

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE
CRIMINAL APPEAL NO.450 OF 2003**

M/s Kothari Enterprises, A)
 Proprietary concern, through its)
 proprietor Shri Bipin A Kothari, having its)Appellant/Complainant
 business premises at Opp Union Bank of)
 India, Magazine Street, Darukhana,)
 Mumbai 400 010)

V/s.

1. M/s Dharendra Agro Food Industries)
 Ltd., a Private Ltd. Company having)
 registered under the Companies Act)
 having its Registered Office at)
 Chakaraverti Complex, 2nd floor, Near)
 Vijay Char Rasta, Navrangpura,)
 Ahmedabad – 380 009)
 2. Shri A. J. Shah, a Director of M/s.)
 Dharendra Agro Food Industries Ltd., a)
 Private Ltd. Company having registered)
 under the Companies Act having its)
 Registered Office at Chakaraverti)
 Complex, 2nd floor, Near Vijay Char Rasta,)
 Navrangpura, Ahmedabad – 380 009)
 3. The State of Maharashtra)Respondents/Accused

Mr. Yash Jain i/b. M/s Halai & Co. for Appellant.
 Ms. Pallavi Dabholkar, APP for State.

**CORAM : K.R.SHRIRAM, J.
 DATE : 27th NOVEMBER 2019**

ORAL JUDGMENT :

1 This appeal is filed under Section 378 (4) of the Code of Criminal Procedure impugning an order of acquittal passed on 14th June 2000 by the Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai. The impugned order reads as under :

“Case for hearing. Complainant and advocate are absent. Accused with advocate present.

Case stands dismissed u/s 256 of Cr.P.C. Accused stands acquitted and bail bond stands cancelled.”

2 With the assistance of the APP – Ms. Dabholkar I have perused the appeal papers. Though advocate appeared for appellant, he was unable to assist the court.

3 Admittedly in this case, process, i.e., summons, has been issued and even plea has been recorded.

4 Section 256 of the Code of Criminal Procedure reads as under :

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.

5 The ingredients of Section 256 (1) are (I) summons must have been issued on a complaint, (ii) the Magistrate should be of the opinion that for some reasons, it is proper to adjourn the hearing of the case to some other date, and (iii) the date on which the order under Section 256(1) can

be passed is the day appointed for appearance of the accused or any day subsequent thereto, to which the hearing of the case has been adjourned. Section 256(1) mandates the Magistrate to acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case. If an exceptional course is to be adopted, it must be spelt out. The discretion conferred upon the Magistrate, however, must be exercised with great care and caution. The conduct of the complainant for the said purpose is of immense significance. He cannot allow a case to remain pending for an indefinite period. There exists a distinction between a civil case and a criminal case. Speedy trial is a fundamental right of an accused. The orders passed by the competent Court of law as also the provisions of the Code of Criminal Procedure must be construed having regard to the constitutional scheme and the legal principles in mind.

6 In this case, admittedly complainant has remained absent on many dates. This is because the appeal itself says that on several dates (not all dates) complainant was present before the Trial Court. The matter was listed on 14 occasions before the Trial Court. Complainant was absent on 5 occasions, which is quite a large number almost 36% (more than 1/3rd) in 14 dates. It is the case of appellant that on 14-6-2000, the date on which the impugned order was passed, complainant and his advocate were absent as complainant was informed by his advocate not to remain present and the advocate himself was busy in some other court. Under Section 256,

complainant can remain absent provided a Magistrate dispenses with his attendance and for dispensation of his attendance an application should have been made. No such application, admittedly was made and the only excuse given is advocate advised him not to remain present.

7 Therefore, if the summons has been issued on complaint and on the date appointed for the appearance of accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, acquit the accused, unless for some reason the Magistrate thinks it proper to adjourn the hearing of the case to some other day. Therefore, Section 256 mandates that if the complainant does not remain present on the appointed day after summons has been issued on complaint and unless attendance of complainant has been dispensed with, the Magistrate shall acquit the accused. If the Magistrate feels that the order of acquittal should not be passed on that date, the Magistrate has to give reasons. In this case, the Magistrate has acquitted the accused as provided under Section 256 because he did not find any reason to adjourn the hearing of the case to some other day. I have to also note, on 4 occasion earlier also, complainant was absent but Magistrate did not dismiss the complaint on these dates and acquit the accused. Only on the 5th time, when complainant remained absent and that too without filing any exemption application, the Magistrate passed the order impugned. The

Magistrate in terms of sub-section (1) of Section 256 exercises wide jurisdiction. Although an order of acquittal is of immense significance, there cannot be any doubt or dispute whatsoever that the discretion in this case had been properly exercised by the Magistrate. In such a situation, I cannot say there is any illegality in the order that requires this Court's interference.

8 In the circumstances, I have to dismiss the appeal. Appeal dismissed.

(K.R. SHRIRAM, J.)