IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

CRL.A.No. 114 of 2009 ( )

IN ST 483/2006 of CHIEF JUDICIAL MAGISTRATE COURT, KOLLAM DATED 30-06-2008

APPELLANT(S)/COMPLAINANT:

K.SURESH, KOTTATHAZHA VEEDU
MEERA NAGAR, MUNDAKKAL EAST, KOLLAM.

BY ADVS.SRI. K.SHAJ
SRI.SAJJU.S

RESPONDENT(S)/ACCUSED/STATE:
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1. ROSHINI RAJENDRAN(TEACHER)
MALAYALAM DEPARTMENT, S.N.PUBLIC SCHOOL, THATTAMALA
KOLLAM.

2. STATE OF KERALA, REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.T.R.RAJAN
R1 BY ADV. SRI.N.SADASIVAN
R2 BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 114 of 2009

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Dated this the 17th day of December, 2015

JUDGMENT

Aggrieved by the acquittal of the accused in a proceeding under Section 138 of the Negotiable Instruments Act by the Chief Judicial Magistrate, Kollam in S.T.483/2006, the complainant before the court below has come up in appeal after obtaining leave of this Court.

2. The facts absolutely necessary for the disposal of this appeal are as follows:

According to the complainant, the accused borrowed a sum of ₹ 1 lakh on 20.01.2006 from him and to discharge the liability, she had issued Ext.P1 cheque. The cheque on presentation bounced for want of funds. A statutory notice issued to the accused did not yield any result. Since the amount remained unpaid, the complaint was laid.

3. The court before which the complaint was laid took cognizance of the offence and after following the

necessary procedures, summons was issued to the accused. When the accused entered appearance, she was furnished with copies of the documents and particulars of offence were read out to her. She pleaded not guilty. The complainant therefore examined PW1 and had Exts. P1 to P6 marked.

4. After the close of complainant's evidence, the accused was questioned under Section 313 Cr.P.C. She apart from denying all the incriminating circumstances brought out in evidence against her, she came forward with an explanation that according to her, her husband was having chitty transaction with the complainant and for receiving the amount, they had to give security for the amounts given by the complainant and in that respect, blank cheques signed by herself and her husband and their documents of title etc, were taken by the complainant. She further states that the entire chitty transaction has been closed and there is no debt due as on date to the complainant. In spite of payment of the entire amount due

to the complainant, he had not returned the document which he had taken at the initial stage and therefore, for return of those documents, they had approached the Civil Court and the Civil Court had passed a decree in their favour directing the defendants in the suit to return the cheques to the plaintiff which include the cheque in question. She examined DW1 in her defence and had Exts.D1 to D8 marked.

5. The court below proceeded on the premises as could be discernible from the order impugned that it was the accused who had chitty transaction with the complainant and for receiving the chitty amount, she had given blank cheques. The court below accepted Exts.D1 to D8 and on that basis, came to the conclusion that the case of the accused is more probable and accordingly, acquitted the accused.

6. Assailing the acquittal, the learned counsel appearing for the appellant contended that it is very clear

from the records that the accused had no consistent case and that alone is sufficient to set aside the order of acquittal. The definite case of the complainant was that the accused had borrowed a sum of ₹1 lakh and she had issued the cheque in question. The court omitted to note that while the accused would say that she had no chitty transaction with the complainant, her witness, DW1 would say otherwise. Anyhow, it is very evident that there were monitory transactions with the complainant. It is not as if that it was a first time borrowal, according to the accused. The court below was not justified in presuming that the accused has gone to the subscriber to the chitty run by the complainant and in that transaction, the cheque has been issued. Therefore on the basis on which the acquittal is made, is not correct.

7. The learned counsel appearing for the respondent on the other hand pointed out that whatever that be, in the light of Ext.D8 the decree in the suit filed by the plaintiff and

her husband against the complainant in this case and others, there was a decree of mandatory injunction to return the various cheques, the return of which was sought for by the plaintiffs and that include the cheque in question also. Therefore, it is quite evident according to the learned counsel, that no debt was due and Ext.P1 cheque was not issued in discharge of any debt due to the complainant. The learned counsel also produced before this Court the judgment in O.S.No.243/2007, a suit instituted by the complainant herein against the accused in respect of the very same transaction involving the very same cheque where he sought return of the money covered by the cheque. By judgment dated 28.09.2012, that suit was dismissed. This further fortifies, according to the learned counsel for the respondent, that no debt was due at all and if at all the cheque was with the complainant, it was not in discharge of any debt as claimed by the complainant in the complaint. It was also pointed out that the contention that

Ext.D8 decree was an ex-parte decree and therefore it cannot have much of a value cannot be countenanced in the light of the fact that an attempt was made by some of the defendants, including the complainant herein to have the ex-parte decree set aside. They failed. It is also pointed out that Ext.P6 petition filed for setting aside the ex-parte decree has also been dismissed. So therefore, the decree covered by Ext.D8 has become final. Therefore, it is contended that even assuming that the court below has proceeded on a wrong premises, ultimately, there is no chance of success for the complainant in the light of the two decrees passed by the Civil Court and also the fact that the petition to set aside the ex-parte decree has also been dismissed. It is therefore contended that no purpose will be served by sending back the matter to the trial court.

8. Of course, it has to be stated that there is considerable force in the submission made by the learned counsel for the respondent. But one fact stares at the face.

The court below proceeded on the premises that it was the accused who had chitty transaction with the complainant. Here, the learned counsel for the appellant may be right in his submission that the accused had no consistent case. When she was questioned under Section 313, she came forward with the case that her husband was the subscriber to the chitty transaction and for the amount bid by him or received by him, cheques were given as security and that included the cheque involved in this proceedings also. However, it is interesting to note when she examined DW1, her husband from her side, her husband came forward with a case that the chitty transaction was with his wife and not with him. He disowned having any chitty transactions with the complainant. There is an apparent conflict between the stand taken by the accused and DW1.

9. It may not be now necessary for this Court to go into the merits and demerits of the decree in the suit for the simple reason that subsequent decree has not been

produced and proved in accordance with law. It will not be appropriate for this Court also to refer to any of the pleadings in that case in the absence of materials.

10. If the foundation of the lower court's order of acquittal is unsustainable, then necessarily the matter will have to be gone into again by the lower court. There is no finding by the court below that the complainant did not have the financial capacity to extend a loan of ₹1 lakh. Even otherwise, the definite stand of the accused was that, the complainant was running a chitty business to which her husband was a subscriber. Once it is found that she was not the subscriber to the chitty transaction the whole scenario changes. Therefore, the conclusion drawn by the court below on the premises that she is involved in the chitty transaction cannot be sustained. The matter requires a reconsideration.

11. It was pointed out by the learned counsel for the appellant that the decree on which reliance is placed i.e. the

decree in which return of cheque was granted covered by Ext.D8 was a suit instituted subsequent to filing of the complaint and that has to be therefore considered accordingly. These are all matters to be again considered by the court below.

For the above reasons, the impugned judgment is set aside and the matter is remanded to the trial court for fresh consideration in the light of what has been stated above. Both parties will be at liberty to adduce further evidence if they so chose. The court below may issue fresh notice to the parties.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge