IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No. 133 of 2009 ( )

AGAINST THE JUDGMENT IN CC 198/2007 of JUDICIAL FIRST CLASS MAGISTRATE-III (MOBILE COURT), ERNAKULAM DATED 16-08-2008

APPELLANT/COMPLAINANT:

M/S. VAJRA CHITS & FINANCE (REG.NO.LD/K/84/EH),
CHENGANNUR, REP. BY PROPRIETOR MR. SANTHOSHKUMAR,
SANTHOSH BHAVAN, KODANCHIRA, PULIYUR (P.O.),
CHENGANNUR, ALAPPUZHA DISTRICT - 689 510.
REP. BY POWER OF ATTORNEY HOLDER MANOJ KUMAR N,
S/O. NARAYANAN PILLAI, AGED 35 YEARS,
VENU BHAVAN, PUNTHALA P.O., KULANADA.

BY ADV. SRI.SAIBY JOSE KIDANGOOR

RESPONDENT(S)/ACCUSED:

JAGADEESWARI GOPALAKRISHNAN,
VRINDAVAN HOUSE,,
MADAPILLI P.O.,
CHANGANASSERY, KOTTAYAM 686 546.

BY ADV. SRI.JOHN BRITTO
BY ADV. SRI.C.A.RAJEEV
BY PUBLIC PROSECUTOR SMT. S. HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.BHAVADASAN, J.

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Crl.A. No. 133 of 2009

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Dated this the 15th day of September, 2015

<u>J U D G M E N T</u>

Aggrieved by the acquittal of the accused for the offence punishable under Section 138 of the Negotiable Instruments Act, the complainant has come up in appeal.

2. The complainant, which is a proprietary concern engaged in Chits and Finance business, extended a personal loan of ₹85,500/- to the accused to be repaid within three months from the date of receipt of the amount. It is stated that the accused had executed a promissory note also. When the money was demanded in May, 2003, the same was not repaid. Later, in order to discharge the liability, it is alleged that the accused issued Ext.P2 cheque dated 05.06.2003, which on presentation bounced for want of funds. A statutory notice was issued by the complainant demanding the payment. But the accused neither made any payment nor issued any reply. Since the amount was not

paid, a complaint was laid.

3. Cognizance of the offence was taken by the Judicial First Class Magistrate Court-I, Ernakulam. 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 his power attorney holder as PW1 and had Exts. P1 to P6 marked. On the defence side, Exts. D1 to D5 were marked.

4. After the close of complainant's evidence, the accused was questioned under Section 313 Cr.P.C. The accused denied all the incriminating circumstances brought out in evidence against her and stated that the concern runs a chitty business and she was a subscriber to the same. She had bid the chit and received the amount. At the time of receiving the amount, two cheques drawn in the account of the accused and her husband towards security were given

to the complainant. She has also given signed blank papers to the complainant. She would say that she was discharged the entire debt through the chitty transaction but the records were not returned.

5. On an appreciation of the evidence in the case, the court below came to the conclusion that the claim of a personal loan has not been proved by the financing company, who was the complainant and there is want of evidence to show that there was any subsisting debt to discharge that Ext.P2 cheque had been issued. Finally, the complaint was dismissed.

6. The learned counsel for the appellant assailed the acquittal on various grounds. It is pointed out that once the signature on the cheque is admitted and its issuance is admitted, presumption under Section 139 of the Negotiable Instruments Act follows and the burden is on the accused to show that there was no subsisting debt. This aspect of the case has been lost sight of by the court below and since the

signature is not disputed, it was incumbent on the part of the accused to adduce evidence in support of her case. The court below, without appreciating the facts and circumstances in the proper perspective, jumped to the conclusion that the case set up by the defence is probable and thus, dismissed the complaint.

7. The learned counsel appearing for the respondent on the other hand contended that the court below has analysed the evidence in considerable detail and it is quite evident that the cheque, which is now produced before court, is one of those which the accused had given at the time of bidding the chit amount and which the complainant received as security. It is significant to notice according to the learned counsel that even going by the complainant's case, at the time of receiving the loan, a promissory note was executed which has not seen the light of the day. Further, it was contended that being a finance concern, it would certainly have accounts and the accounts should

reflect the personal loan extended to the accused. Those documents were also not produced. To crown it all, the learned counsel pointed out that Ext.D1 speaks for itself. Ext.D1 is a notice issued on behalf of the complainant to the accused. Ext.D1 is dated 21.04.2003 wherein it is stated that ₹88,000/- is the due amount towards the chitty transaction and the accused was called upon to pay the same. Notice after dishonour of cheque contains an entirely different story and all these aspects have been taken into consideration by the court below and the court below found that the complainant has not succeeded in discharging his burden of proof. The learned counsel pointed out that there are no grounds to interfere with the order of acquittal.

8. As rightly pointed out by the learned counsel for the respondent, the complainant is a financial company. It runs a chit business also. It is not disputed by the complainant company that the accused was a subscriber to a chit and none of her statements regarding the chit has

been challenged or spoken to against by the power of attorney holder who was examined on behalf of the complainant. It is also stated that at the time of extending the loan of ₹85,500/- for which Ext.P2 cheque is alleged to have been given and the accused had executed a promissory note also. If that be true, there is nothing which prevented the complainant from producing that document which would have gone a long way in establishing its case. Then again, when the accused specifically disputed the personal loan, it would have been only appropriate for the complainant to produce the accounts maintained by him to show that in fact, a loan had been extended to the accused and she had received the amount. That was also not done. Further, as rightly pointed out by the learned counsel for the respondent, Ext.D1 speaks for itself. That is dated 21.04.2003. That makes mention of the fact that an amount of ₹88,000/- is due towards the chit transaction. The alleged payment is said to be on February, 2003. At a point of time when there was already a huge amount due from the accused, it is inconceivable that the complainant would have advanced further amount to the accused. These are all the factors which made the court below to come to the conclusion that the complainant has not been able to discharge burden casts on them.

9. The contention based on Section 139 of Negotiable Instruments Act has necessarily to fail. The initial burden is on the complainant to prove the necessary ingredients to attract the offence. There is no presumption under Section 139 of the Negotiable Instruments Act that merely because a cheque is issued, it is executed by the accused. The liability to show the existing debt is always on the complainant. That is evident from a combine reading of Section 138 and 139 of the Negotiable Instruments Act. There is a catena of decisions in this regard to show that merely because a signature admitted or even handing over of cheque is admitted, that does not lead to an inference that there is an

existing debt for which the cheque was issued. In the case on hand, the various documents produced by the accused would show that there was a chitty transaction between the parties and in all probability, the cheque would have been issued with respect to that transaction.

The court below was therefore justified in reaching the above conclusion and the result is that this appeal is without merits and it is liable to be dismissed. I do so.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge