

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 214 OF 2015

Mrs. Kunda Sandesh Wairkar .. Applicant

v/s.

Sandip @ Sandy Maruti Raut & Anr. ..Respondents

Mr. Usman Chisty for the Applicant.
Mr.Chaitanya Pendse for the Respondent No.1.
Mrs. R.V.Newton, APP for the State.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : AUGUST 26, 2015.**

P.C.

1. This is an application under Section 378(3) of Cr.PC. for leave to appeal against the judgment dated 26.3.2015 in C.C.No. 2765/SS/2012, whereby the learned Metropolitan Magistrate, 7th Court, Dadar,Mumbai has acquitted the aforesaid respondent no.1 for the offence under Section 138 of the Negotiable Instruments Act.
2. The case of the applicant-complainant was that the respondent no.1-accused had issued the cheque dated 25.8.2012 for Rs.3,20,000/- towards discharge of his legally enforceable debt. The

said cheque was presented in the bank, and was returned unpaid for “funds insufficient” on 6.9.2012. By statutory notice dated 14.9.2012 the accused was called upon to pay the cheque amount within 15 days. The said notice was returned unclaimed. The applicant-complainant thereafter filed complaint on 18.10.2012.

3. Upon being summoned, the respondent no.1-accused entered appearance and thereafter substance of acquisition was explained to him and his plea was recorded. The evidence of the complainant was recorded and the statement of the accused came to be recorded under Section 313 of Cr.P.C. The defence of the accused was of total denial.

4. After considering the evidence recorded, the learned Magistrate acquitted the accused mainly on the ground that the complainant has not proved the signature of the accused on the cheque and further that he has not proved the contents of the cheque. The Learned Magistrate therefore held that the presumption under Section 118 and 139 of the Negotiable Instruments Act cannot be invoked. The learned Magistrate further held that the applicant-complainant had not adduced any evidence to prove that she had advanced loan of

Rs.3,20,000/- to the accused. As regards the statutory notice, the learned Magistrate has held that the applicant-complainant had proved that she had despatched the statutory notice to the accused. The learned Magistrate further held that the said notice was returned unserved with endorsement "unclaimed". Since the notice was sent on the correct address of the accused, it was deemed to have been served on the accused. The learned Magistrate however held that the complainant has not proved the contents of the notice and hence mere service of the statutory notice is of no help.

5. Learned Counsel for the applicant-complainant has brought to my notice the answer given by the respondent no.1-accused to question no.10 asked under Section 313 of Cr.P.C. wherein the respondent no.1 accused has in clear terms admitted having issued the cheque and had stated that the said cheque was given as security. In the circumstances, prima facie, the finding of the learned trial Judge that the complainant has not proved the signature of the accused or the contents of the cheque is not justifiable. Consequently, the learned Magistrate was not justified in not invoking the provisions of Section 118 and 139 of the Negotiable

Instruments Act.

6. It is also to be noted that the applicant-complainant had placed on record copy of the statutory notice, original postal receipt as well as the unclaimed postal envelope, which were tendered in evidence and marked Exhibit 28, 29 and 30 respectively. The said documents prima facie prove the contents of the statutory notice which, as held by the learned Magistrate were already dispatched at the correct address and were deemed to be served to the respondent no.1-accused. In my considered view, the learned Magistrate has ignored the material evidence and the reasons given are prima facie not justifiable.

7. Under the circumstances, Leave to appeal granted. Appeal is admitted.

. Respondent no.1- accused is directed to furnish bail bond of Rs.10000/- with one surety in the like amount to the satisfaction of the learned Magistrate, 7th Court, Dadar, Mumbai.

(ANUJA PRABHUDESSAI, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed judgment/order.