

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

**CRIMINAL APPLICATION NO.385 OF 2013
IN
CRIMINAL APPEAL NO. OF 2013**

H.F. Jewellers

.. Appellant

Vs.

Vijay Ambalal Kothari & Anr.

.. Respondents

.....

Mr.Prashant Bhavake, Advocate for the Appellant.

None for Respondent No.1.

Mr.S.R. Agarkar, APP for Respondent No.2 – State.

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CORAM : SMT.ANUJA PRABHUDESSAI, J.

DATED : DECEMBER 04, 2017.

P.C. :

By this application the applicant sought leave to challenge the judgment dated 9th November, 2012 in Summary Criminal Case No.504 of 2010.

2 The applicant was the complainant in the said summary criminal case (shall be hereinafter referred to as “Complainant”, for short) filed under Section 138 of the Negotiable Instruments Act, 1881. It was the case of the complainant that the respondent accused has purchased from his

shop gold ornaments worth Rs.7,50,000/-. The respondent accused had issued a cheque dated 29th December, 2009, towards the price of the said gold ornaments. Said cheque was dishonoured and hence statutory notice was issued to the respondent-accused. The respondent-accused did not pay the amount, hence, the complaint under Section 138 of Negotiable Instruments Act, 1881, came to be filed.

3 The defence of the respondent-accused was that the subject cheque was misplaced and he had already intimated the bank about the same vide letter dated 21st October, 2009 and had requested the bank not to honour the said cheque. The accused had denied having purchased any gold from the complainant and had further claimed that there was no legal liability that the cheques were not issued by him towards any legal liability.

4 After considering the evidence adduced by the complainant as well as by the accused, the learned Judge held that the defence raised by the accused was probable. The learned Judge, therefore, acquitted him for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

5 It is to be noted that the subject cheque is dated 29th December, 2009, which was allegedly issued by the accused towards the price of gold purchased by him from the complainant. The complainant has relied upon a receipt to prove the said transaction. The said receipt is dated 6th October, 2009. The said receipt does not bear the signature of the accused which fact is admitted by the complainant. The statutory notice dated 18th January, 2010, does not make any reference to such receipt and also does not indicate that the cheque dated 29th December, 2009 was issued towards the transaction dated 6th October, 2009. The receipt dated 6th October, 2009 also does not make any reference to the cheque dated 29th December, 2009. The complainant has not explained either in the complaint, in the notice or his evidence before the Court as to why he had accepted the cheque dated 29th December, 2009, when in fact the transaction was of 6th October, 2009. This is relevant as there is no material on record to show that the complainant and the accused had any business transactions between them. The receipt also is vague and does not disclose the nature of the ornaments sold to the accused. It is also pertinent to note that almost two months prior to the date of the cheque, the accused had already

written to the bank that the subject cheques were misplaced and he had requested the bank not to honour the said cheques.

6 In the light of the above facts, the learned Magistrate was justified in holding that the defence raised by the accused was probable. The findings of the learned Magistrate are based on evidence on record and the same are probable. There is no reason to interfere with the said findings. The application has no merits and hence the leave is rejected.

(SMT.ANUJA PRABHUDESSAI, J.)