

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE
CRIMINAL APPEAL NO.1340 OF 2002**

M/s Jayanti Business Machines Ltd.)
207, Madhava, Bandra Kurla Road,)
Commercial Complex, Bandra (East),)
Bombay 400 050)
through Shri Ashok K. Tiwari,)
Manager Asst)Appellant/Complainant

V/s.

1. Mrs. Nusrat Ahmed)
2. Mr. Subodh Kothari)
both residing at H-304, Harishikesh,)
Apna Ghar, Andheri (W),)
Bombay 400050)
3. The State of Maharashtra)Respondents/Accused

Ms Neha Rane i/b Mr. S. V. Marwadi for appellant.
Ms. Anamika Malhotra, APP for State.

**CORAM : K.R.SHRIRAM, J.
DATE : 2nd DECEMBER 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 9-12-1999 by the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai.

The impugned order reads as under :

“The complainant and advocate absent, when called out. Accused No.2 present with Advocate. The complainant has not taken any step since long time, hence the complaint is dismissed and accused are acquitted u/sec. 138 of N. I. Act.”

2 With the assistance of Ms Rane for appellant and the APP – Ms. Malhotra , I have perused the appeal papers and records and proceedings.

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 The matter was listed on 37 dates and on 37th day the complaint came to be dismissed and accused acquitted. On the first three dates of filing complaint itself the complainant prayed for time for verification. On the 4th date complainant was absent. On the 5th date complainant was present and again sought time. Thereafter, on 10 occasions the roznama indicates complainant was absent. Therefore, on 11 out of 37 dates complainant was absent. On 4 occasions complainant sought time. After 4-3-1999, complainant never remained present. The roznama of the Trial Court for 4-3-1999, 6-5-1999, 3-7-1999, 28-9-1999, indicate that complainant was absent on those dates. On 7-10-1999 again complainant was absent and accused submitted an application for dismissal of the appeal. On these dates, even the advocate for complainant remained absent. Therefore, on 9-12-1999, the order impugned was passed.

It is stated in the appeal memo that complainant being a limited company was initially represented by one Mr. S. B. Pethkar, who left the company. Thereafter, the company authorised one Mr. Ashok Tiwari, as substitute for Mr. S. B. Pethkar. It is also stated that the company filed an

application before the Trial Court on 13-9-1996 to that effect and later Mr. Ashok Tiwari was representing. Strangely, appellant states “However, subsequently the Learned Magistrate refused to recognize the said Tiwari as representative of the complainant”. In the memo of appeal, it is also stated “..... Exhibit C is a copy of the application submitted by Tiwari to replace the said S. B. Pethkar”. There is no Exhibit C annexed to the memo of appeal. I have checked the records and proceedings with the assistance of Ms Rane for appellant and the APP Ms Malhotra. Both also say the alleged application by complainant to replace Mr. S. B. Pethkar with Mr. Ashok Tiwari is not found in the records and proceedings. There is a letter of authority annexed as Exhibit C to the second copy maintained by the registry, but that is an unsigned document with blanks. Roznama also does not indicate that any such application was filed. Though, I must be candid that on 6-5-1999 roznama says representative present on behalf of complainant but his advocate was absent. This itself shows how serious appellant was in prosecuting the complaint. There are many dates when advocate of complainant has also remained absent, though complainant was 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. 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.)