firm. Thus in *Lona (KA) v. Dada Haji Ibrahim Hilari & Co.* [AIR 1981 Ker. 86], a promissory note to was executed by one of the two partners of the firm using the words "the promise to pay". The note had been executed on the letterhead containing the full name and description of the firm. It was held that both the firm and the second partner were liable on the pro-note.

Legal representative - According to sec.30, a legal representative of a deceased person, who signs an instrument is his own name, becomes personally liable on it, unless he specifically limits or excludes his liability for examples by use of the words 'the amount to be paid only from the estate of the deceased etc.

Definition of a Cheque

A cheque is defined in Sec 6 of NI Act as under :-

(i) A cheque is a bill of exchange drawn on a specified banker

(ii) Payable on demand

(iii) Drawn on a specified banker

(iv) Electronic image of a truncated cheque is recognized under law. The Information Technology Act, 2002 recognizes (a) digital signatures and (b) electronic transfer as well

A cheque is nothing but a bill of exchange with special features (i) It is always payable on demand (ii) always drawn on a specified banker i.e., the drawee of a cheque is the banker on whom the cheque is drawn. The banker with whom the customer holds his/her account. This drawee bank is called the paying bank. The parties to a cheque are:

Apart from the above three parties, others involved in payment and collection of cheques are :

Endorser. The person who transfers his right to another person *Endorsee:* The person to whom the right is transferred

Different types of cheques

(1) Open Cheque:

A cheque is classified as 'Open' when cash payment is allowed across the counter of the bank.

(2) Bearer Cheque:

A cheque which is payable to any person who holds and presents it for payment at the bank counter is called a 'Bearer cheque'. A bearer cheque can be transferred by mere delivery without any endorsement.

(3) Order Cheque:

An order cheque is a cheque which is payable to a particular person. In case of order cheque, the word 'bearer' might have been cancelled and the word 'order' is written. The payee can transfer an order cheque by endorsement to another person by signing his name on the back of the cheque

Crossing of Chquue

Crossing is an 'instruction' given to the paying banker to pay the amount of the cheque through a banker only and not directly to the person presenting it at the counter. A cheque bearing such an instruction is called a 'crossed cheque'; others without such crossing are 'open cheques' which may be encashed at the counter of the paying banker as well. The crossing on a cheque is intended to ensure that its payment is made to the right payee.

Sections 123 to 131 of the Negotiable Instruments Act contain provisions relating to crossing. According to Section 131-A, these Sections are also applicable in case of drafts. Thus not only cheques but bank drafts also may be crossed.

Cheque crossed generally

Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally, [section 123]

Cheque crossed specially

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker. [section 124].

Payment of cheque crossed generally or specially

Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection. [section 126].

Cheque bearing "not negotiable"

A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have, and shall not be capable of giving, a better title to the cheque than that which the person form whom he took it had. [section 130]. Thus, mere writing words 'Not negotiable' does not mean that the cheque is not transferable. It is still transferable, but the transferee cannot get title better than what transferor had.

"Account Payee" crossing : N.I. Act does not recognize "Account Payee" crossing, but this is prevalent as per practice of banks in India. In view of this, RBI has directed banks that:

(1) Crediting the proceeds of account payee cheques to parties other than that clearly delineated in the instructions of the issuers of the cheques is unauthorized and should not be done in any circumstances.

(2) If any bank credits the account of a constituent who is not the payee named in the cheque without proper mandate of the drawer, it would do so at its own risk and would be responsible for the unauthorized payment. Reserve Bank has also warned that banks which indulge in any deviation from the above instructions would invite severe penal action.

(3) In case of an 'account payee' cheque where a bank is a payee, the payee bank should always ensure that there are clear instructions for disposal of proceeds of the cheques from the drawer of the cheque. If there are no such instructions, the cheque should be returned to the drawer.

(4) However, with a view to mitigating the difficulties faced by the members of co-operative credit societies in collection of account payee cheques, relaxation has been extended in respect of co-operative credit societies. Banks may consider collecting account payee cheques drawn for an amount not exceeding '50,000/- to the account of their customers who are co-operative credit societies, if the payees of such cheques are the constituents of such co-operative credit societies.

Double Crossing

A cheque bearing a special crossing is to be collected through the banker specified therein. It cannot , therefore, be crossed specially again to another banker, i.e., cheque cannot have two special crossings, as the very purpose of the first special crossing is frustrated by the second one.

However, there is one exception to this rule for a specific purpose. If a banker, to whom the cheque is originally specially crossed submits it to another banker for collection as its agent, in such a case the latter crossing must specify that it is acting as agent for the first banker to whom the cheque is specially crossed.

Endorsement

Definition of Endorsement

Section 15 defines endorsement as follows:

"When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to have endorsed the same and is called endorser.

Thus, an endorsement consists of the signature of the maker (or drawer) of a negotiable instrument or any holder thereof but it is essential that the intention of signing the instrument must be negotiation, otherwise it will not constitute an endorsement. The person who signs the instrument for the purpose of negotiation is called the 'endorser' and the person in whose favour instrument is transferred is called the 'endorsee'. The endorser may sign either on the face or on the back of the negotiable instrument but according to the common usage, endorsements are usually made on the back of the instrument. If the space on the back is insufficient for this purpose, a piece of paper, known as 'allonge' may be attached thereto for the purpose of recording the endorsements.

Legal Provisions regarding Endorsements

The following provisions are contained in the Act as regards endorsements:

(1) *Effect of Endorsements.* The endorsement of a negotiable instrument followed by delivery transfers the endorsed property therein with the right of further negotiation (Section 50). Thus the endorsee acquires property or interest in the instrument as its holder. He can also negotiate it further. (His right can, of course, be restricted by the endorser in case of a restrictive endorsement.)

Section 50 also permits that an instrument may also be endorsed so as to constitute the endorsee an agent of the endorser.-

(1) to endorse the instrument further, or

(2) to receive its amount for the endorser or for some other specified person.

The examples of such endorsements are as follows:

(i) Pay C for my use.

(ii) Pay C or order for the account

Where a negotiable instrument is endorsed for any of the above purposes, the endorse becomes its holder and property therein is passed on the endorsee. In *Kunju Pillaiand Others v.Periasami*(1969 II. M.I.J. 148) the High Court held that a holder of a negotiable instrument, who secures the same by endorsement, does not lose the right of his action by reason of the death of the original payee. In *Mothireddy v. Pothireddy* (A.I.R. 1963, A.P 313) the Andhra Pradesh High Court also held that "the right based on the endorsement having made for a specific purpose, namely, collection of the amount, will be valid till that purpose is served." The ordinary law regarding agency does not, therefore, apply in such cases.

(2) Endorser. "Every sole maker, drawer, payee or endorsee or all of several join makers, payees or endorses of a negotiable instrument may endorse and negotiate the same." This is subject to the condition that the right to negotiate has not been restricted or excluded (Section 51). Thus in case the instrument is held jointly by a number of persons, endorsements by all of them is essential. One cannot represent the other.The absence of the words "or order" in the instrument or endorsement thereon does not restrict further negotiation. For example a bill is drawn payable to A or order. A endorses it to B but the endorsement does not contain the words "or order" or any equivalent words. B may further negotiate the instrument.

It is, however, essential that the maker or drawer or drawer of an instrument must have lawful possession over it,

i. e., he must be its holder in order to enable him to endorse o negotiate it. A payee or an endorsee of the instrument must be its holder for eth same purpose.

(3) Time. A negotiable instrument may be negotiated until its payment has been made by the banker, drawee or acceptor at or after maturity but not thereafter (Section 60).

(4) Endorsement for a part of the amount. The instrument must be endorsed for its entire amount. Section 56 provides that "no writing on a negotiable instrument is valid for the purpose of negotiable if such writing purports to transfer only a part of the amount appearing to be due on the instrument." Thus an endorsement for a part of the amount of the instrument is *invalid.*

But in case an instrument has been partly paid, it may be negotiated for the balance of the amount provided a note to that effect is given on the instrument (Section 56).

If the endorser intends to transfer the document to two or more endorsees separately, it will not constitute a valid endorsement.

(5) The legal representative of a deceased person cannot negotiate by delivery only, a promissory note, bill of exchange or cheque payable to order and endorsed by the deceased but not delivered (Section 57). If the endorser dies after endorsing the instrument payable to order but without delivering the same to the endorsee, such endorsement shall not be valid and his legal representative cannot complete its negotiation by mere delivery thereof.

(6) Unless contrary is proved it is presumed under Section 118 that "the endorsements appearing upon a negotiation instrument were made in the order in which they appear thereon." It means that the endorsement which appears on an instrument first is presumed to have been made earlier to the second one.

General Rules regarding the Form of Endorsements

An endorsement must be regular and valid in order to be effective. The appropriateness or otherwise of a particular form of endorsement depends upon the practice amongst the bankers. The following rules are usually followed in this regard.

1. Signature of the endorser. The signature on the document for the purpose of endorsement must be that of the endorser or any other person who is duly authorized to endorse on his behalf. If a cheque is payable to two persons, both of them should sign their names in their own handwriting. If the endorser signs in block letters, it will not be considered a regular endorsement.

2. Spelling. The endorser should spell his name in the same way as his name appears on the cheque or bill as its payee or endorsee. If his name is mis-spelt or his designation has been given incorrectly, he should sign the instrument in the same manner as given in the instrument. Thereafter, he may also put his proper signature in the same handwriting, if he likes to do so. For example, if the payee's name is wrongly spelt as 'Virendra Perkash' instead of 'Virendra Prakash' regular endorsement will be as follows:

Virendra Prakash

Merely writing the correct name will not be regular endorsement.

No addition or omission of initial of the name. An initial name should neither be an added nor omitted from the name of the payee or endorsee as given in the cheque. For example, a cheque is payable to S.C. Gupta should not be endorsed as S. Gupta or vice versa. Similarly, a cheque payable to Harish Saxena should not be endorsed as H. Saxena because it will be doubtful for the paying banker to ascertain thatSaxena is Harish Saxena and nobody else. It is possible that some Hari Saxena has signed on the cheque as H. Saxena.

3. Prefixes and suffixes to be excluded. The prefixes and suffixes to the names of the payee or endorsee need not be included in the endorsement. For example, the words "Mr., Messrs, Mrs., Miss, Shri, Shrimati, Lala, Babu, General, Dr., Major, etc." need not be given by the endorser otherwise the endorsement will not be regular. However, an endorser may indicate has title or rank, etc., after his signature. For example, a cheque payable to Mojor Raja Ram or Dr. Laxmi Chandra may be endorsed as 'Raja Ram, Major' or Laxmi Chandra, M.D.' A cheque payable to Padmashri Vishnu Kant may be endorsed as Vishnu Kant, Padmashri.

Paying Banker

The Negotiable Instruments Act,1881 deals with negotiable instruments like promissory notes, bills of exchanges, cheques and similar payment instruments such as demand drafts, dividend warrants, etc. A banker in his capacity as a banker deals with the above mentioned negotiable instruments on different occasions. The NI Act lays down the law relating to payment of a customer's cheque by a banker and also the protection available to a banker. The relationship between a banker and customer, being debtor-creditor relationship the banker is bound to pay the cheques drawn by his customer. This duty on the part of the banker, to honour his customers' mandate, is laid down in Section 31 of the Negotiable Instruments Act.

Sections 10, 85, 85A, 89 and 128 of the Negotiable Instruments Act, 1881 grants protection to a paying banker. We shall in detail, examine individually these Sections and with the help of case laws apply the provisions of these Sections to a given set of facts.

Obligations of a Paying Banker

The customer who has deposited money with a bank being a creditor has the right to ask back the money from the banker who is a debtor. The duty on the part of the banker to pay has been laid down in Section 31 of the Negotiable Instruments Act, 1881 in the following terms:

Section 31

"The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required to do so, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default."

1. Section 31 applies only to Bankers

   This is because as per Section 6 of the Negotiable Instruments Act, 1881 "cheque" has been defined as "a Bill of Exchange drawn on a specified *banker* and not expressed to be payable otherwise than on demand".

2. *Sufficient funds:* The banker should have sufficient funds of the drawer, i.e. there should be sufficient credit balance in the customer's account.

3. *Properly available:* The funds available in the customer's account, should also be properly available to the payment of the cheque. The funds may not be available to pay the cheque if:

   (a) the banker has exercised his right of set off for amounts due from the customer;

   (b) there is an order passed by a Court, competent authority or other lawful authority restraining the bank from making payment.

4. *When duly required to do so:* The banker is duty bound to pay the cheque only when he is duly required to do so. This means that the cheque must be properly drawn and signed by the drawer.

5. *Compensate the drawer:* In case the banker refuses payment wrongfully, then he is liable only to the drawer of the cheque and not to any endorsee or holder, except when

(a) the bank is wound up, in which case the holder becomes a creditor entitled to make a claim;

(b) the banker pays a cheque disregarding the crossing, the true owner can hold the banker liable.

6. *Loss or damage caused by default:* A banker is liable to the drawer for any loss or damage which may have occurred to the drawer due to the wrongful dishonour of the customer's cheque.

Protection to paying banker

(a) For a paying banker to claim protection under the Negotiable Instruments Act, one of the criteria he has to satisfy is that the payment is in due course. As to what is payment in due course has been stated in Section 10 which reads as follows:

"Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which does not afford a reasonable ground for believing that he is not entitled to, receive payment of the amount therein mentioned.

From the above definition it can be seen that payment in due course requires the payment to be made:

- in accordance with the apparent tenor of the instrument;
- in good faith;
- without negligence;
- to the person in possession of the instrument; and
- while making payment the banker should not have reasons to believe' that the person in possession of the instrument is not entitled to receive payment of the amount mentioned in the instrument.

(b) Section 85 of the Negotiable Instruments Act, 1881 grants protection to a banker on his making payment on a cheque. Though this principle may sound as a simple logic it is to be noted that the protection granted as per Section 85 is not absolute.

Section 85 of the Negotiable Instruments Act, 1881 reads as follows:

Section 85

1. Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course.
2. Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.

(c) Section 89 of the Negotiable Instruments Act states the effect of making payment on instrument on which alteration is not apparent and reads as follows:

Section 89

"Payment of instrument on which alteration is not apparent: Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the sum according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed."

Leading cases on payment of cheques by a bank

Liability of Paying Banker when Customer's Signature on Cheque is Forged

(a) Section 128: Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and in case such cheque has come to the hands of the payee the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque has been paid to and received by the true owner thereof.

1. In *Canara Bank vs Canara Sales Corporation and Others* [(1987) 2 Supreme Court Cases 666] the Supreme Court state that *when the customer's signature on the cheque is forged, there is no mandate to the bank to pay*. As *such* a *banker is not entitled to debit the customer's account on such forged cheque*. Since

the relationship between the customer and the bank is that of a creditor and debtor, the bank had no authority to make payment of a cheque containing a forged signature. The bank would be acting against the law in debiting the customer with the amount of the forged cheque as there would be no mandate on the bank to pay. The Supreme Court pointed out that the document in the cheque form on which the customer's name as drawer was forged was a mere nullity. The bank would succeed only when it would establish adoption or estoppel. In deciding the case the Supreme Court relied on its earlier judgement in Bihta Co-operative Development and Cane Marketing Union Ltd. vs bank of Bihar (AIR 1967 Supreme Court 389).

2. In Bihta *Co-operative Development and Cane Marketing Union Ltd. vs bank of Bihar,* the Supreme Court held that "one of the signatures was forged so there was no mandate by the customer at all to the banker and the question of negligence of the customer in between the signature and the presentation of the cheque never arose. Therefore, in a joint account if one of the signatures is forged then there is no mandate and banker cannot make payment.

Payment to Be in Due Course for Bank to Seek Protection

1. In the case of "*Bank of Bihar vs Mahabir Lal* (AIR 1964 Supreme Court 397)" Supreme Court held that a banker can seek protection under Section 85 only where payment has been made to the holder, his servant or agent, i.e. payment must be made in due course. Payment to a person who had nothing to do with the firm or a payment to an agent of the Bank would not be a payment to the firm. In this case The bank instead of handing over cash to the firms partner, to be paid over to the wholesalers, entrusted it with one of the bank's employees (Potdar) who accompanied the partner to the wholesalers. However, before the money could be paid to the wholesalers the Potdar absconded.

2. The Calcutta High Court had occasion to consider as to whether a Bank had made payment in due course or not in the case of *Bhutoria Trading Company (BTC) vs Allahabad Bank* (AIR 1977 Cal. 363) The Court held that:

"The Expression payment" in due course has been defined in Section 10 of the Negotiable Instruments Act to mean payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof, under circumstances which do not afford reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. It can hardly be questioned that the payment by the defendant bank of the cheque in question has been made by the defendant bank in accordance with its apparent tenor.

The cheque is an uncrossed cheque payable to the plaintiff or order. The cheque was endorsed by the plaintiff through its Manager. The fact that Jethmall is the Manager is borne out by the seal of the Company which is unquestionably an authentic seal. The seal of the Manager is also equally authentic. That the payment was made in good faith has not been disputed for all practical purposes. There is not a grain of evidence before the Court from which it remotely appears that the payment was not made in good faith. Now that the entire evidence is before the Court, the question of onus to prove good faith loses much of its importance. No negligence has been proved against the bank.

The defendant bank insisted on identification of Jethmall and Jethmall was in fact identified by Kishanlal Maheswari, a constituent of the bank, the defendant NO.3. The defendant bank therefore took all reasonable precautions even though the circumstances in which the cheque was presented for payment did not afford any reasonable ground for believing that Jethmall was not entitled to receive payment of the amount mentioned therein. The plaintiff having failed to prove the trade practice which he alleged and the bank having paid the cheque, in accordance with the apparent tenor of the instrument, in good faith, and without negligence, to Jethmall who was in possession thereof the defendant is entitled to succeed. There were no circumstances which afforded any reasonable ground for believing that he was not entitled to receive

payment of the cheque. It must be held that the bank made the payment in due course. The learned Judge, in our opinion has rightly pointed out that payment in due course is necessarily payment in the ordinary course.

3. Whether payment made by a bank was payment in due course would depend on the facts of a given case. In *Madras Provincial Co-operative Bank Ltd. vs Official Liquidator, South Indian Match Factory Ltd.* (AIR 1945 Mad 30) the court held that payment to a liquidator against the cheque presented across the counter was not a payment in due course and the bank was not entitled to seek protection under Section 85 of the Negotiable Instruments Act. The Court held that under Section 244A of the Indian Companies Act, 1913, an official liquidator was required to open an account with a bank and pay thereir. moneys received by him in the course of the liquidation. Rule 66 of the Rules framed by the Madras High Court under the Act required that all bills and other securities payable to the company or to the liquidator should, unless the judge otherwise directs, shall as soon as they came into the hands of the liquidator, be deposited by him in the bank. From the cheque itself the Bank had notice that it was payable to the liquidator in his official capacity. That the bank realized this in full was shown by the fact that it called for the order of his appointment. Bankers knew or must have deemed to have known that this money could only be collected by the payee through his own bank and, therefore, it was most improper on his part to ask for payment over the drawee's counter.

Payment in Good Faith, Without Negligence of an instrument on which Alteration is not Apparent

1. The effect of Sections 10 and 89, and Section 31 was considered by the Supreme Court in *Bank of Maharashtra v.M/s Automotive Engineering Co.* (1993) 2 SCC 97. The question which arose for consideration in this appeal was whether the paying bank was bound to keep an ultraviolet ray lamp and to scrutinize the cheque under the said lamp even if no infirmity on the face of the said cheque on visual scrutiny was found. The Supreme Court held that:

(i) Section 89 of the Negotiable Instruments Act gives protection to the paying banker of a cheque which has been materially altered but does not appear to have been so altered, if payment was made according to the apparent tenor thereof at the time of payment and otherwise in due course.

(ii) Section 10 of the said Act defines payment in due course to mean payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

(iii) Section 31 of the said Act obliges the drawee bank having sufficient funds of the drawer in its hands properly applicable to the payment of such cheque, to make payment of the cheque when duly required to do so.

(iv) On analyzing the evidence, the Courts below had held that on visual examination no sign of forgery or tampering with the writings on the cheque could be detected. It was found that the agent of the appellant bank had verified the serial number and signature on the cheque and had compared the signature on the cheque with the specimen signature of the respondent and on scrutiny of the cheque visually no defects could be detected by him. There was sufficient funds of the drawer with the appellant bank, which had no occasion to doubt about the genuineness of the cheque from the apparent tenor of the instrument. There was no evidence to hold that the payment was not made in good faith. Simply because the ultraviolet ray lamp was not kept in the branch and the said cheque was not subjected to such lamp, would not be sufficient to hoid the appellant bank guilty of negligence more so when it has not been established on evidence that the other branches of the appellant bank or the other commercial banks had been following a practice of scrutinizing each and every cheque or cheques involving a particular amount under such lamp by way of extra precaution.

(v) In such circumstances, it is not correct legal proposition that the bank, in order to get absolved from the liability of negligence, was under an obligation to verify the cheque for further scrutiny under advanced technology or for that matter under ultraviolet ray lamp apart from visual scrutiny even though the cost of such scrutiny was only nominal and it might be desirable to keep such lamp at the branch to take aid in appropriate case.

(vi) The Courts below were not justified in holding that the bank had failed to take reasonable care in passing the cheque for payment without subjecting it for further scrutiny under ultraviolet ray lamp because the branch was in the industrial area where such forgery was rampant and other branches of the appellant bank were provided with such lamp.

2. The protection granted to a banker under Section 89 had come up for consideration before the Calcutta High Court in *Brahma Shumshere Jung Bahadur vs Chartered Bank of India*, Australia and China (AIR 1956 Cal. 399). The court held that since no alteration or obliteration was visible at the time of payment, the payment was made according to the apparent tenor at the cheque. Further since drawer had on other occasions also issued cheque signed by him and written by others, the bank suspicion could not have aroused. The Court also held that the words "liable to pay" appearing in the third paragraph of Section 89 included a liability to pay under an overdraft agreement as much as it applied to an ordinary deposit account. As regards exceeding the overdraft limit, the Court held that no definite limit was fixed at any time and it fluctuated according to the securities deposited.

3. In the case of *Tanjore Permanent Bank vs S.R. Rangachari* (AIR 1959 Madras 119) the High Court was called upon to decide a case in which cheque was materially altered and the bank sought protection under Section 89. The Court held that since the material alteration on both the cheques were visible and since they were not authenticated by the drawers initials, the payment made by the bank was not accordingto the apparent tenor of the instrument and as such the bank cannot claim protection under Section 89 of the Negotiable Instruments Act. The Court in coming to the above conclusion relied on the following paragraph of Bhashyam and Adiga's Negotiable Instruments Act:

The bank has also to see whether there are any alterations in the cheque and whether they have been properly authenticated. Therefore, where an alteration in a cheque is initialed not by all the drawers but only some of them, the bank will be paying the amount on the said cheque at its own risk. In this connection it is necessary to notice that under Section 89 protection is afforded to the bank paying a cheque where the alteration is not apparent.

It is to be noted as per Section 89 the bank can seek protection only if there is material alteration in the cheque and does not appear to have been altered. This, however, does not protect a banker in case the signature of the customer is forged. As stated earlier a forged cheque is no mandate of the customer and as such the bank cannot make payment on a cheque where the signature of the customer is forged. The question whether a signature is forged or not depends on the evidence and the court in coming to a conclusion that the signature is forged would look into the facts and circumstances that led to the payment of the cheque.

4. In *Bareilly Bank Ltd. vs Naval Kishore* (AIR 1964 All 78) N opened an account with the bank by making a cash deposit of' 19,900. N was issued a cheque book containing 25 cheques. 17 months after the opening of the account N drew a cheque for the first time for' 5,900 which was dishonoured by the bank. On enquiries N was informed that 11 months back three cheques aggregating ' 19,500 were paid by the bank and the present balance in the account was a mere ' 437. N denied issuing of the cheques and sued the bank. In evidence it came out that 3 cheques used to withdraw the amounts were not from the cheque book issued to N and were from a different cheque book. Though bank was not in a position to explain this lapse, they made an attempt to counter the contentions of N by producing his specimen signature which appeared

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to be similar to the ones on the cheques. N however denied that the specimen signature was his and the Court concluded that the alleged specimen signature were totally different from N's regular signature. Evidence also was led to show that the bank's own employees were involved in the forgery since the ledger page of N's account showed that certain erasures and scorings were made and the signature of N missing in the cheque book issue register. Therefore the court refused to accept the bank's contention.

Payment by Bank under mistake - whether Recoverable

The question whether a bank paying a forged cheque can recover the same from the payee was considered by the Calcutta High Court in *United Bank of India v. A T Ali Hussain & Co.* (AIR 1978 Calcutta 169). The High Court held that so long as the status quo is maintained and the payee has not changed his position to his detriment, he must repay the money back to the payer. If, however, there has been a change in the position of the payee who, acting in good faith, parts with money to another without any benefit to himself before the mistake is detected, he cannot be held liable. Equity disfavours unjust enrichment. When there is no question of unjust enrichment of the payee by reaping the benefit of an accidental windfall he should not be made to suffer, for he would be as innocent as the payer who paid the money acting under a mistake.

Collection of Cheque

Collection of cheques, bills of exchange and other instruments on behalf of a customer is an indispensable service rendered by a banker to his customer. When a customer of a banker receives a cheque drawn on any other banker he has two options before him - (i) either to receive its payment personally or through his agent at the drawee bank, or (ii) to send it to his banker for the purpose of collection from the drawee bank. In the latter case the banker, deputed to collect the amount of the cheque from another banker, is called the 'collecting banker'. He presents the cheque for encashment to the drawee banker and on its realization credits the account of the customer with the amount so realized.

A banker is under no legal obligation to collect his customer's cheques but collection of cheques has now become an important function of a banker with the growth of banking habit and with wider use of crossed cheques, which are invariably to be collected through a banker only. While collecting his customer's cheques, a banker acts either

(i) as a holder for value, or

(ii) as an agent of the customer.

The legal position of the collecting banker, therefore, depends upon the capacity in which he collects the cheques. If the collecting banker pays to the customer the amount of the cheque or credits such amount to his account and allows him to draw on it, before the amount of the cheque is actually realized from the drawee banker, the collecting banker is deemed to be its 'holder for value'. He takes an undertaking from the customer to the effect that the latter will reimburse the former in case of dishonour of the cheque.

Banker as a holder for value

A banker becomes its holder for value by giving its value to the customer in any of the following ways:

(a) by lending further on the strength of the cheque;

(b) by paying over the amount of the cheque or part of it in cash or in account before it is cleared;

(c) by agreeing either then or earlier, or as a course of business, that customer may draw before the cheque is cleared;

(d) by accepting the cheque in avowed reduction of an existing overdraft; and

(e) by giving cash over the counter for the cheque at the time it is paid in for collection.

In any of these circumstances the banker becomes the holder for value and also the holder in due course. He bears the liability and possesses the rights enjoyed by the holder for value. If the last but one endorsement is proved to be forged, he will be liable to the true owner of the cheque. But he shall have the right to recover the money from the last endorser, i.e., his own customer, if the customer is unable to pay, the banker himself will bear the loss. If the cheque sent for collections returned dishonoured, the collecting banker can sue all the previous parties after giving them notice of dishonour. It is, however, essential that the amount of the cheque is paid to the customer in good faith.

Collecting Banker

Collecting Banker as an Agent

A collecting banker acts as an agent of the customer if he credits the latter's account with the amount of the cheque after the amount is actually realized from the drawee banker. Thereafter the customer is entitled to draw the amount of the cheque. The banker thus acts as an agent of the customer and charges from him a commission for collecting the amount from outstation banks.

As an agent of his customer, the collecting banker does not possess title to the cheque better than that of the customer. If the customer has no title thereto, or his title is defective, the collecting banker cannot have good title to the cheque. In case the cheque collected by him did not belong to his customer, he will be held liable for conversion of money, i.e., illegally interfering with the rights of true owner of the cheque.

Conversion by the Collecting Banker

Sometimes a banker is charged for having wrongfully converted cheques to which his customer had no title or had defective title. Conversion means wrongful or unlawful interference (i.e., using, selling, occupying or holding) with another person's property which is not consistent with the owner's right of possession. Negotiable instruments are included in the term 'property' and hence a banker may be charged for conversion if he collects cheques for a customer who has no title or defective title to the instrument. The basic principle is that rightful owner of the goods can recover the same from anyone who takes it without his authority and in whose hands it can be traced. When the banker acts as an agent of his customer for the collection of his cheques, he cannot escape this liability. However, the right of the true owner is a restricted one and cannot be exercised in case the goods reach the hands of one who (i) receives it in good faith, (ii) for value, and (iii) without the knowledge that the other party had no authority thereon. Except these circumstances, the true owner of the goods (including the negotiable instrument) can file a suit for conversion.

Statutory Protection to Collecting Bank

Section 131 of the Negotiable Instruments Act grants protection to a collecting banker and reads as follows:
Section 131

Non-liability of a banker receiving payment of cheque: A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

Explanation: A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

The provisions of the above section has been applied to drafts as per Section 131 A of the Negotiable Instruments Act.

Conditions for protection: Though Section 131 grants protection to a collecting banker, the protection is not unconditional. For the collecting banker to claim the protection under Section 131 he has to comply with certain conditions and they are:

1. The collecting banker should have acted in good faith.
2. He should have acted without negligence.
3. He should receive payment for a customer.
4. The cheque should be crossed generally or specially to himself.

Collecting bank's duty

Section 131 of the Negotiable Instruments Act which affords protection to the collecting bank requires amongst other conditions, that the bank should not have been negligent. To show that the bank has not been negligent the bank will have to prove that it has taken all precautions that would be required of a prudent banker in collecting a cheque. Over the years based on practice and judicial pronouncements, these precautions have been laid down as duties imposed on bankers, the non-compliance of which can make the bank liable on the grounds of negligence. We shall now individually examine these duties.

Duty to open the account with references and sufficient documentary proof

The duty to open an account only after the new account holder has been properly introduced to is *too* well grained into today's banker's mind that it would be impossible to find an account without introduction. The necessity to obtain introduction of a good customer is to keep off crooks and fraudsters who may open accounts to collect forged cheques or other instruments. As an added precaution RBI has insisted that while opening accounts photograph of the customer and sufficient documentary proofs for constitution and address be obtained.

In this regard the English Decision *Ladbroke v. Todd* (1914) 30 TLR 433 can be referred to. In this case a thief stole a cheque in transit and collected the same through a banker where he had opened an account without reference and by posing himself as the payee whose signature the thief forged. After the cheque was collected the thief withdrew the amount. The bank was held liable to make good the amount since it acted negligently while opening the account in as much as it had not obtained any reference.

In Syndicate Bank v. Jaishree Industries and Others AIR 1994 Karnataka 315, the Appellant opened an account in the name of "M/s Axle Conductor Industries Ltd. by the Proprietor, R.K. Vyas". The introduction was given by one Nanjunde Gowda, who was having a small shop at the address given by the account holder. The address of the account holder, given by the account holder, was just opposite the Appellant Bank. In the account opening form the name of the account holder was given as "M/ Axle Conductor Industries by the Proprietor R.K. Vyas". No information was sought or inquiry held as to the incorporation of the account holder nor was the Memorandum of Association, Resolution, etc., scrutinized. On 3 January 1979, partners of Firm "A" purchased a draft for' 2,51,125 from State Bank of India, Ahmednagar, in favour of M/s Axle Conductor Industries Ltd. The draft was deposited in the account with the Appellant on 5 October 1979 and the amount was collected by the Appellant and credited to the account on 9 October 1979. On 10 October 1979, the monies were withdrawn from the account. The partners of "A" filed a suit against the Appellant and State Bank of India for recovery of' 2,51,125 wrongly collected by Appellant and paid by State Bank of India.

The High Court held that there was failure to follow the proper procedure for opening account in the name of a limited company, that the account was opened as if it was a proprietary concern, the staff of the Appellant Bank did not bestow sufficient care even to notice the word "Ltd." on several occasions, such as, at the time of opening of the account or withdrawal of amounts from the account. The High Court felt that having accepted the application as if it was an application by a proprietary concern, strangely the Appellant Bank allowed the account to operate in the name of the limited concern. There was, therefore, lack of care on the part of the Appellant Bank in the entire transaction.

The conditions to be satisfied for claiming protection under Section 131 of the Negotiable Instruments Act are: (a) that the banker should act in good faith and without negligence in receiving payment, i.e. in the process of collection, (b) that the banker should receive payment for a customer, i.e. act as mere agent in the collection of the cheque, and not on his account as holder, (c) that the person for whom the banker acts must be his customer, and (d) that the cheque should be one crossed generally or specially to himself.

The High Court stated that if the draft was drawn in favour of a fictitious person, it could not be said that the ownership stood transferred to a non-existent person for the purpose of examining the question whether the bank as a collecting banker acted negligently or not. The ownership would pass to the true owner. The High Court did not consider it necessary to decide as to what extent a person obtaining a draft in favour of a fictitious person would lose the ownership in favour of a bona fide "holder in due course".

In view of the aforesaid, the Appellant Bank was held to have acted without taking any care, and was found negligent throughout and was not entitled to the protection under Section 131 of the Negotiable Instruments Act.

In *Indian Bank v. Catholic Syrian Bank* AIR 1981 Mad 129, the Madras High Court had occasion to consider negligence of collecting banker which had opened an account after proper introduction.

Briefly the facts were that one D had opened an account with Salem branch of bank A. A customer of that branch had taken D to the said branch and had informed the Manager that D was a man from Indore and that he wanted to open a bank account to enable him to purchase carpets from Salem. Although bank A had claimed that the customer, who had introduced D, was a well-known customer of bank A and was a leading merchant of Salem and had a large volume of business, it was found in the evidence recorded by the Court, that these claims were not true. The introducer had an account and also had some fixed deposits with bank A. The transactions were for paltry amount and the amount standing to the credit of the introducer at the relevant time, was only ' 192.57.

On 12 June 1969, M obtained a demand draft for' 20 from the branch at Singanallur of the bank B. The draft was drawn on the branch office of bank B in favour of D and company. By means of clever forgery, the draft was altered for' 29,000 drawn in favour of D. The draft was presented by D on 13 June 1969 for credit to his account opened with Salem branch of bank A and the amount was collected by bank A from bank B and credited to the account of D.

On 14 June 1969, the Salem branch of bank B came to know from its Singanallur branch that the draft was issued for' 20 and was drawn in favour of D and company, payable at Cochin and that no draft for a sum of' 29,000 had been issued. At once the Salem branch of bank A was contacted and was informed of the fraud, but unfortunately by then, bank A had already paid a large part of the draft amount to D under a self cheque.

Bank B (Paying banker) filed the suit against bank A (collecting banker) for recovery of' 29,000 on the ground that the collecting banker had been negligent while opening an account in the name of D and by reasons of its negligence and want of good faith, the forged draft got to be wrongly converted.

The High Court observed that the collecting banker had opened the account, in the name of D on a mere introduction of one of its account holders, knowing fully well that the said account holder was not a well-known leading merchant and had no large business with it at the relevant time. Further the collecting banker had not independently questioned D about his business and his credit worthiness before allowing him to open an account. When D stated that he had come from Indore, the Manager of the collecting banker did not even care to find out his permanent address, more so when in the application for opening account filed by D, the address given was of that of the introducer. Moreover, when D told the Manager of collecting banker that he had not till then opened any account although he had come from Indore to Salem to do business, the collecting banker, before opening the account, should have been more alert.

Duty to confirm the reference where the referee is not known or has given reference in absentia

Though as a matter of practice bankers in India require introduction by an existing customer of the bank, this may not always be possible especially when the branch is newly opened. In such cases the customers are required to get references from known persons in the locality or from the existing bankers. In such case the banker is required to make enquiries with the referee to confirm that the person whose account is newly opened is a genuine person.

In *Harding v. London Joint Stock Bank* [1914] 3 Legal Decision Affecting Bankers 81, an account was opened for a new customer after complying with the necessary formalities. The account was not opened by deposit of cash as is the usual practice but was by paying in a third party cheque. The bankers in the case made enquiries with the customer who thereupon produced a forged letter issued by his employer giving him power to deal with the cheque. It was thereafter found that the cheque was stolen by the customer and credited to his account. The bank was held negligent for failure to make necessary enquiries from the employer as to whether the customer who was an employee had in fact the necessary power to deal with the cheque.

Duty to ensure crossing and special crossing

It is the duty of the banker to ensure that the cheque is crossed specifically to himself and if the cheque is crossed to some other banker they should refuse to collect it. Similarly where the cheque is crossed to a specific account then crediting the same to another account without necessary enquiries would make him liable on the grounds of negligence. In case of "non-negotiable" crossing a banker cannot be held negligent merely because of collection of such instruments. In the case of *Crumpling v. London Joint Stock Bank Ltd.* [1911-13] All England Rep 647 it was held that a non-negotiable crossing is only one of the factors amongst others to be considered to decide about the bankers negligence and that the mere taking of a non-negotiable cheque cannot be held to be evidence of negligence on the part of the bankers.

Duty to verify the instruments or any apparent defect in the instruments

Sometimes the instrument which is presented for collection would convey to the banker a warning that a customer who has presented the instrument for collection is either committing a breach of trust or is misappropriating the money belonging to some other. In case the banker does not heed the warning which is required of a prudent banker then he could be held liable on the grounds of negligence as can be seen from the following cases:

(a) In *Underwood Ltd. v. Bank of Liverpool Martin Ltd.* [1924] 1 KB 775, the Managing Director of a company paid into his private account large number of cheques which were to be paid into the company's account and the bank was held negligent since it did not make enquiries as to whether the Managing Director was in fact entitled to the amounts represented by these cheques.

(b) In *Savory Company v. Llyods Bank* [1932] 2 KB 122, the cheques which were payable to the employer was collected by the employee in a private account opened by him and the bank was held liable for negligence. In this case two dishonest clerks of a Stock Broker stole bearer cheques belonging to their employer which were collected in an account maintained by one of the clerks and in another account in his wife's name. It was held that the bank had been negligent in opening the clerks account inasmuch as they had not obtained his employer's name while opening the account and that in the case of his wife's account the bank was negligent in as much as it had not obtained the husband's occupation and his employer's name while opening the account.

(c) In the case of *Australia and New Zealand Bank v. Ateliers de Constructions Electriques de Cherleroi* [1967] 1 AC 86 PC, an agent paid his principal's cheque into his personal account and the bank was charged with conversion. However, the bank defended the same on the grounds that there was implied authority from the principal to his agent to use his private account for such purpose. Though the banker was negligent in dealing with the cheques without specific authority the bank escaped liability since it was found that the principal had in fact authorized his agent to use his private account.

(d) In *Morrison v. London County and Westminster Bank Ltd.* [1914-5] All ER Rep 853, the Manager of the plaintiff was permitted to draw cheques per pro his employer and he drew some cheques payable to himself which he collected into his private account. The bank was held negligent for collecting such cheques without making necessary enquiries even though there was a clear indication that the Manager was signing as an agent of the firm.

Duty to take into account the state of customer's account

The collecting banker is required to take into account the status of the customer and also the various transactions that have taken place in the customer's account so as to know the circumstances and the standard of living of the customer. If for example, a person is an employee and the nature of his employment is that of a clerk his salary would be known to the bank and any substantial credits by way of collection of cheques would be suspected and it would be the duty of the banker to take necessary precautions while collecting such cheques.

In *Nu-Stilo Footwear Ltd. v. Lloyds Bank Ltd.* [1956] 7 Legal Decisions Affecting Bankers P. 121, the plaintiffs who were manufacturer of ladies footwear were defrauded by their Secretary and Works Accountant who converted 9 cheques payable to the plaintiffs into his account. The Secretary opened the accounts in the defendant bank in a false name and as reference gave his real name. The bank thereupon called the reference and got a satisfactory reply which included the fact that the account holder had recently come down from Oxford and intended setting up a business of his own. The Secretary thereupon presented 9 cheques totally aggregating to £ 4855. Since these cheques were drawn on the plaintiffs they sued the defendant bank who had collected the cheques. The Court held that the collecting bank was negligent in as much as the collecting bank did not take necessary precautions because the amounts collected were inconsistent with the business of the account holder and therefore necessary enquires should have been made by the bank.

Negligence of collecting bank in collecting cheques payable to third parties

The collecting bank has to make necessary enquiries before any third party cheques are collected on behalf of its customer. In *Ross v. London County Westminster and Parrs Bank Ltd.* [1919] 1 KB 678, cheques payable to "the Officer in charge, Estate Office, Canadian Overseas Military Force" were used by an individual to pay off his debts. There was an instruction in all the cheques that it was negotiable by the concerned officer. However, it was held that the fact that the cheques were drawn in favour of the Officer in charge should have put the banker on enquiry and since no such enquiry was made by the banker the bank is liable on the grounds of negligence.

Indemnities and Guarantees

Indemnities

In day to day banking operations, a banker comes across instances where he has to protect his interest in case of certain transactions. A customer may request a banker to issue a duplicate draft or fixed deposit receipt. In such cases, to protect against any possible loss, the banker should issue the duplicate draft and/ or fixed deposit receipt against an indemnity.

Section 124 of the Indian Contract Act,1872 defines indemnity as, " A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a ' Contract of Indemnity'.

Indemnity is applicable where there is a loss. The contract of insurance is based on the principles of indemnity. The life insurance companies agree to cover the loss of life, whereas the general insurance companies wish to cover the loss to the property or asset, covered under respective insurance policies.

The two parties involved in the contract of indemnity are (i) "indemnifier", the person who gives the undertaking or promise and (ii) the " indemnified " to whom such a promise is given.

While issuing a duplicate fixed deposit receipt, the bank obtains an indemnity (usually in their standard form) and the indemnifier (customer) need to give all details regarding the original receipt. The indemnity will have clauses to protect the bank's interest. The indemnifier will undertake not to use the original and surrender the same to the bank, in case he is able to locate the original. He further undertakes to cover the loss, if any, that will be incurred by the bank on account of issuing such duplicate fixed deposit receipt.

Guarantees

Banks grant loans and advances (fund based) and provide other credit facilities (non fund based) such as, bank guarantee and letters of credit. Non fund based limits are granted by banks to facilitate the customers to carry on with the trading and business activities more comfortably. Bankers can earn front end fees and these non fund based items become contingent liabilities for banks.

A contract of guarantee is covered under the Indian Contract Act,1872. Sec 126 defines a guarantee as contract to perform the promise or discharge a liability of a third person in case of his default. The contract of guarantee may be oral or in writing. Banks, however insist on written guarantees.

There are 3 parties to the contract of guarantee. They are called Surety, Principal Debtor and the Creditor. These parties are also called as the guarantor, borrower and the beneficiary.

Banks deal with two types of guarantees: (i) Accepted by the bank, and (ii) Issued by the bank

(1) Guarantees accepted by the Bank:

At the time of lending money, banks accept securities. In addition to the tangible assets a borrower arranges to furnish a personal security given by surety (guarantor). This is called third party guarantee, who undertakes to pay the money to the bank inclusive of interest and other charges, if any, in case the principal borrower fails to repay or if the borrower commits default. Banks also obtain Corporate guarantees issued by companies who execute corporate guarantee as authorized by the Board of Directors' resolution.

As per Sec 128 of the Contract Act,1872, the surety's liability is co-extensive with that of the principal debtor.

For example, Bank MNC has sanctioned a term loan of Rs 10 lakhs to P on the personal guarantees of Q and S. In this case Bank MNC is the creditor. P is the borrower or the principal debtor. Both Q&S are the sureties or guarantors. In case P commits a default, in repaying the debt to the Bank MNC (as per the terms and conditions of bank's sanction letter) then both Q&S (as sureties/guarantors) are liable to pay the dues to the bank.

(2) Guarantees issued by the Bank:

A Bank Guarantee is a commitment given by a banker to a third party, assuring her/ him to honour the claim against the guarantee in the event of the non- performance by the bank's customer. A Bank Guarantee is a legal contract which can be imposed by law. The banker as guarantor assures the third party (beneficiary) to pay him a certain sum of money on behalf of his customer, in case the customer fails to fulfill his commitment to the beneficiary.

Dishonour of cheques

s.138 to 142 speaks about the dishonour of cheques and the consequences thereof. The Act was further amended in the year 2005 to remove the difficulties and paved a way in filing cheque bounce cases in a court at a place where the cheque was presented for clearance and not the place of issue.

Ingredients for Dishonour of cheques

i. A person must have drawn a cheque on a bank account maintained by him.

ii. The cheque should have been issued in discharge, in whole or in part, of any debt or other liability

iii. The cheque has been presented to the bank within the period of its validity.

iv. The cheque is returned by the bank unpaid, either because of funds insufficient or it exceeds the amount arranged to be paid.

v. The payee makes a demand for the payment by giving a notice in writing, within 30 days of the receipt of information by him from the bank.

vi. The drawer fails to make payment of the said amount of money within 15 days of the receipt of the said notice.

vii. Complaint is made within one month of the date on which the cause-of-action arises.

Issue regarding jurisdiction

K. Bhaskaran v. Shankaran AIR 1999,SC 3762, had given jurisdiction to initiate the prosecution at any of the following places.

a) Where cheque is drawn.

b) Where payment had to be made.

c) Where cheque is presented for payment

d) Where cheque is dishonoured.

e) Where notice is served upto drawer.

In Dashrath Rupsingh Rathod v. State of Maharashtra and Another(Criminal Appeal No. 2287 of 2009), a three-judge bench of the Apex Court of India held that the territorial jurisdiction *qua* dishonour of cheques is restricted to the court within whose local jurisdiction the offence was committed, i.e. the bank on which it is drawn. The observations of the Apex Court in *Dashrath Rupsingh* marked a departure from the Apex Court's observations and findings in, *inter alia, K. Bhaskaran v. Sankaran Vaidhyan Balan* ((1999)7SCC510) and *Harman Electronics Pvt. Ltd. v. National Panasonic India Pvt. Ltd* ((2009) 1 SCC 720) As a consequence, complaints under Section 138 of the Act were to be filed/ returned (in the event filed prior to the judgment and wherein proceedings had not traversed the stage of Section 145(2) of the Act) for filing in the "proper court", i.e. the Court within whose jurisdiction the bank on which the cheque in question was drawn is situated.

The Bombay High Court dealt with this issue in the case of *Ramanbhai Mathurbhai Patel v State of Maharashtra*, the Bombay High Court considered the scenario when at par cheques are dishonoured by a branch of the bank other than the drawee bank branch. The issue in this regard was whether "proper court" will be the Court within whose juridisction the cheque has been dishonoured or the Court within whose jurisdiction the drawee bank branch is situated. Dismissing the petition, the High Court held that the complaint will be tried by the Court within whose jurisdiction the cheque is dishonoured. The Bombay High Court surmised that by issuing at par cheque, the drawer has given the option to the banker of the payee to get the cheques cleared from the nearest available branch of the bank of the drawer.

While the Apex Court's decision in *Dashrath Rupsingh Rathod* provides that the jurisdiction shall vest with the court where the cheque is dishonoured; in the instance of at par cheques, there could be multiple places where the cheque can be dishonoured.

Consequentially, a Special Leave Petition was filed against this decision of the Bombay High Court. The Apex Court, vide its order dated 16.09.2014, stayed the order of the Bombay High Court. However, vide its order dated 20.03.2015, the Apex Court dismissed the SLP as withdrawn. Therefore, the lack of clarity pertaining to jurisdiction qua at par cheques prevailed.

Further, the aftermath of *Dashrath Rupsingh* witnessed procedural delays with regard to continuation of proceedings under the Act. These included delays associated with, *inter alia*, transfer formalities, oppositions to transfer requests, arguments upon the stage of evidence as envisaged in Section 145(2) of the Act. There was also express discontent over the transfer/initiation of the complaints, pursuant to the jurisdiction vesting with the court where the bank of the defaulter is situated.

The aforementioned lacunae, *inter alia*, led to representations by stakeholders, industry associations et al. to the Government of India as to the impact of the *Dashrath Rupsingh* decision upon business interests. In order to address the existing and contemplated difficulties in filing of complaints under Section 138 of the Act, the negotiable instruments amendment Act, 2015 passed. The brief details are as follows.

[(a) "a cheque in the electronic form" means a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometrics signature) and asymmetric crypto system or with electronic signature, as the case may be

(ii) after Explanation II, the following Explanation shall be inserted, namely:— 'Explanation III.—For the purposes of this section, the expressions "asymmetric crypto system", "computer resource", "digital signature", "electronic form" and "electronic signature" shall have the same meanings respectively assigned to them in the Information Technology Act, 2000.']

s.138. Dishonour of cheque for insufficiency, etc., of funds in the account.

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, 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 from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course. of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation.-For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

s.139. Presumption in favour of holder

It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

s.140. Defence which may not be allowed in any prosecution under section 138. 140.Defence which may not be allowed in any prosecution under section 138. It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that section.

s.141. Offences by companies.

(1)Offences by companies. If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence Was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2)Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly, Explanation.-For the purposes of this section,- (a)"company" means any body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm. (S.142 was amended and now s.142 A also inserted, for further clarification, refer beginning of this topic)

[s.142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted, namely:—

"(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account (amended by 2015 Act)

s.142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of section 142 or the case has been transferred to that court under sub-section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.

(3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times.] (inserted by 2015 Act)

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Annexure

MODEL QUESTION PAPERS

BANKING LAW

PART A — (2 x 12 = 24 marks)

Answer TWO of the following in about 500 words each.

1. Who is a customer? What are the different types of special types of customer?
2. Define Security Interest; explain the procedure for securatisation under SARFESI Act, 2002?
3. Explain the salient features of Negotiable Instruments Act by referring to recent amendments and Judicial Perspectives.

PART B — (2 x 7 = 14 marks)

Answer TWO of the following in about 300 words each.

4. *Differentiate holder from holder in due course.*
5. *Discuss the effect of crossing of cheques.*
6. *Enumerate the rights of customers on winding up of companies.*

PART C — (5 x 4 = 20 marks)

Write short notes on FIVE of the following:

7. Bankers Bank
8. Special status to State Bank of India.
9. Pass book
10. Banker's Lien
11. Garnishee order
12. Banking Ombudsman.

PART D — (2 x 6 = 12 marks)

Answer TWO of the following by referring to the relevant provisions of law and decided cases. Give cogent reasons.

13. "X" issues a cheque to "Y" for Rs. 1,00,000, which was a payment for j time barred debt. The cheque was presented for payment and the sane was dishonoured. "Y" sues "A" for dishonour of cheque. Decide.
14. "C" is a private bank which started to issue their own money circulation to their own customers. RBI threatens "C" and says that they would cancel their banking license. Decide.
15. "A" is a banking customer who keeps his jewels in the bank locker safety. "A" also pays some rent for the locker. Later on 'A" finds some jewels missing. Decide whether the bank is liable even though the key of the locker was with "A",

BANKING LAW

PART A — (2 x 12 = 24 marks)

Answer TWO of the following in about 500 words each.

1. What are the functions of Reserve Bank of India, do agree with the constitution of Monetary Policy committee to take policy decisions?
2. Discuss the recent judicial perspectives pertaining to dishonour of cheques.
3. What are the various types of crossing? And also state the effect of crossing cheques.

PART B — (2 x 7 = 14 marks)

Answer TWO of the following in about 300 words each.

4. Examine the role played by Non Banking financial companies and state the need for regulating NBFC's.
5. State the impact of E-Banking in banking sector in India.
6. Discuss the powers, functions and duties of a Banking Ombudsman.

PART C — (5 x 4 = 20 marks)

Write short notes on FIVE of the following:

7. SARFAESI Act
8. Clearing House of Banks
9. Paying banker
10. Inchoate negotiable instruments
11. Davnes v. Noble
12. Bankers Secrecy

PART D — (2 x 6 = 12 marks)

Answer TWO of the following by referring to the

relevant provisions of law and decided cases. Give cogent reasons.

13. RBI issues guidelines to reduce interest for commercial banks. But the commercial banks refuses to reduce the interest rate as instructed by RBI. The RBI gives notice for cancelling the license of such defaulting banks. The association for all India Pvt. Bank challenges the notice. Decide
14. "A" is a Internet Banking Customer who receives an E-mail from bank employee who requires his personal sensitive information regarding his Internet Bank Account. "A" sends the information by marking it confidential. But the employees e-mail was hacked and "A" lost lot of money. Decide the liability of "A".

    "A" deposit 30 sovereigns of golds as a collateral security and attains a loan. The loan was repayed and the bank was required to return the gold. But the bank did not return the gold and said it was stolen. Decide.