IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.61 OF 2017

Smt. Deena Mavji Baria .... Applicant
Vs.
Prabha Anand Barathe & Ors. .... Respondents

Mr. Sanjeev Prataprao Kadam for the Applicant.
Mr. Kamlesh Jain I/by Mr. Manoj M. Chauhan for respondent no.1.
Ms. Pallavi Dabholkar APP for the State.

Coram : ***Smt. Sadhana S. Jadhav***, J.
Date : 15th March 2019

P.C.:

1 Heard.

2 This is an application seeking leave to appeal challenging the judgment and order dated 7th December 2016 passed by the Metropolitan Magistrate, 7th Court, Dadar, Mumbai thereby acquitting the respondent for the offence punishable under Section 138 of Negotiable Instruments Act.

3 It is the case of complainant that the accused namely, Prabha Anand Barathe i.e. respondent no.1 had agreed to sell her

room No.B-22 situated in Om Sagar Darshan Co-operative Housing Society at Kandivali (West) to the present applicant for a consideration of Rs.15,60,000/-. The parties to the agreement had signed the requisite documents. Thereafter the respondent no.1 had informed the applicant that she does not wish to continue with the agreement and has changed her decision and therefore she would refund the entire amount, which is paid by the applicant. She had issued one cheque in favour of the applicant to the tune of Rs.10,00,000/-. The said cheque was dishonoured on account of 'insufficient funds'.

4 The applicant herein had issued legal notice to the accused. The accused had not replied to the said notice and therefore the applicant was constrained to file a complaint under Section 138 of Negotiable Instruments Act.

5 In the course of the trial, respondent no.1 herein had examined her sister namely Ratnamala Anand Barathe as a defence witness as well as the Bank Manager. She had also disputed the

signature on the said cheque. It had thereafter transpired that the signature of the disputed cheque was of Ratnamala Barathe and not of the present applicant. It was the defence of the accused that both the sisters were holding joint account and therefore the cheque was issued by one sister.

6 In view of the said defence raised by the accused-respondent no.1, an application was filed before the learned Magistrate seeking to arraign additional accused i.e. Ratnamala Barathe by virtue of the provisions under Section 319 of Code of Criminal Procedure. The said application was rejected by the learned Metropolitan Magistrate vide order dated 30th August 2016. The respondent no.1 was acquitted on the said ground.

7 The learned Magistrate has observed that in fact the cheque was not signed by the present respondent but it was signed by her sister, Ratnamala Barathe. The learned Magistrate has relied upon the judgment of the Hon'ble Apex Court, in the case of <u>Aparna R. Shah Vs. Sheth Developers Pvt. Ltd.</u>, (<u>Criminal Appeal No. 813 of</u>

2013) and has acquitted the respondent. In fact the order passed below Exhibit 40 dated 30th August 2016 was not challenged before the Higher Court and hence has attained finality. Since the present respondent was not the signatory of the said cheque, she could not have been prosecuted under Section 138 of Negotiable Instruments Act. The learned Magistrate had not charged the accused with Section 420 of Indian Penal Code also.

8 Needless to say that the accused was not being prosecuted with the aid of Section 141 of the Negotiable Instruments Act. The very language of Section 138 of Negotiable Instruments Act contemplates that the liability would be borne by the signatory to the cheque and none others. Section 138 of the Negotiable Instruments Act reads as follows:

> "**Section 138. Dishonour of cheque for insufficiency, etc., of funds in the account**. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it

exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:
Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to 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;

(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; and

(c) the drawer of such cheque fails to make the 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.

9 In view of above, the application seeking leave to appeal being sans-merits, stands rejected.

(*Smt. Sadhana S. Jadhav*, J)