

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 5951 OF 2004.

Manoj Ramniklal Shah. ... Applicant.
Versus.
M/s.Raj Steel Corporation & ors. ... Respondents.

Shri N.K.S.Das for the Applicant.

Shri R.L.Majgaonkar for the Respondents Nos.1 and 2.

Shri U.V.Nikam, A.P.P. for the State.

CORAM : ABHAY S.OKA, J.

DATED : 30th November, 2006.

P.C.:

1.Â Heard the Advocate for the Applicant and the learned Advocate appearing for the 1st and 2nd Respondents. By order dated 12th October 2006 it was directed that this Application and/or Appeal should be disposed of at admission stage. Leave to prefer Appeal is granted. Appeal is admitted. Taken up for hearing forthwith.

2. The Applicant is the complainant in a complaint filed under section 138 of the Negotiable Instruments Act, 1881. The process was issued in the complaint. By order dated 27th August 2004, the learned Metropolitan Magistrate, 13th Court, Dadar, Mumbai dismissed the complaint as both the parties and their Advocates were absent. The order of dismissal was passed under section 256 of the Code of Criminal Procedure, 1973 which has

the effect of acquittal of the Respondents.

3. The learned Advocate for the Applicant submitted that the Applicant was diligent in prosecuting the complaint. He stated that all along the complainant attended the complaint. He pointed out that the Advocate appearing for the Applicant was not keeping good health and was suffering from heart ailments. The said Advocate died on 10th September 2004. The death certificate of the said Advocate is also annexed to this Application. The learned Advocate for the 1st and 2nd Respondents submitted that there was no reason for the Applicant to remain absent and therefore, the learned Magistrate was justified in dismissing the complaint.

4. I have considered the submissions. I have perused the Roznama of the proceedings annexed to the application. The Roznama shows that all along the Applicant was present on the relevant dates. On 11th May 2004, the complaint was sent to Lok Adalat for the purpose of settlement. Thereafter, the Complaint was adjourned to 10th July 2004 and 6th August 2004. Thereafter it was fixed on 27th August 2004. On that day, the Applicant was absent. It is stated in the Application that the Advocate for the Applicant was suffering from heart ailment who eventually expired on 10th September 2004. From the Roznama it appears that

the Applicant was diligently prosecuting the complaint and there does not appear to be any negligence on the part of the Applicant. In my view, the learned Magistrate ought to have given one chance to the Applicant. The order impugned deserves to be set aside and the complaint deserves to be restored.

5. Hence the following order is passed:

- i) The impugned order dated 27th August 2004 passed by the learned Metropolitan Magistrate, 13th Court, Dadar, Mumbai in Case No.217/S/2002 is set aside and the case is restored to file. The learned Magistrate will send intimation of the date fixed in the case to both the parties.
- ii) The Appeal is partly allowed in the above terms.
- iii) Writ to be sent immediately.
- iv) All contentions of the parties on merits of the complaint are expressly kept open.

Judge.