

Non Delivery of Notice Under Section 138 NI Act leads to No Proceedings Against the Accused

written by Abhishek Bagga | July 17, 2019



A single Bench comprised of Justice Sanjeev Sachdev of the Hon'ble Delhi High Court in the matter of *RL Varma and Sons v P C Sharma*^[1] dismissed the complaint under Section 138 of the NI Act, 1881 ("NI Act") on the ground that the demand notice was not delivered to the accused, as the address to which the notice was sent to, was incorrect.

FACTS:

The Appeal arose from the impugned order of the Appellate Court that dismissed the Petitioner's Appeal and the Learned Trial Court's conviction order. The Petitioner had advanced a cheque of 10 Lakhs for an outstanding debt. The said cheque was returned due to insufficient funds in the bank account maintained by the Appellant. The Petitioner served a cheque bounce notice addressed to the addressee under Section 138 of the NI Act, however, the address was not of his residence, nor his place of work- it was merely a building that happened to be promoted by the Petitioner. Further, it was submitted that the building is being used as an office complex and comprises of approximately 16 floors occupied by several people and organizations, further, it was submitted that he never met the petitioner or corresponded with the petitioner at the address. It was contended that in the complaint filed by the complainant the correspondence address mentioned in the alleged acknowledgment has been mentioned as the second address of the petitioner and the petitioner was served with summons only at the second address.

PROCEDURAL

HISTORY:

Upon being convicted by the Learned Trial Court, the Petitioner filed an Appeal and the same was heard by Special CBI Judge in Karkardooma Court,

Delhi.[2] The arguments presented

Were, that the presumption u/s. 138 of the NI Act was improper as the cheque was never meant for satisfaction of the debt, and was only meant as security; as well as claiming that notice was

not properly served and hence procedure under Section 138 NI Act has not been fulfilled, making the conviction unlawful.

The court dismissed these claims, it dismissed the lack of notice defence by reasoning that if the guard said "he does not come to the office regularly, or

at a fixed time", he did infact come to the office at times and therefore a watchman could easily find out which office in the building was his and deliver

it to him. Reliance was placed on the judgment of the Supreme Court *C.C.*

Alavi Haji vs Palapetty Muhammed & Anr[3], wherein, it was held

that a person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required

under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation.

SUBMISSIONS:

The Petitioner contended that as the building had no spaces occupied by him, it could not be considered to be a place of work. His second line of argument was that the credit letter he had previously sent to the complainant, contained both the address mentioned above at the top of the letter, as well as a separate correspondence address at the bottom. Therefore, he contended, that as the Petitioner did not serve the required notice to the correct address, proceedings under Section 138 NI Act, could not have been initiated. In response to the case cited by the Special Judge, the Petitioner contended that the case law was only applicable when the notice was sent to the correct address.

The complainant contended that he personally visited the premises of the building, wherein, the guard told him that the Petitioner does not come to the office regularly and has no regular timings of visitation when he does visit. He also contended that the address in question was communicated to him in the credit letter and was therefore valid.

JUDGMENT: Section 138 NI Act

The Court focused its judgement on the issue of notice. On examination of the evidence as well as the Learned Court's judgement of acquittal of the Petitioner. The Hon'ble High Court observed that the Ld. Courts had convicted the Petitioner because the Petitioner had not categorically refuted reception of notice and that he had not contended lack of any interest or right in the property at the time of the notice being sent. The Court rejected these holdings. It held the logic of the Ld. Court to be flawed. It was not proved as a fact that the Petitioner even had an office in the building. The notice had been sent via registered post but returned unsent as there had been no one to receive it. The Court also categorically observed that the watchman of a building which houses multiple offices could not be considered as an

authorised agent to receive legal notice, which meant that even if the postman had delivered it to the watchman, notice would not have been delivered.

Furthermore, the complainant later served summons to the correspondence address, implying that he was aware of the correspondence address. The presumption of service of notice could not be held in favour of the complainant if the notice was sent to the incorrect address. As the necessary notice had not been served, the complaint could not be considered as valid.

CONCLUSION: Section 138 NI Act

The High Court did not delve into as many questions of law as the appellate Court had. It focused its attention on ascertaining whether or not procedural law had been complied with. On finding that the complainant had failed to comply with the notice procedure under Section 138 NI Act, it acquitted the accused. The judgement does suffer from some lack of analysis. The petitioner attempted to distance the applicability of the *Alavi Hajj* ratio from the current facts and circumstances- important, as it poked holes in the appellate Courts reasoning. However, it was never addressed by the High Court. The Special Judge seemed to interpret the mischief of the Supreme Court judgement as a means of holding unscrupulous cheaters accountable, by simply having them pay up within fifteen days of receiving a summons. The judgement did, however, use the term "by post with correct address". There was ample room to consider if the use of an old and irrelevant address right at the top was within the scope of the mischief *Alavi Hajj* wished to address; i.e. if the addition of an unused address at the very top, and the actual correspondence address at the bottom could be perceived to be a method of avoiding reception of notice. Further analysis may have helped establish crystal clear precedent.

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[1]

Revision Petition (crl) 438 of 2017

[2] Appeal (crl.) 56 of 2017

[3] Appeal (crl.) 767 of 2007

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