

* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 31.07.2009
Judgment delivered on: 04.08.2009

Crl. L.P. 201/2006

EICHER MOTORS LTD. Appellant

versus

MRS PUSHPA CHAND Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Apporve Karal, Advocate

For the Respondent :None

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. Leave granted.
2. Briefly by this petition the order dated 20.04.2006 passed by the learned Magistrate in complaint no. 1559/1/2003 is sought to be assailed. By the said order the learned Magistrate has dismissed the complaint for non-prosecution and consequently, acquitted the accused. The appellant being aggrieved has preferred the present petition to this Court.

3. The facts and circumstances in the background of which the present appeal has been instituted is briefly set out hereinafter:

3.1 The respondent being desirous of purchasing a vehicle, approached the Centurian Bank Ltd. (in short the 'Bank'), through the appellant. The appellant at the relevant time was the

constituted attorney for granting such like loans. For the said purpose a tripartite agreement bearing No. NE1386/03/2001 dated 27.03.2001 (in short 'tripartite agreement') was executed amongst the appellant, the Bank and the respondent. It is not disputed that the loan was disbursed to the respondent, who purchased a vehicle bearing model no. 10.70HSD. For the purposes of repaying of the said loan, the respondent had issued cheques. One such cheque drawn on the Nainital Bank Ltd., Br. Raninbagh, Distt, Nainital (UA) bearing No. 434471, dated 05.06.2003, in the sum of Rs 3,40,269/-, was presented by the appellant for encashment to its banker. The cheque was returned by the respondent's banker vide memo dated 18.06.2003. Consequently, the appellant triggered the provisions of Section 138 of the Negotiable Instruments Act, 1881 (in short the 'N.I. Act') by issuing a statutory notice of demand dated 18.06.2003. This was followed by institution of criminal complaint on 27.08.2003. In the criminal complaint along with the respondent two other persons, who stood as guarantors, have been arrayed as accused Nos. 2 & 3. Alongwith the criminal complaint an affidavit by way of evidence was also filed by the appellant.

3.2 On 28.08.2003, the learned Magistrate after perusing the documents on record, the affidavit of evidence and upon hearing submissions on behalf of the complainant directed registration of the complaint and issuance of summons to the three (3) accused. The matter was posted for further proceedings on 06.04.2004.

3.3 On 06.04.2004, fresh summons were issued to the accused, as the earlier summons had not been returned.

3.4 The matter was posted on 19.04.2005. On 19.04.2005, the complainant was not present, however, the accused no. 1 i.e., Mrs Pushpa Chand was present alongwith her counsel. She was admitted to bail on furnishing a personal bond of Rs 10,000/- and the surety of a like amount. Fresh summons were issued, in respect of, accused no. 2 and 3 as they were 'absent'.

3.5 The matter was posted to 28.08.2005. The matter was, however, taken up on 29.08.2005, as 28.08.2005 was declared a holiday on account of 'Janmashtmi'. On 29.08.2005, there was once again no appearance on behalf of the complainant. Accused no. 1, Mrs Pushpa Chand was also absent, however, an application for exemption from personal appearance was moved by her counsel on the ground that she was suffering from a viral fever. The learned Magistrate was pleased to grant her exemption from appearance for that day. In the bail application filed by accused no. 3, the bail was granted on his furnishing a personal bond of Rs 10,000/- with the local surety of a like amount. Fresh summons were issued in respect of accused no. 2. The matter was posted to 20.04.2006.

3.6 On 20.04.2006, the case in the first instance was called out in the morning session, at that time there was no appearance on behalf of the complainant, while accused no. 1 and 3 were present with their counsel. Accused no. 2 was still unserved. The learned Magistrate noted that process fee had not been filed. The matter was, however, kept back for 1 p.m. There was no appearance even at 1 p.m. The matter was called out once again post-lunch at 2:35 p.m., however, the same position obtained. Consequently, the learned Magistrate, on account of the fact that

no process fee had been filed despite orders dated 29.08.2005, dismissed the complaint for non-prosecution and proceeded to acquit the accused.

4. It is important to note that a perusal of the order sheets of this court would show that the counsel for the respondent, in a sense is guilty of the same lackadaisical approach which the appellant adopted in the trial court in prosecuting the case. There was no appearance on behalf of the respondent on the following dates, i.e., on 29.05.2008, 24.09.2008, 05.03.2009, 29.07.2009 & 31.07.2009. On 31.07.2009 even after a pass over there was no appearance on behalf of respondent.

5. I have, however, perused the reply filed by the respondent in this Court. A perusal of the reply would show that while the respondent has admitted that a tripartite agreement dated 27.03.2001 was entered into between appellant, Centurian Bank and the respondent, the said agreement was terminated and pursuant thereto vehicle had been seized on 10.07.2002. The respondent has in the reply admitted that she was required to pay monthly instalment of Rs 13,593/- in cash and for the purposes of 'security' she had issued six blank cheques. It is also contended that the legal notice dated 18.07.2003 issued by the appellant was replied by the respondent vide her advocate's response dated 24.07.2003. The respondent has averred that despite the order of the learned Magistrate dated 29.08.2005 directing issuance of fresh notice to accused No.2 upon filing fresh process fee, since process fee was not deposited by the appellant, the learned Magistrate had rightly dismissed the

complaint on 20.04.2006, as the appellant was not interested in prosecuting the case.

6. Before me the learned counsel for the appellant has submitted that on 19.04.2005 the authorized representative of the appellant alongwith the counsel reached the court late as they were to attend to other matters in court and by the time they reached the court, orders had already been passed granting bail to accused no. 1 and issuance of fresh summons to accused no. 3. As regards non-appearance on 29.08.2005, the learned counsel submitted that the counsel for the appellant in the court below, due to a personal difficulty, was unable to attend the court which, however, could be conveyed to the authorized representative at a point in time which was close to the time for court proceedings, resulting in the authorized representative reaching late, by which time once again orders had been passed. It is submitted that at the time of noting the next date, the authorized representative had inadvertently recorded a wrong date, i.e., 12.07.2006 as against 20.04.2006, which was the correct date. The incorrect date was communicated to the counsel for the appellant. He submitted that it is this inadvertent mistake which resulted in the appellant-complainant's non appearance on 20.04.2006, and the delay in filing the process fee for summoning the accused no. 2.

7. After hearing the learned counsel for the appellant and after perusing the record it is quite evident that the complainant undoubtedly has been lackadaisical in prosecuting the complaint. However, taking into account the fact that the complaint was still at a preliminary stage of effecting service on accused No.2, the

learned Magistrate while exercising his power under Section 256 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.') could have avoided the extreme option of dismissing the complaint for non-prosecution. The reason given by the appellant that the date fixed for further proceedings in court had been wrongly recorded and hence, primary cause of absence of the authorised representative and default in filing the process fee, appears to be genuine or at least cannot be outrightly disbelieved. The power available to the Magistrate under Section 256 of the Cr.P.C. to dismiss a complaint and acquit the accused, is to be exercised keeping in mind the purpose for which it is conferred. The width and scope of the power is explained by the Supreme Court in the case of ***Associated Cement Co. Ltd vs keshvanand (1998) 1 SCC 687***. Justice K.T. Thomas (as he then was) speaking for the court has observed that the purpose of conferring power on the Magistrate under Section 256 of the Cr.P.C. is to deter dilatory tactics on the part of the complainant once he sets in motion criminal proceeding by instituting a complaint. The purpose being that accused is perforce required to attend court proceedings on dates fixed by the court and is thus, put to harassment if the complainant does not turn up in the court on dates when his presence is necessary. This provision affords protection to the accused against such tactics being adopted by the complainant. This, however, does not mean that if the complainant is absent the court is duty bound to acquit the accused. If the situation mandates the Magistrate has the power to adjourn the hearing. On the other hand, if the Magistrate considers that the personal appearance of the

complainant is not necessary it has the power to dispense with his attendance and proceed with the case. It is for the court to consider whether the presence of the complainant is necessary for the progress of the case on the day when the complainant is absent or the situation is such that the case be adjourned to another date. If the situation mandates that there is no reason to adjourn the case, the Magistrate is free to dismiss the complaint and acquit the accused. The ratio of ***Associated Cement (supra)*** has been followed in a later judgment of the Supreme Court in the case entitled ***S. Anand Vs. Vasumathi Chandrasekar (2008) 4 SCC 67.***

8. Applying the principle enunciated by the Supreme Court in ***Associated Cement*** and ***S. Anand (supra)*** in my view since service had not been effected on accused no. 2 the learned Magistrate could have adjourned the case for effecting the service on accused no. 2 especially in the circumstance that on the previous date there was no default on the part of the complainant, in depositing the necessary process fee for effecting service on the accused in the case. In my view it is quite possible that the authorized representative of the appellant wrongly noted the date as 12.07.2006, as against the correct date, that is, 20.04.2006 and hence, delayed the deposit of process fee for issuing of summons to accused no. 2.

9. Taking into account the aforesaid facts and circumstances and the submissions made before me, the appeal is allowed and the impugned order dated 20.04.2006 is set aside. The complaint is restored to its original number. The learned Magistrate shall commence further proceedings from the stage at which the case

was prior to the date when the impugned order was passed. Given the fact that the complaint is of 2003, the learned Magistrate shall take steps to expedite the proceedings. Parties shall appear before the Magistrate for appropriate orders on 17.08.2009.

10. Accordingly, the petition is disposed of.

RAJIV SHAKDHER, J

August 04, 2009
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