

HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT  
SRINAGAR

Reserved on: 04.06.2022

Pronounced on:08.07.2022

CRMC No.381/2018

ENGINEERING CONTROL

...PETITIONER(S)

*Through: Mr. Mian Tufail, Advocate, vice  
Mr. M. A. Qayoom, Advocate.*

Vs.

BANDAY INFRATECH PVT. LTD.

....RESPONDENT(S)

*Through: Mr. Prince Hamza, Advocate, vice  
Mr. M. Y. Bhat, Sr. Advocate.*

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged the complaint filed by the respondent against him for offence under Section 138 of Negotiable Instruments Act (hereinafter for short "the NI Act") before the Court of Judicial Magistrate, 1<sup>st</sup> Class (3<sup>rd</sup> Additional Munsiff), Srinagar. The petitioner has also challenged order dated 15.04.2015, whereby the learned Magistrate has, after taking cognizance of the offence, issued process against the petitioner.

2) It appears that the respondent has filed a criminal complaint for offence under Section 138 of the NI Act against the petitioner before the trial Magistrate alleging that the petitioner had issued a cheque bearing No.33201209 dated 12.02.2015 for an amount of Rs.22,89,500/-. The cheque was drawn on J&K Bank Branch Ltd in

favour of the complainant and when the same was presented for payment before the bank, it was returned unpaid for insufficiency of funds. The respondent/complainant is stated to have served a statutory legal notice of demand upon the petitioner but despite receipt of the same, the petitioner failed to make the payment within the statutory period and as a consequence of this, the respondent filed the impugned complaint against the petitioner before the learned trial Magistrate, who, vide the impugned order dated 15.04.2015, took cognizance of the offence and observed that, prima facie, offence under Section 138 of the NI Act is made out against the petitioner. Accordingly, process was issued against the petitioner.

**3)** The only ground urged by the petitioner for challenging the impugned complaint and the order of taking cognizance is that statutory notice of demand has not been served upon him, inasmuch as the address on which the respondent has dispatched the said notice is incorrect to the knowledge of the respondent. It is contended that the petitioner is a resident of Delhi but the notice of demand has been dispatched by the respondent/complainant on a wrong address at Jammu. Thus, according to the petitioner, without service of statutory notice of demand upon him, it cannot be stated that the offence under Section 138 of the NI Act is made out against him. It is urged that the learned trial Magistrate has not taken note of this aspect of the matter and passed the impugned order dated 15.04.2015 which is liable to be set aside.

4) I have heard learned counsel for the parties and perused the material on record.

5) In the notice of demand dated 17.02.20215 address of the petitioner has been shown as under:

I) Engineering Control, through its Proprietor,  
Shah Ji Koul,  
S/O Surrender Nath Koul,  
RIO 58 Priyag Apartment,  
Vasundra Enclave-96 Jammu, J&K

II) Anand Prabat  
New Delhi

6) A perusal of the impugned complaint also shows that address of the petitioner/accused has been shown as resident of 58-Priyag Apartment, Vasundra Enclave-96, Jammu. When the process was issued by the learned trial Magistrate against the petitioner/accused, the same could not be served upon him because of the wrong address. The trial court record shows that the respondent/complainant moved an application before the said Court furnishing fresh particulars of the petitioner/accused. It seems that the same was done by the respondent/complainant in pursuance of order dated 31.08.2015 passed by the learned trial court. The fresh particulars of the petitioner/accused submitted by the respondent/complainant before the learned trial court are as under:

Engineering Control 17/94, Gail no. 7,  
Than Singh Nagar Anand Prabbat, New Delhi-5  
Prop:- Shahji Koul S/o Şurinder Nath Koul  
R/O 58, Paryag, Apartment Vasundra Enclave,  
Delhi-96.

7) From the aforesaid record, it is clear that the respondent/complainant had mentioned wrong address of the petitioner/accused both in the statutory notice of demand as well as in the complaint because Priyag Apartment, Vasundra Enclave-96 is located in Delhi not in Jammu. Thus, it can safely be stated that statutory notice of demand was sent by the respondent/complainant to the petitioner/accused on an address which was not correct. The question arises as to whether a notice of demand sent on wrong address of the drawer of a cheque would amount to giving of notice to him as contemplated in clause (b) of proviso to Section 138 of the NIA Act.

8) Learned counsel for the petitioner has contended that unless notice of demand is served upon the drawer of the cheque and he fails to pay the amount within the statutory period, the presumption in terms of Section 138 of the NI Act cannot arise against the drawer. On the other hand, learned counsel for the respondent/complainant has contended that the law requires the complainant only to give a notice of demand and service of notice is not necessary. It is contended that there was an agreement executed between the parties and in the said agreement, the address of the petitioner was shown in the same as shown in the notice of demand and the complaint. According to him, this is the address given by the petitioner himself and, as such, he cannot contend that the same is a wrong address. In support of his contentions, learned counsel for the respondent has relied upon the

judgments of the Supreme Court in the case of **D. Vinod Shivappa vs. Nanda Belliappa**, (2006) 6 SCC 456 and **C. C. Alavi Haji vs. Palapetty Muhammad and another**, (2007) 14 SCC.

9) Before proceeding to determine the merits of the rival contentions advanced by learned counsel for the parties, it would be necessary to notice the legal position on the subject.

10) Proviso to Section 138 of the NIA Act stipulates that three conditions must be satisfied before dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented before 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. The second condition is that the payee or the holder in due course of the cheque must make a demand for payment of the amount of money by giving a notice in writing to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make 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. It is only upon the satisfaction of all the aforesaid three conditions that an offence under Section 138 can be said to have been committed by the person issuing the cheque. Thus, giving of notice of demand to the payee within the stipulated period after dishonor of a cheque is one of the necessary

conditions for making out the offence under Section 138 of the NIA Act.

**11)** The Supreme Court in the case of **D. Vinod Shivappa vs. Nanda Belliappa, (2006) 6 SCC 456**, has elaborately dealt with a situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc. It was observed that if in each such case, the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. The Court further observed that it would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. The Court went on to observe that a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability, can successfully avoid his prosecution because the payee is bound to issue a notice to him within a period of 30 days from the date of receipt of information from the bank regarding return of the cheque as unpaid.

**12)** The aforesaid observations were relied upon by the Supreme Court in the case of **C. C. Alavi Haji** (supra). However, it was observed by the Supreme Court that when the notice is sent by

registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. What the Supreme Court has emphasized is that the notice should have been sent on the correct address of drawer of the cheque. It is only then it can be said that notice has been received by the drawer of the cheque.

**13)** In **Harman Electronics Private Limited and another vs. National Panasonic India Private Ltd, (2009) 1 SCC 720**, the Supreme Court has, while deliberating on the issue, observed as under:

*“13. It is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence. For the purpose of proving its case that the accused had committed an offence under Section 138 of the Negotiable Instruments Act, the ingredients thereof are required to be proved. What would constitute an offence is stated in the main provision. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in provisos (a), (b) and (c) appended to Section 138 of the Negotiable Instruments Act are intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to Section 138 therefore must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would.”*

**14)** It was further observed by the Court that for constitution of an offence under Section 138 of the Act, the notice must be received by

the accused. The Court went on to observe that it may be deemed to have been received in certain situations. An inference of having received the notice by a drawer of a cheque can be raised only if the notice has been dispatched to his correct address. Such an inference cannot be drawn if the notice has been sent on the incorrect address of the drawer of the cheque.

**15)** In the instant case, the trial court record clearly shows that the address of the petitioner/accused is not correctly mentioned either in the complaint or in the notice of demand. It is for this reason that the respondent/complainant was directed by the trial Magistrate to furnish fresh particulars of the petitioner/accused. The address of the petitioner is shown as “Vasundra Enclave, Jammu” which is patently incorrect. The second address of the petitioner shown in the notice of demand and the complaint as “Anand Prabat, New Delhi” is incomplete, inasmuch as it lacks necessary details that would enable a postman to locate the addresses. Once the material on record clearly suggests that the statutory notice of demand was sent by the respondent/complainant on a wrong address, the presumption of receipt of notice by the petitioner/accused does not arise. Thus, the pre-condition of filing a complaint under Section 138 of the NI Act of sending a statutory notice has not been satisfied in the present case. Therefore, no cause of action arose in favour of the respondent/complainant to file the subject complaint. He, therefore, could not have instituted the complaint nor the trial court could have



taken cognizance of the offence and issued process against the petitioner.

**16)** For the foregoing reasons, it is clear that the material on record does not disclose commission of offence under Section 138 of the NI Act against the petitioner/accused, as such, the impugned complaint and the proceedings emanating therefrom deserve to be quashed.

**17)** The petition is, accordingly, allowed and the impugned complaint and the proceeding emanating therefrom are quashed.

**18)** A copy of this order be sent to the learned trial court for information.

Srinagar,  
08.07.2022  
"Bhat Altaf, PS"

*Whether the order is speaking:*

*Whether the order is reportable:*

(Sanjay Dhar)  
Judge

*Yes/No*

*Yes/No*