

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.263 OF 2019

Vardhman Steel
E-12, MIDC, Waluj, Aurangabad
Through its G.P.A. Holder,
Jayesh Kushalchand Parekh
Age: 52 years, Occu.: Service,
R/o. Vardhman Steels,
E-12, MIDC, Waluj,
Opp.Ranjangaon Phata Kaman,
Aurangabad.

..Appellant
(Ori. Complainant)

VERSUS

Sai Engineering,
Mr. Mahadeo Thorat,
Proprietor: Sai Engineering,
Age: Major, Occu.: Business,
R/o. Gut No.34-36, Plot No.29/1,
Behind Savera Auto, Ranjangaon,
MIDC Waluj, Aurangabad,
And R/o. Mr.Mahadev Thorat
Sai Engineering, Opp. H.P.Gas
Godown, Gut No.67, Plot No.128,
MIDC, Waluj, Aurangabad.

..Respondent
(Ori. Accused)

....

Advocate for Appellant : Shri M.V.Ghatge
Advocate for Respondent : Shri R.V.Gore

....

CORAM : P.R.BORA, J.

DATE : 3rd SEPTEMBER, 2019

ORAL JUDGMENT:-

1. "Whether service of statutory demand notice as contemplated under Section 138(b) of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the N.I.Act'), on the drawer of the cheque can be held invalid on the ground that the office copy of the said notice filed by the complainant alongwith the

complaint under Section 138 of the N.I.Act', does not bear the signature either of the counsel, who sent the said notice or of the drawee of the cheque ?” is the question which falls for my determination in the present appeal.

2. In Summary Criminal Case No.3245 of 2016, the learned Magistrate has held the service of statutory notice contemplated under Section 138(b) of the N.I.Act, invalid on the ground that office copy of the said notice does not bear the signature either of the complainant or his Advocate and eventually only on the said ground has dismissed the said complaint filed by the present appellant.

3. In Summary Criminal Case No.3245 of 2016, it was the case of the present appellant (hereinafter referred to as the complainant) that the respondent had purchased CRCA Steel Sheets from the appellant Firm worth Rs.1,25,052/- and towards the payment of the said amount, had issued the subject cheque. It stood dis-honoured on the ground 'Account Closed'. It was his further contention that he then issued a statutory notice as envisaged under Section 138(b) of the N.I.Act, to the respondent and demanded the amount of the cheque from him. The notice was duly served upon the respondent, but he did not pay the amount of the said cheque within the stipulated period. In the circumstances, the complainant filed a complaint under Section 138 of the N.I.Act,

against the respondent. Alongwith complaint, the complainant had filed on record the copy of the cheque issued by the respondent, cheque return memo received from the bank, the office copy of the notice and the acknowledgement receipt. The acknowledgement receipt was not received within the expected period. The appellant had therefore lodged a complaint in that regard, in response to which, it was informed by the postal authorities that the said notice was duly served upon the noticee i.e. respondent. The said documents were also placed on record by the appellant. The learned Magistrate, after being satisfied that all ingredients for constituting an offence under Section 138 of the N.I.Act, were *prima-facie* fulfilled, issued the process against the respondent.

4. In order to prove the guilt of the accused, the complainant himself deposed and also placed his reliance on the documents filed on record by him. The defence of the respondent was of total denial. The learned Magistrate framed the following Points for determination and recorded his finding as mentioned against each of the said points:

"Sr. No.	Points for Determination	Findings
1.	<i>Whether accused had issued cheque for discharge of legally enforceable debt or liability ?</i>	Yes.
2.	<i>Whether the cheque was presented within statutory period and it was dishonoured?</i>	Yes.

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|----|--|---------------------------------|
| 3. | <i>Whether accused had failed to pay the cheque amount after receipt of notice ?</i> | <i>No.</i> |
| 4. | <i>Whether accused has committed an offence punishable under Secion 138 of N.I.Act ?</i> | <i>No.</i> |
| 5. | <i>What order ?</i> | <i>..Accused is acquitted."</i> |

5. The learned Magistrate, thus, though recorded an affirmative finding that the accused had issued cheque in favour of the complainant towards discharge of legally enforceable debt and also held that the subject cheque was presented within the statutory period and the same stood dishonoured because the concerned account was closed by the respondent, on the point of issuance of notice, he has recorded negative finding, which has resulted in dismissal of the complaint. The learned Magistrate in paragraph No.18 of the impugned Judgment has noted that, for want of signature over the office copy filed on record by the claimant, the notice (Exhibit 18) was not liable to be held a legal notice in the eyes of law. The learned Magistrate has further observed that absence of signature on the office copy of the notice either of the counsel or the complainant himself was a serious lacuna in the case of the complainant. The learned Magistrate has further held that the complainant has failed in proving that he had sent notice to the accused after dishonour of the cheque. For the said reasons, the learned Magistrate eventually acquitted the accused.

6. Shri M.V.Ghatge, learned counsel appearing for the appellant submitted that the learned Magistrate has manifestly erred in acquitting the respondent on the ground that the complainant failed to prove the service of the statutory notice upon the respondent. The learned counsel submitted that, in his examination-in-chief, the complainant had specifically deposed that after receiving the cheque return memo from the concerned bank, he had sent a legal notice through his counsel to the respondent demanding the amount of cheque and the same was duly served upon the respondent as per the report received in that regard from the Postal authorities. The learned counsel submitted that the facts so deposed on oath by the complainant were neither denied nor disputed by the respondent in the cross-examination of the complainant. The learned counsel submitted that in the circumstances, there was no substance in the objection raised on behalf of the respondent that the office copy was not bearing any signature.

7. The learned counsel cited the Judgment of the Honourable Apex Court in the case of **Indra Kumar Patodia and Another Vs. Reliance Industries Ltd. And Others [2013 AIR SC 426]**. In the said matter, the complaint under Section 138 of the N.I.Act itself was presented without signature of the complainant or his counsel. The learned counsel taking me through the discussion made and the finding recorded in the said Judgment, submitted that the case of the present appellant stands at better footings. The

learned counsel submitted that the ratio laid down in the case of ***Shaikh Farooq s/o. Shaikh Amir Bagwan Vs. Shaikh Rafiq s/o. Shaikh Ayyub and another [2017(1) Mh.L.J. 586]*** would not apply to the facts of the present case. The learned counsel cited one more Judgment of the Honourable Apex Court in the case of ***SIL Import, USA Vs. EXIM AIDES SILK EXPORTERS, BANGALORE [(1999) 4 Supreme Court Cases 567]***, to urge that when a notice sent by E-mail is also held to be a valid compliance of sending notice before initiating any legal proceeding, the office copy of the notice could not have been discarded by the learned Trial Court only on the ground that it was not bearing any signature below it either of the complainant or his counsel. The learned counsel also relied upon the Judgment of the Honourable Apex Court in the case of ***C.C.Alavi Hazi Vs. Palapetty Muhammed and Another [(2007) 6 Supreme Court Cases 555]***, wherein the law of presumption in respect of service of notice has been crystallized.

8. Opposing the submissions advanced on behalf of the appellant, Shri R.V.Gore, learned counsel appearing for the respondent, submitted that the Trial Court has rightly acquitted the respondent – accused on account of his failure to prove that the statutory notice under Section 138 of the N.I.Act, was issued and served upon the respondent. The learned counsel placed his reliance on the Judgment of learned Single Judge of this Court in the case of ***Shaikh Farooq s/o Shaikh Amir Bagwan*** (supra). The learned counsel also relied upon two more Judgments of this Court; one in the case of ***Pandurang Ramchandra Ghorpade Vs. Vijay***

Gopala Lohar and another [2015 All M.R. (Cri.) 4806] and another in the case of ***Armstrong Builders and Developers Vs. Vishvanath Naik [2007(1) All.M.R.167]***.

9. I have given due consideration to the submissions made on behalf of the learned counsel appearing for the parties. I have perused the impugned Judgment and the evidence on record. As noted herein above, the Trial Court has recorded a clear finding holding that the accused had issued the subject cheque to the complainant towards discharge of legally enforceable debt/liability. The learned Trial Court has also held that the subject cheque was presented for its encashment within the statutory period and it stood dishonoured on the ground 'account closed' .

10. In his testimony before the Trial Court Jayesh Kushalchand Parekh (PW-1), who is the complainant, has deposed that after receiving the cheque return memo from the bank, the statutory notice, as envisaged under Section 138 of the N.I.Act, was issued by him through his counsel on 22.03.2016 by R.P.A.D. PW-1 has further deposed that since the acknowledgement receipt was not received, he had filed a written complaint in that regard on 29.04.2016 to the Postal authorities, whereupon, he was informed by the Postal authorities that the notice was duly served on the respondent accused on 23.03.2016. In the cross-examination of PW-1, the facts stated as above by him remained un-shattered. Respondent neither denied the fact of issuance of notice by the

complainant nor the fact in regard to the report received from the Postal authorities revealing that the notice was duly served upon the respondent.

11. In the case of **Indra Kumar Patodia and Another** (supra), a complaint under Section 138 of the N.I.Act, itself was filed without any signature thereon. In the said matter a serious objection was raised by the accused therein to dismiss the said complaint on the ground that it was not signed by the complainant or his counsel. The Trial Court had upheld the said objection and had dismissed the complaint. The complainant challenged the order of acquittal before the High Court by filing an appeal in that regard. The said appeal was allowed by the High Court and though the order passed by the High Court was challenged by the respondent before the Honourable Apex Court, no interference was caused by the Honourable Apex Court in the Judgment and order passed by the High Court. The Honourable Apex Court has held in the said matter that the complaint under Section 138 of the N.I.Act, without signature can be maintained when such a complaint is verified by the complainant and the Process is issued by the Magistrate after due verification.

12. In the instant matter, in his testimony before the Trial Court, Jayesh Kushalchand Parekh (PW-1) has specifically deposed that on 22.03.2016, a notice was issued to the respondent accused demanding the amount of cheque through his counsel on both

the addresses of the accused. The said notice dated 22.03.2016, was sent by the complainant to the respondent by R.P.A.D. As has come on record, the said notice was duly served upon the respondent accused. The letter in that regard received from the Postal authority is filed on record by the appellant and is marked as Exhibit 28. The learned Trial Court has not recorded any such finding that the notice is not served upon the respondent accused. PW-1 has further deposed that the complainant has filed on record the office copy of the said notice. I reiterate that the facts so deposed by PW-1 have not been denied or disputed by respondent in the cross-examination of PW-1. In the circumstances, though the office copy of the notice is not signed by the complainant or his counsel, the said notice could not have been discarded or kept out of consideration by the learned Magistrate on the said ground. The learned Magistrate has also erred in recording a finding that the complainant has failed in proving the contents of the said notice. As noted earlier, it was deposed by PW-1 that by sending notice dated 22.03.2016, cheque amount was demanded from the respondent. As has been held by the Honourable Apex Court in the case of **Indra Kumar Patodia and Another** (supra), when the complaint was verified by the complainant, even though the said complaint was not signed by the complainant, it was quite maintainable. Applying the said analogy, it has to be held in the instant matter that when complainant has deposed that the notice was sent to the respondent demanding the cheque amount and its office copy

was filed on record, though the same was not signed by him or his counsel, on that ground, it could not have been held that there was no notice to the respondent as envisaged under Section 138(b) of the N.I.Act.

13. The similar issue was for consideration before the learned Single Judge of Karnataka High Court in the case of **Sri Satyanarayana Gowda Vs. Rangappa [1996 CRI.L.J. 2264]**. In the said matter also an objection was raised on behalf of the accused that, the notice said to have been issued through the Advocate of the complainant, was not signed. It was therefore contended on behalf of the accused that the said notice was not the notice in the eyes of law as contemplated under Section 138(b) of the N.I.Act. A submission was made on behalf of the accused that the complaint was liable to be rejected on that ground alone. The learned Single Judge of the Karnataka High Court, however, turned down the said objection holding that Section 138(b) does not contemplate that the notice should be signed by the party. I deem it appropriate to reproduce herein below paragraph No.7 of the said Judgment, which reads thus:-

“7. The learned counsel for the petitioner vehemently argued that this decision is not applicable as the said decision was rendered by the Court with a reference to Sec. 80 CPC. On the other other hand, this notice is required in a criminal case as contemplated under Sec.138(b) of the Act. In a criminal case all the requirements of the provisions of law will have to be complied with, failing which the complaint is liable to be rejected. The object of issuing notice is absolutely clear from the reading of Sec.138. The object and purpose is to give an

information to the person who had issued the cheque that the said cheque was dishonoured, so as to facilitate him to make good the amount within 15 days from the date of receipt of such information from the holder of the cheque. Whether that purpose is achieved is the only question that arises for consideration. Similar is the object under S. 80 of the CPC, wherein the Government should be given notice of 2 months, so as to settle the claim of the person who had got issued the notice. In this case also, the advocate has given full description of the respondent and he has also stated the particulars of the cheque and also the fact that the same was dishonoured by the bank when presented same by the respondent for want of sufficient funds and he also requested him to pay that amount within 15 days failing which he would proceed against him under Sec.138 of the Act, etc. From this detailed description it is abundantly clear that the petitioner had come to know of the purpose for which the notice was issued by the advocate. Therefore, the learned advocate had satisfied all the necessary ingredients of Sec.138 of the Act, but only by mistake he had not signed the notice. Therefore, that itself would not in any way lead to come to a conclusion that the notice issued by the advocate without his signature is invalid in the eye of law. Hence, the argument of the learned counsel for the petitioner is unsustainable."

14. In the above matter, the learned Single Judge had relied upon one earlier Judgment of the Karnataka High Court in the case of ***Sha Jetmal Vs. The General Manager, Southern Railways [AIR 1995 Kar. 219]***. In the said matter, the plaintiff though had issued a notice under Section 80 of the Code of Civil Procedure (CPC) before filing of the suit, it was not signed by him or his Advocate. The Court of first instance dismissed the plaintiff's suit on the ground that there was no compliance of provisions under Section 80 of the CPC in view of the fact that the notice which was issued by the plaintiff before filing of the Suit, was not signed either by

the party or by the Advocate. The order passed by the Court of first instance was first challenged before the District Court and thereafter before the High Court. The High Court held that notice, even though unsigned, sufficiently complies with the requirements of Section 80 of the CPC and hence was a valid notice.

15. In the case of ***Sha Jetmal*** (supra), the Karnataka High Court had referred to and relied upon the Judgment of the Honourable Apex Court in the case of ***Ghanshyam Dass and Others Vs. Dominion of India and Others [AIR 1984 SC 1004]***. In the said case before the Honourable Apex Court, the plaintiffs' father was a contractor and he had supplied charcoal to the Government. He had claimed additional amount in terms of the escalation clause in the agreement. Since the said amount was not paid, he had issued a notice under Section 80 of the CPC to the Government, but his claim was denied. He, however, died before he could institute suit against the Government. The plaintiffs i.e. sons of the contractor then filed a suit without issuing any fresh notice under Section 80 of the CPC. An objection was, therefore, raised that the suit was liable to be dismissed for want of statutory notice under Section 80 of the CPC by the plaintiffs, who had instituted the said suit. The Trial Court held that no further notice under Section 80 of the CPC was necessary and the notice issued by the father of the plaintiffs enured to the benefit of the plaintiffs. The Trial Court's decision was reversed by the High Court. The

matter was then taken to the Honourable Apex Court. The Honourable Apex Court held that no fresh notice was necessary and the notice already served enured to the benefit of the plaintiffs.

16. The observations made by the Honourable Apex Court in the aforesaid Judgment, in interpretation of Section 80 of the CPC are quite material. I deem it appropriate to reproduce the said observations made in paragraph Nos.16, 17 and 18 of the said Judgment, which read thus:-

“16. Section 80 of the Code is but a part of the Procedure Code passed to provide the regulation and machinery, by means of which the Courts may do justice between the parties. It is therefore merely a part of the adjective law and deals with procedure alone and must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it. In Sangram Singh V. Election Tribunal, Kotah (1955) 2 SCR 1 : (AIR 1955 SC 425) Vivian Bose, J. in his illuminating language dealing with the Code of Civil Procedure said :

“It is procedure, something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.”

17. Our laws of procedure are based on the principle that “as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities”. Here, all the requirements of Section 80 of the Code were fulfilled. Before

the suit was brought, the Dominion of India received a notice of claim from Seth Lachman Dass. The whole object of serving a notice under Section 80 is to give the Government sufficient warning of the case which is going to be instituted against it was that the Government, if it so wished, settle the claim without litigation or afford restitution without recourse to a court of law. That requirement of Section 80 was clearly fulfilled in the facts and circumstances of the present case.

18. It is a matter of common experience that in a large majority of cases the Government or the public officer concerned makes no use of the opportunity afforded by the section. In most cases the notice given under Section 80 remains unanswered till the expiration of two months provided by the section. It is also clear that in a large number of cases, as here, the Government or the public officer utilised the section merely to raise technical defence contending either that no notice had been given or that the notice actually given did not comply with the requirements of the section. It is unfortunate that the defendants came forward with a technical plea that the suit was not maintainable at the instance of the plaintiffs, the legal heirs of Seth Lachman Dass, on the ground that no fresh notice had been given by them. This was obviously a technical plea calculated to defeat the just claim. Unfortunately, the technical plea so raised prevailed with the High Court with the result that the plaintiffs have been deprived of their legitimate dues for the last 35 years."

17. In the case of **Shaikh Farooq** (supra) relied upon by Advocate Shri Gore, the notice allegedly sent in compliance of the provisions under Section 138 of the N.I.Act, was returned unserved and the said unserved envelop, allegedly containing the said notice, was filed alongwith the complaint by the complainant therein. During the trial of the case, the said unserved envelop was opened by the Court and the notice was taken out from the

said envelop, which was found to be unsigned. In the circumstances, it was held by this Court that,

“the law raises presumption of service if the notice under R.P.A.D. is refused. However, if the envelop Exhibit 26(1) is to be read with the unsigned notice Exhibit 41, what could be said is that the unsigned typed paper was sent to the accused in the form of notice claiming to be from the Advocate. When there is no signature of anybody, it appears difficult to find that there is compliance of clause (b) of Section 138 of the Act which requires that notice should be given in writing. If the Advocate was to write notice in his own hand and send in which signature remains, it could be still said to be notice of the Advocate or the complainant. But when there is typed document in the form of Notice with no signature (not even an initial) of anybody, it cannot be said to be legal notice. Nobody could be said to own up the correctness of the contents.”

18. Emphasizing the observations made as aforesaid, it was asserted by Advocate Shri Gore that in the present matter also the complainant has failed in complying with the mandatory requirement of issuing notice in writing to the respondent since the notice was not bearing signature either of the party or the Advocate.

19. It is, however, difficult to agree with the argument as has been advanced by Advocate Shri Gore. The facts of the present case and the facts which were existing in the case of **Shaikh Farooq** (supra) are distinguishable. In the said matter, the notice, which was sent to the respondent, itself was not signed, whereas in the instant matter, the office copy of the notice filed on record alongwith the complaint is not signed by anybody. As because the office copy is not signed, no such conclusion can be

drawn that the notice, which has been duly served upon the respondent, was also unsigned. Admittedly, the respondent has not placed on record the copy of the notice served upon him. The learned Trial Court has also observed in paragraph No.17 of the impugned Judgment that in absence of the copy of the notice sent to the accused, it cannot be ascertained whether it was signed or not. In the next paragraph, the learned Trial Court, however, had gone wrong in observing that there is no concrete evidence on record to establish that the typed notice sent to the accused was signed either by the complainant or by the Advocate and hence, it cannot be held to be a legal notice.

20. As per the provisions of Section 138 of the N.I.Act, before filing a complaint under the said Section, the payee or the holder in due course of the cheque, as the case may be, has to make a demand for the payment of the said 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 the return of the cheque as unpaid and if the drawer of the said cheque fails to make payment of 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, only then such complaint can be filed.

21. It is thus evident that to send a notice on the correct address of the drawer of the cheque demanding the cheque

amount and due service of the said notice on the drawer, are the only mandatory requirements as contemplated under Section 138 of the N.I.Act. In the circumstances, averments in the plaint that, such notice was sent by R.P.A.D. on the address of the drawer and the same has been duly served upon the drawer, shall be held the sufficient compliance. If postal slip evidencing that the notice was despatched and the acknowledgement receipt showing that the notice was received to the respondent are filed on record, the complainant shall be held to have discharged the burden on him. Even if the office copy of the said notice is not filed on record, unless the respondent comes out with a case that the item, which was allegedly delivered to him, was not the notice demanding the amount of cheque from him, it has to be held that the document, which is served upon the respondent, was a notice as contemplated under Section 138(b) of the N.I.Act.

22. The question of service of notice in terms of Section 138(b) of the N.I.Act, was placed before the larger Bench of the Honourable Apex Court in the case of **C.C.Alavi Hazi** (supra) in view of a reference made by two Judge Bench of the Honourable Supreme Court. The following question was referred to the larger Bench *"Whether in absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice; or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this Court in the case of Vinod Shivappa ?"*. The larger Bench of the Apex Court, while answering the reference made to it, held that, when the notice is

sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issuing notice in terms of Clause (b) of proviso to Section 138 of the N.I.Act, stands complied with. The larger Bench has, further, observed that the complaint must, however, contain basic facts regarding the mode and manner of issuance of notice to the drawer of the cheque and the same shall be held to be compliance of the mandatory statutory procedural requirements. As has been further observed by the larger Bench, it would be then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the said item was never tendered or that the report of the Postman was incorrect.

23. In the present matter, the complainant has specifically averred in the complaint filed by him that the statutory demand notice was issued by him to the respondent on 22.03.2016, and the same has been duly served upon the respondent. As I have noted earlier, since the acknowledgement receipt was not received within the reasonable time, correspondence was made with the Postal authority, whereupon it was informed by the said authority that the notice despatched on 22.03.2016, was delivered to the addressee i.e. respondent on 23.03.2016. In his testimony before The trial Court, the complainant had reiterated the aforesaid facts on oath. As stated earlier, the facts so

deposed by the complainant have not been denied or disputed by the respondent. Further, the learned Magistrate has held that the complainant has successfully established that the accused had issued the subject cheque towards discharge of legally enforceable debt. The Trial Court has also held that the complainant has proved that the subject cheque was presented within the statutory period and it was dishonoured for the reason 'account closed'. In paragraph No.15 of the impugned Judgment, the Trial Court has categorically observed that the accused has not seriously disputed issuance of cheque or its dishonour. The Trial Court has further observed that the vague answers given by the accused in his statement under Section 313 of the Code of Criminal Procedure also support contentions of the complainant regarding presentment and dishonour of cheque.

24. In view of the facts as aforesaid, in fact, even if the complainant would not have filed on record the office copy of the notice, no such finding was liable to be recorded that there was no compliance as contemplated under Section 138(b) of the N.I.Act.

25. Proviso (b) to Section 138 of the N.I.Act, reads thus:

“(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 thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid.”

Though, the proviso mandates giving of notice in writing, it nowhere prescribes that the said notice shall be signed by the party or if sent through Advocate, by the said Advocate. Ordinarily, such notice is signed by the party or the Advocate, who sends such notice on behalf of the said party. However, if inadvertently such notice is despatched without the signature either of the party or the Advocate, only on that count, no such conclusion can be recorded that there was no compliance as contemplated under Section 138(b) of the N.I.Act. As has been explained by the Honourable Apex Court in the case of ***D.Vinod Shivappa Vs. Nanda Belliappa [(2006) 6 Supreme Court Cases 456]***, (supra), the very purpose of adding proviso (b) and (c) to Section 138 of the N.I.Act, is to protect the honest drawers, whose cheques may have been dishonoured for the fault of others or who may genuinely wanted to fulfill their promise but on account of inadvertence or negligence fail to make necessary arrangement for the payment of the said cheque. Thus, what is required to be communicated to the drawer of the cheque is the fact that the cheque issued by him to the payee has stood dishonoured for want of insufficient funds or for the reason as is mentioned in cheque return memo and there must be a demand that the drawer of the cheque shall make payment of the amount of the said cheque within fifteen days from receipt of the said notice. As has been provided in Section 138 of the N.I.Act, if the drawer of the said cheque makes payment of the cheque amount within fifteen days of receipt of such notice, he cannot be held guilty for

the offence under Section 138 of the N.I.Act.

26. In the present matter, it is not the case of the respondent that he did not receive notice dated 22.03.2016. It is the defence raised by the respondent that the complainant has failed in proving that the notice dated 22.03.2016 sent by him is a valid notice as contemplated under Section 138(b) of the N.I. Act. From the material on record, it is further evident that the defence as aforesaid has been raised by the respondent after noticing that the office copy of the notice dated 22.03.2016, filed by the complainant alongwith the complaint, is not signed either by the complainant or the Advocate through whom the said notice was sent. The learned Trial Court also has held it to be a serious lacuna in the case of the complainant by recording a finding that it was not a legal notice in the eyes of law. The learned Magistrate has gone one step ahead in further observing that even if the complainant had examined his Advocate on oath, who had sent the said notice, even then he would not have succeeded in proving the said notice as the same was not signed by the said Advocate.

27. The finding recorded as above by the learned Magistrate is wholly unsustainable. Even if it is assumed that proviso (b) to Section 138 of the N.I.Act, requires that the notice in writing shall be duly signed by the party or his Advocate, on the basis of the unsigned office copy of the notice placed on record, it could not have been assumed that the notice, which was sent to the

respondent and which has been duly served upon him, was also unsigned.

28. As noted herein above, it is not denied or disputed by the respondent that the notice dated 22.03.2016, is received to him. As has come on record, the said notice was duly served upon the respondent on 23.03.2016. It is not the case of the respondent that the communication so received to him by R.P.A.D. on 23.03.2016, was not the notice contemplated under Section 138(b) of the N.I.Act. It is also not the case of the respondent that the communication so received to him was not in respect of the subject cheque and its dishonour. It is also not the case of the respondent that in the communication so received, the name of the complainant was not appearing or that there was no demand of the cheque amount or that the said communication was lacking necessary particulars as are contemplated under Section 138(b) of the N.I.Act. It is also not the case of the respondent that the contents of the communication received to him and the contents of the office copy placed on record are not tallying with each other. It is also not the case of the respondent that the communication received to him does not bear the signature either of the complainant or the Advocate through whom the complainant had sent the said notice to him. In the above circumstances, it has to be presumed that the communication received to the respondent by R.P.A.D. on 23.03.2016, was the notice contemplated under Section 138(b) of

the N.I.Act., irrespective of the fact that the office copy of the said notice filed alongwith the complainant is unsigned.

29. From the facts as above and the other material on record, it is quite obvious that only after noticing that the office copy filed alongwith the complaint is unsigned, the respondent has cleverly raised a defence of non-compliance of the provisions under Section 138(b) of the N.I.Act. Had the office copy be bearing signature either of the party or his Advocate, perhaps the respondent may not have taken any such defence. It is thus evident that, to defeat the claim of the complainant, the respondent had raised a technical plea that there was no compliance of Section 138(b) of the N.I.Act and therefore the complaint was not maintainable. Unfortunately, the technical plea so raised prevailed with the learned Magistrate and resultantly the complaint was dismissed by the Trial Court.

30. The learned Magistrate has failed in appreciating and understanding the object and purpose behind adding of proviso (b) and (c) to Section 138 of the N.I.Act. As has been elaborately discussed by me herein above, the object of issuing the notice is to give an information and intimation to the person, who had issued the cheque that the said cheque has dishonoured so as to facilitate him to make good the amount within fifteen days from the date of receipt of such information from the holder of the cheque. The question is whether the said purpose can be said to

have been achieved in the present matter. According to me, the same has been fully achieved. The complainant in his testimony before the Trial Court has specifically deposed that on 22.03.2016, he had sent a notice to the respondent on his both addresses demanding the amount of dishonoured cheque through his Advocate and the same was served on the respondent on 23.03.2016. The fact so deposed by the complainant has not been denied or disputed by the respondent. Not only that the aforesaid fact was deposed on oath by the complainant but he has also filed on record the postal slip evidencing that the notice was despatched by him by R.P.A.D. and the acknowledgment receipt demonstrating that the same was served upon the respondent. The office copy of the said notice was also placed on record by the complainant. Though, the said office copy was unsigned, since the contents of the said notice were deposed on oath by the complainant before the Trial Court, having regard to the law laid down by the Honourable Apex Court in the case of **Indra Kumar Patodia and Another** (supra), the Trial Court must have held the requirement under Section 138(b) of the N.I.Act, to have been complied with by the complainant.

31. For the reasons stated above, I have no hesitation in holding that the Trial Court has grossly erred in dismissing the complaint filed by the present appellant under Section 138 of the N.I.Act, on the ground that the office copy of the statutory mandatory notice as contemplated under Section 138(b) of the

N.I.Act, filed alongwith complaint was not signed either by the complainant or his Advocate. The impugned Judgment and order, therefore, cannot be sustained and deserves to be set aside. From the evidence on record, it has to be held that the notice contemplated under Section 138(b) of the N.I.Act, was duly served upon the respondent. I reiterate that the Trial Court has already held that the complainant has successfully proved the fact of issuance of cheque in his favour by the respondent towards legally enforceable debt and said stood dishonoured for the reason that the account was closed. In view of the discussion made by me, the requirement as contemplated under Section 138(b) of the N.I.Act, is also held to be complied with. It is not in dispute that the respondent has not made the payment of the subject cheque within fifteen days of receiving summons from the Court. The appellant – complainant has thus successfully proved that the respondent has committed an offence punishable under Section 138 of the N.I.Act. In the result, the following order is passed:-

ORDER

- I) The Judgment and order passed by the Judicial Magistrate First Class (Court No.13), Aurangabad, on 07.02.2018, in SCC No.3245 of 2016, is quashed and set aside.
- II) The respondent is held guilty and convicted for the offence punishable under Section 138 of the N.I.Act, and is sentenced to pay fine of Rs.2,00,000/-, in default, to suffer simple imprisonment for six months.

III) The respondent to deposit the amount of fine in the Trial Court, within eight weeks from the date of this order. If he fails to deposit the amount of fine within the stipulated period, the Trial Court shall ensure that the respondent undergoes the default sentence.

IV) Appeal stands allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

spt