

(2009) 04 DEL CK 0219
In the Delhi High Court
Case No : Criminal L.P. 279 of 2008

G.E. Capital Transportation Financial Services Ltd.	APPELLANT
Vs	
State and Another	RESPONDENT

Date of Decision : 22-04-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 256, 256(1), 313
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2010) 3 BC 316 : (2010) CriLJ 480

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Shishir Mathur, for the Appellant; Manoj Ohri, APP for R-1 and Om Prakash, for R-2, for the Respondent

Judgement

Reva Khetrapal, J.

Crl. L.P. 279/2008

Leave granted.

The leave petition stands disposed of accordingly.

Crl. A. /2009 (to be numbered)

1. Be registered and numbered.

2. This appeal is directed against the order dated 18.10.2008 passed by the learned Metropolitan Magistrate, New Delhi acquitting the accused in the complaint case titled as "G.E. Capital Transportation Financial Services Ltd. v. Shyam Vir Singh" filed u/s 138 of the Negotiable Instruments Act.

3. The facts relevant for the disposal of the present appeal are that the respondent No. 2 had approached the appellant Company for grant of loan for the purchase of a vehicle, consequent to which a loan agreement was executed between the appellant Company and the respondent No. 2. Subsequently, in

discharge of the outstanding amount, the respondent No. 2 issued two cheques bearing No. 78794 dated 20.09.2007 for an amount of Rs. 14,850/- and another Cheque No. 78795 dated 20.10.2007 for an amount of Rs. 14,850/- both drawn on the Oriental Bank of Commerce, Ghaziabad. The aforesaid cheques were dishonoured on presentation, resulting in the appellant Company filing a complaint u/s 138 of the Negotiable Instruments Act. On 19.04.2008, the said complaint was received in the Court and the same was adjourned to 22.04.2008 for consideration. By an order dated 22.04.2008, the learned Metropolitan Magistrate issued summons to the accused and thereafter listed the matter for 06.06.2008. On the said date, i.e. on 06.06.2008, the respondent No. 2 entered appearance and was admitted to bail. Notice u/s 251 Cr.P.C. for the offence punishable u/s 138 of the N.I. Act was framed against the respondent No. 2, to which the respondent No. 2 pleaded not guilty and claimed trial. Pertinently, however, the respondent No. 2 at the time of entering his plea of "Not Guilty" stated that he had issued the aforesaid cheques but the same could not be cleared on account of financial difficulty and as he was ill during relevant period, but he had made payments during the aforesaid period in four instalments of Rs. 50,000/- each, and altogether he had made a payment of eight instalments, and only three instalments were due when the vehicle was re-possessed by the complainant on 12.01.2008. He did not make the said payment subsequently as the complainant had seized/re-possessed his vehicle. He had received the notice, but non-payment was on account of the aforesaid re-possession.

4. After framing of the aforesaid notice, the case was listed on 22nd July, 2008 and thereafter adjourned to 21st August, 2008 for evidence. On 21st August, 2008, an application seeking exemption of the authorised representative of the appellant Company was filed before the learned Metropolitan Magistrate, which was allowed, and thereafter the matter was adjourned to 18.10.2008 for evidence. On the said date, i.e. on 18.10.2008, an application for exemption was filed on behalf of the authorised representative of the appellant Company which resulted in the passing of the impugned order. The said order dated 18.10.2008 reads as follows:

CC No. 1116/08 and 1108/08 18.10.2008

Present: Counsel for the Complainant. Accused on bail.

Case is at the stage of CE.

AR is not present. Neither affidavit has been filed nor copy of the same has been given to the opposite counsel for the accused. Pass over is sought for ensuring appearance of the AR of the Complainant.

Put up at 11.30 a.m.

Sd/- MM/New Delhi. 11.30 a.m. Present: None for the Complainant. Accused on bail. Put up at 12.30 p.m.

Counsel for complainant appears and states that AR is unable to turn up. An

exemption application filed stating that he is out of Station for official work.

Ld. Counsel for complainant stated that he would be adopting the same affidavit which was filed at the stage of pre-summoning evidence. This is another plea for taking time. It is pertinent to mention that despite having several opportunities this submission was never made earlier. No ground is made out for extending any further opportunity to lead evidence. CE stands closed.

In view of there being no incriminating evidence against the accused there is nothing to be put to him u/s 313 Cr.P.C. Accused is acquitted of the offence punishable u/s 138 N.I. Act.

Bail bonds cancelled. Surety discharged. Endorsement on documents, if any be cancelled.

File be consigned to Record Room.

Sd/- (Vipin Kumar Rai) MM/New Delhi.

5. The learned Counsel for the appellant Mr. Mohit Mathur, Advocate assails the aforesaid order on the ground that the learned Metropolitan Magistrate instead of deciding the exemption application filed on behalf of the authorised representative of the complainant stating that he was out of station for official work, proceeded to acquit the accused on the ground that there was no incriminating evidence against the accused. This, despite the counsel for the complainant stating that he would be adopting the same affidavit which was filed at the stage of pre-summoning evidence. The learned Counsel for the respondent No. 2, on the other hand, submits that this was not the first time when the authorised representative of the complainant was not present, and as such the order passed by the learned Metropolitan Magistrate acquitting the accused was perfectly justified.

6. After hearing the counsel for the parties and going through the orders passed by the learned trial court, I am of the opinion that in view of the provisions of Section 256 of the Code of Criminal Procedure, the learned Metropolitan Magistrate instead of acquitting the accused ought to have exercised the other options available to him under the aforesaid Section. For the sake of ready reference, the said Section is reproduced hereunder:

256. Non-appearance or death of complainant.-(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day: Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of Sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

7. The proviso to Section 256(1) clearly provides that where the complainant is represented by a pleader/counsel or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the attendance of the complainant and proceed with the case. In the present case, as is evident from the impugned order dated 18.10.2008, the counsel for the complainant was present before the learned Magistrate and had moved an exemption application stating that the authorised representative of the complainant Company was out of station for official work. In the circumstances, in my view, the learned Metropolitan Magistrate keeping in view the provisions of Section 256(1) and the admissions made by the accused at the time of framing of notice u/s 251 that he had issued the cheques in question and had received legal notice for their dishonour, should have disposed of the application for exemption from personal appearance of the authorised representative of the complainant Company and afforded another opportunity to the complainant Company to substantiate its case, instead of acquitting the accused for want of incriminating evidence. The accused, needless to state, could have been compensated by imposition of suitable costs.

8. In view of the aforesaid, the impugned order dated 18.10.2008 passed by the learned Metropolitan Magistrate is set aside and the complaint is restored to its original number. Parties shall appear before the concerned Court on 9th July, 2009. The counsel for the respondent No. 2 shall, however, be compensated by payment of Rs. 10,000/- as costs.

9. The appeal stands disposed of accordingly.