

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 4713 OF 2025

1) Shabbir Tajuddin Mulani		
Age: 52 years, Occu: Teacher		
R/at: Sangram Nagar, Bypass Road,		
Tal. Malshiras, Dist. Solapur.		... Petitioner
		(Original Accused)

Versus

1) Hanumant Sahebrao Magar		
Age: 47 years, Occu: Agriculturist		
R/at: Nimgaon, Tal. Malshiras,		... Respondent.
Dist. Solapur.		(Original Complainant)

...

Mr. Shardul Diwan, (Through VC) a/w Adv. Poonam Dhotre, Advocate for Petitioner.

Adv. Drishti Madhani (Through VC) a/w Mr. Sandeep Deshpande i/by Bhavake & Associate, Advocates for Respondent.

...

CORAM : ABHAY J. MANTRI, J.
DATE : OCTOBER 01, 2026

ORAL JUDGMENT :

1. **Rule.** Rule made returnable forthwith, and the matter is taken up for final disposal at the admission stage with the consent of the learned Advocates for the respective parties.

2. The Petitioner, being aggrieved by the Judgment and order dated 30th September, 2025 passed by the learned Additional Sessions Judge,

Malshiras, in Criminal Revision Application No. 09 of 2025, whereby the order passed by the learned Judicial Magistrate First Class, Malshiras (for short, the “*learned Magistrate*”) below Exhibit-41 in S.T.C. No. 1463 of 2021, whereby the Application for recalling the Original Complainant for further cross examination under Section 311 of the Code of Criminal Procedure, 1973 (for short, “*Cr.P.C.*”) was rejected on 28th March, 2025, has preferred this Petition.

3. The Respondent is the Original Complainant before the learned Magistrate, who has filed the Complaint against the Petitioner under Section 138 of the Negotiable Instruments Act, 1881 (for short, the “*N. I. Act*”) for dishonour of the cheque. During the pendency of the proceedings, on 1st July, 2023, the Complainant filed an affidavit of evidence before the learned Trial Court; then, on 23rd August, 2024, he entered into the witness box and produced and proved the documents. On the same day, his cross-examination was conducted partly and, at the request of the Advocate for the Petitioner/Accused, it was deferred as she desired to produce relevant documents; as such, time for further cross-examination was granted. His further cross-examination commenced and concluded on 1st October, 2024.

4. On 4th March, 2025, the Petitioner filed an application to recall the witness, i.e. the Respondent, as while cross-examining the witness, the Advocate for the accused had inadvertently failed to properly put the

question regarding the part payment made by the friend of the accused, Dnyandev Bagal, into the bank account of the Respondent and, therefore, moved the application. The Respondent opposed the Application on the ground that there is no provision to recall the witness to fill the lacuna and, therefore, urged rejection of the Application. After hearing the learned Advocates for both parties, the learned Magistrate, vide order dated 28th March, 2025, rejected the Application, holding that “*it was not permissible to fill the lacuna arising from the failure to give proper instructions to the Advocate for the Accused/Petitioner*”.

5. Feeling aggrieved by the said order, the Petitioner has preferred a Revision before the learned Sessions Court. After hearing the parties, the learned Additional Sessions Judge dismissed the Revision by Judgment dated 30th September, 2025, holding that the order passed by the learned Magistrate was just, legal and proper, and that no interference was warranted in the revisional jurisdiction. Being dissatisfied with the said Judgment and order, the Petitioner has preferred this Petition.

6. Learned Advocate for the Petitioner, during the argument, has taken me through the Application filed before the learned Magistrate and the order passed by the learned Magistrate as well as the learned Sessions Court. He also drew my attention to the suggestion put to the Respondent by the learned Advocate for the Petitioner. (at page no. 35.)

7. He also drew my attention to the account statement in that regard. However, he submitted that, at the time of cross-examination, the learned Advocate for the Petitioner had not received proper instructions about the payment made by the Petitioner's friend in the Respondent's bank account. Therefore, the question regarding said transaction remained to be put to the Respondent during his cross-examination and, therefore, for that purpose, it is necessary to recall the Respondent for further cross-examination.

8. Consequently, he submitted that the learned Magistrate as well as the Sessions Court have not recorded their findings as to how the recalling of the witness is not necessary for the just decision of the said case and, therefore, urged that the Petition be allowed.

9. To buttress his submission, he relied on the Judgment in ***Rajaram Prasad Yadav Vs. State of Bihar and another***¹ (for short "***Rajaram***") and drew my attention to the principles laid down by the Hon'ble Supreme Court in the said Judgment, as set out in paragraph no. 23 from clause (a) to (n) and shown clauses (c) and (j) thereof and relied on the principle laid down in the said Judgment.

10. It is pertinent to note that during the argument, on a query put to the learned Advocate for the Petitioner, he fairly submitted that the Petitioner

¹ 2013 (14) SCC 461

had not replied to the notice issued by the Respondent before filing of the complaint nor raised his defence by filing reply to the complaint.

11. It appears that on 1st July 2023, the Respondent filed an affidavit of evidence in the Court and entered into the witness box on 23rd August, 2024, and on that day the Advocate for the Petitioner cross-examined the Respondent partly and thereafter sought time for further cross-examination as the Petitioner wanted to produce some important documents in support of his defence. Accordingly, further cross-examination was deferred. On 1st October 2024, the further cross-examination was commenced and concluded.

12. It is pertinent to note that on 23rd August, 2024, the matter was adjourned at the request of the Petitioner for giving an opportunity to him to produce the documents before the Court. Despite this opportunity, the Petitioner failed to produce the documents before the learned Magistrate during the further cross-examination on 1st October, 2024.

13. It would be appropriate to reproduce the suggestion put to the witness during his cross-examination dated 1st October, 2024, which read thus: “हे म्हणणे खरे नाही की दि.२९.१०.२०२० रोजी आरोपीने माझ्या रत्नाकर बॅकेच्या खात्यामध्ये रु. ३,००,०४०/- एवढी रक्कम आरटीजीएसद्वारे पाठविली होती”.

14. It appears that the learned Advocate for the Petitioner put the specific suggestion to the Respondent that “*on 29th October 2020, the Petitioner/accused transferred an amount of Rs. 3,00,040/- by RTGS in his*

bank account". The Respondent denied the said suggestion. On that day, he did not produce any other document before the learned Magistrate in support of his defence, nor did he put any suggestion to him that his friend had deposited the said amount in the Respondent's bank account.

15. After 5 months, on 4th March, 2025, the Petitioner moved an Application before the learned Magistrate to recall the Respondent as he had failed to put the suggestion to him that on 29th October, 2020, his friend Dyandev Bagal had deposited an amount of Rs.3,00,040/- in the bank account of the Respondent. He did not bring this fact on record during cross-examination because, at the time of cross-examination, his friend's bank account statement was not available with him and, therefore, his Advocate inadvertently failed to put the said question to the witness. Therefore, he moved an application. The learned Magistrate, after considering the rival submissions, observed in paragraph no. 6 of the order that "*full opportunity of cross-examination of the complainant was given to the Petitioner/Accused. Also, sufficient opportunity was given to the Petitioner to file the necessary documents on record*".

16. So also, without the bank account statement, the learned Advocate for the Petitioner could have put the suggestion to the witness in that regard. However, the entire cross-examination of the Respondent indicates that no question was put to him in that regard and, therefore, the

learned Magistrate held that “*failure of the accused to give proper instructions to his Advocate and failure to ask the relevant question is not a reason sufficient to recall the witness for the just decision of the case*”. It seems that the learned Magistrate recorded that the recall was not necessary for the just decision of the case and, therefore, I do not find substance in the contention of the learned Advocate for the Petitioner that the learned Magistrate has not recorded a specific finding in that regard.

17. In paragraph No. 8, the learned Magistrate has considered the Judgment in **Rajaram** (supra). It was further held that “it has already been seen that the reasons stated in the application by the Petitioner are not sufficient even to recall the witness. It was also held that “*the Application was filed only in order to fill up the lacuna remained due to failure to give proper instructions to the Advocate of the Petitioner.*” Therefore, the Application was rejected. The learned Sessions Court confirmed the said order.

18. I would like to reproduce the principle laid down by the Hon’ble Supreme Court in **Rajaram** (supra), in paragraph no. 23, clauses (a) to (n) of the said Judgment, which reads thus:

“ a) *Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*

b) *The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as*

thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

(h) The object of Section 311 Cr. P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved

and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

19. As per the principles laid down in clauses (e) to (h), it reveals that the object of Section 311 of Cr.P.C. imposes a duty on the Court to determine the truth and to render a just decision.

20. It is undisputed that the Petitioner had not replied to the notice at the first instance and thereby failed to put up his defence. Secondly, on 23rd August, 2024, at the request of the learned Advocate for the Petitioner, time was granted to produce the documents on record and further cross-examination was conducted on 1st October, 2024, i.e. after nearly 40 days. These facts indicate that the Petitioner was granted sufficient opportunity to produce the documents on record when the account statement on which the Petitioner relies is dated 29th October, 2020, and was within the Petitioner's knowledge. Despite this, he failed to bring the said document on record. If the Petitioner had been aware of the said part payment by his friend in the Respondent's bank account, he would certainly have instructed his Advocate and produced the said bank account statement before him. The failure to give instructions and produce the said bank statement of 2020 leads to an adverse

inference that the Petitioner wanted to put up a different story and thereby protract the matter.

21. Even assuming that the learned Advocate for the Petitioner contends that he wanted to put the suggestion to the witness/Respondent that his friend had deposited a part of the cheque amount in the bank account of the Respondent, that suggestion also would not suffice for the purpose, as the Petitioner did not reply to the notice nor was the entire cheque amount paid by the Petitioner or his friend within the prescribed time as contemplated in the notice and, therefore, I do not find substance in his contention in that regard that the said fact is necessary to determine the dispute between the parties for the just decision of the case.

22. In view of the above discussion, the clause (c) and (j) of para 23 of the decision in *Rajaram* are not helpful to the Petitioner in support of his contentions.

23. In the light of the above discussion, in my view, the Petitioner has failed to make out a case to show that the recall of the witness is necessary for the just decision of the case.

24. On the contrary, it appears that the Petitioner, with an intent to protract the criminal trial, had moved this Application belatedly and thereby abused the process of law and, for that purpose, in my view, it is appropriate to saddle the costs on the Petitioner for the said conduct.

25. Consequently, the Petition, being bereft of merits, *stands dismissed with costs of Rs.20,000/-*.

26. Out of Rs.20,000/-, the Petitioner is directed to pay Rs.10,000/- to the Respondent and Rs.10,000/- be credited to the Government within a period of one month from today, failing which the Petitioner's further right to proceed in the matter will be forfeited.

27. Inform the learned Trial Court accordingly.

28. It further appears that, since 2021, the proceedings have been pending before the learned Trial Court. Therefore, the learned Trial Court is directed to dispose of the matter as expeditiously as possible, and within six months from receipt of a copy of this order. No further time will be granted.

29. The Petition stands disposed of.

(ABHAY J. MANTRI, J.)

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