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Volume - 3

SIERRA INNOVATIONS

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Introduction

'Negotiability' is the main characteristics of negotiable instrument. 'Negotiable' means transferable. Instrument' is a written document by which something is conveyed from one person to another; it is a written document by which a right is created in favour of some person i.e. it is a means by which a legal right is vested in a person. When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

A Negotiable Instrument is a document guaranteeing the payment of a specific amount of money, either on demand or at a set time. Such payment may be made either on demand or at a future date.

The law relating to negotiable instruments in India is, contained in. the Negotiable Instruments Act, 1881.

In the background, it is pertinent to note that the Negotiable Instruments Bill having been passed by the Council, received its assent on 9th December, 1881 and it came into force on the 1st day of March, 1882 as THE NEGOTIABLE INSTRUMENTS ACT, 1881 (26 of 1881).

Preamble

Whereas it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques; It is hereby enacted as follows:

Definition of Negotiable Instrument

The Negotiable Instrument Act defines negotiable instrument as:

Section 13 "Negotiable instrument"

(1) 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 express0ed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

(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 indorsement is an indorsement in blank.

(iii) Where a promissory note, bill of exchange or cheque, either originally or by indorsement, 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.

(2) A negotiable instrument may be made 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.

This definition, inter alia, reflects two ideas and these two ideas are generally criticized:

1. It is only an enumerating clause and does not give the definition of the negotiable instrument.
2. Negotiable Instrument Act is confined only to promissory notes, bills of exchange and cheques.

Therefore, on the two aforesaid grounds, this definition is criticized by few jurists.

Definition by Thomas

Thomas defined Negotiable Instrument as "Negotiable Instrument is one which is, by legally recognized custom of trade, or by law:

(a) Transferable by delivery or by delivery and endorsement.
(b) Holder in due course may sue for the recovery of money.
(c) The right of holder in due course is free from defects.

This definition is applicable in England and now accepted in India also.

Definition by Willis

"Negotiable Instrument is the property which is acquired by any one, who takes bonafide and for value notwithstanding any defect of title, in the person from whom he took it"

This is the most accepted definition.
This definition explains that when a person gets the negotiable instrument bonafide and for value, then even though the title of the person from whom he took that negotiable instrument is defective, the title of such a receiver will be good and free from defect. Thus, it is an exception to the rule "nemodat quod non habet."

An Exception to "Nemodat quod non Habet"

Negotiable instruments constitute an exception to the principle **"Nemodat quod non habet",** which means that **a person cannot transfer a better title than he himself has**. So, any person taking a negotiable instrument in good faith and for value becomes the true owner even if he takes it from a thief or finder.

In the case of **Raphael v. Bank of England (1855), 17 C. B. 161),** some bank notes of the Bank of England were stolen in a robbery. The bank immediately prepared and distributed a list of the stolen notes. The plaintiff, money changer in Paris, also received one such list. Some months after the receipt of this notice, a man came to the plaintiff to exchange a Bank of England note. The plaintiff had no recollection of the notice completely forgetting it, cashed the notes. The note turned out to be stolen one. It was held that the plaintiff, having taken the note in good. Faith, was entitled to its payment. He was though negligent; he had acted honestly.

In this context the definition of "Holder in due course" given in section 9 of the Negotiable Instruments Act 1881 as applicable in India should also be noted. The provision of section 58 of the same Act is also to be noted. The word used in U/S 9.

Section 9 Holder in due course"—"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 indorse 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.

Without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title." Here the word sufficient cause means that the person should act in good faith and with reasonable caution. A person must take the negotiable instrument with the title of the transferor is a good one and there should be nothing which could arouse a suspicion in his mind that the title of the transferor is defective.

Characteristics of Negotiable Instrument

Negotiable instrument has the following features:

1. It is in writing.
2. It gives right to recover money.
3. It is transferable.
4. It is an exception to the maxim "nemodat quod non habet".
5. Right to recover money and money only.

6. Amount should be certain.
7. Parties should be certain.
8. Governed by prohibition by the Reserve Bank of India Act.
9. Presumptions attached to negotiable instrument (Sections 118 and 119).

Prohibition by the Reserve Bank of India Act

The prohibition is contained in **Section 31** of the Reserve Bank of India Act, 1934. The whole idea behind this provisions that the individuals are not permitted to Issue currency notes.

Section 31 of Reserve Bank of India Act states that

Section 31 Issue of Demand Bills and Notes

(1) No person in India other than the Bank, or, as expressly authorized by this Act the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person. Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent.

(2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, (26 of 1881) no person in India other than the Bank or, as expressly authorized by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer the instrument.

(3) Notwithstanding anything contained in this section, the Central Government may authorize any scheduled bank to issue electoral bond.

Explanation: For the purposes of this sub-section, "electoral bond" means a bond issued by any scheduled bank under the scheme as may be notified by the Central Government.

Advantages of Negotiable Instrument

1. Easy to transfer
2. Easy to carry
3. Protects and saves the currency
4. Eacilitates commercial transactions notes.
5. Right person will get money.
6. Has got evidentiary value.

Kinds of Negotiable Instruments

Section 13 (1), Negotiable Instrument Act 1882, states - A "**Negotiable instrument**" means a promissory note, bill of exchange or cheque payable either to order or to bearer. "Thus, in the legislation being discussed here, there are three kinds of negotiable instruments, viz. promissory note, bill of exchange and cheque.

Chapter - II

Promissory Note

A promissory note is an instrument in writing (not being a bank-note or a currency-note) 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. **Section 4**

The question, whether a particular document is a promissory note or not, has to be decided with reference to

(a) The description of the instrument,
(b) The language of the instrument taken as a whole;
(c) The circumstances under which the document came to the executed;
(d) The intention of the parties manifest on the face of the document; and
(e) The surrounding circumstances.

All these factors have a cumulative bearing on a proper construction of the documents whether it is a promissory note or not. Rangastumi v. Govindaswamy, AIR 1981 Mad 434.

Essential Ingredients of a Valid Promissory Note

1. It must be in writing:
2. It must contain an undertaking to pay:
3. It must be signed by the maker;
4. The undertaking to pay must be unconditional:
5. The maker of the note must be certain;
6. The sum payable must be certain
7. The promise should be to pay & money, and money only;
8. The payee must be certain.

A promissory note must contain an unconditional promise to pay the amount it cannot be conditional. Here the words, "at my convenience," are vague, and also amount to a condition, and thus, the document is not a promissory note.

In Bachan Singh v. Ram Awadh, AIR 1947 All 431, the was whether the following two documents were promissory notes. The wording of the two instruments was as follows:

1. I had borrowed a sum of Rs……… bearing interest at the rate of………… per cent. From B on 28th March, 1939, and have therefore executed this pronote.

2. I of my own free will and accord, approached M and borrowed from him the sum of Rs…….. Bearing interest at the rate of………… per cent. Per mensem for the purpose of purchasing bullocks. I have therefore executed these few presents by way of a promissory note.
   The Allahabad High Court held that the above two documents, although called promissory notes, were merely acknowledgments of the debts coupled with an agreement to pay interest, but they were not promissory notes

Bill of Exchange

"Section 5 "Bill of exchange". —A "bill of exchange" is 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 instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified even which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payble may be "certain", within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, 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 mis-named or designated by description only."
A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument **Section 5.**

Essential Requirements of a Valid Bill of Exchange

The following are the eight essential requirements of a valid Bill of Exchange:

1. It must be in writing;
2. It must contain an order to pay;
3. The order contained in the bill should be unconditional;
4. It must be signed by the drawer;
5. The drawee must be certain;

6. The payee must be certain;
7. The sum payable must be certain;
8. It must contain an order to pay money, and money only.

The essentials of bill of exchanges are that the instrument must be in writing and the instrument includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded and it should be signed by the maker and there must be an order to pay. Krishna Devi v. Firm Tikayaram Lekhraj Batra, I (2003) BC 644 (MP)

Parties to a Bill of Exchange

The three parties involved in a bill of exchange are:
1. The drawer;
2. The drawee; and
3. The payee.

The drawer is one who draws or makes the bill; the drawee is one who the payee is one to whom the payment is to be made.

Cheque

Section 6 "Cheque"- A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Explanation

(i) For the purposes of this section, the expressions—

(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;

(b) "**a truncated cheque**" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Explanation

(ii) For the purposes of this section, the expression "clearing house" means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India.

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(21 of 2000).

Section 6 as amended in 2002 by Act 55 of 2002 w.e.f. 6 February, 2003

A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

A cheque to be valid should certainly specify the amount and also the details regarding the payee. If at the time of the issue, the amount is not specified and payee is uncertain, than the cheque does not become a valid negotiable instrument as defined in the Act. For being a valid negotiable instrument the essential requisite was certainty, regarding the amount to be paid as well as the person to whom the amount has to be paid. Capital Syndicate v. Jameela, 2003 (1) CCC 579 (Ker).

(a)

Promissory Note	Bill of Exchange
(i) In a promissory note, there are only two parties, the maker and the payee.	(i) In a bill of exchange, there are three parties to be specified, i.e., drawer, drawee and payee; though any two out of these three capacities may be filled by one and the same person.
(ii) A promissory note cannot be made payable to the maker himself.	(ii) In a bill of exchange, the drawer and payee may be the same person.
(iii) In a promissory note there is an unconditional promise by the drawer to pay a certain sum to the payee.	(iii) In bill of exchange, there is an unconditional order to a drawee, to comply with the drawer's direction as to payment.
(iv) The liability of the maker of the pro-missory note is absolute because he unconditionally binds himself to pay.	(iv) The obligation undertaken by the drawer of a bill of exchange is only conditional since he becomes a surety for payment by the drawer.

(v) The maker of the promissory note becomes the principal debtor.	(v) The drawee of a bill of exchange on acceptance becomes the principal debtor as he accepts the primary liability to pay according to the tenor of the bill of exchange.

(b)

Promissory Note	Bond
(i) Section 4 of the Negotiable Instruments. Act, 1881 defines 'promissory note' as an instrument in writing (not being a bank-note or currency-note) 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.	(i) Section 2(5) of the Stamp Act defines the term 'bond' as including (a) Any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be; (b) Any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and (c) Any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.
(ii) In case of a promissory note, the amount of money payable under the instrument must be certain.	(ii) In case of a bond the amount of money
(iii) Section 4 of the Negotiable Instruments Act which defines promissory note does not provide that it must be attested by a witness.	(iii) An instrument to be a bond must necessarily be attested by a witness.
(iv) A promissory note is payable to order or bearer	(iv) A bond is not payable to order or bearer