



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

902 CRIMINAL WRIT PETITION NO. 117 OF 2025

M/s. Pande Iron Trading Company,
Through its Partner
Pankaj S/o. Trilokchand Pande,
Age. 55 years, Occu. Business,
R/o. Opp. Bank of Maharashtra, Chauraha
Aurangabad.

At presnet R/o. 50 Greens Society,
Opposite Kamalnayan Bajaj Hospital,
Beed Bypass, Aurangabad.

...Petitioner

Versus

1. Nasiruddin S/o. Mohamadali Lakhani,
Age. 60 years, Occu. Business,
R/o. Jwaladas Maharaj Math,
Kailash Nagar, Aurangabad.

2. The State of Maharashtra
Through the office of
Public Prosecutor, High Court of Bombay
Bench at Aurangabad.

...Respondents

Advocate for the Petitioner : Mr. Bhandari Anand P.
Advocate for Respondent No. 1 : Mr. S.M. Biyani
APP for Respondent No. 2 : Mr. K.K. Naik

AND

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Advocate for the Petitioner : Mr. Bhandari Anand P.
Advocate for Respondent No. 1 : Mr. S.M. Biyani
APP for Respondent No. 2 : Mr. S.M. Ganachari

CORAM : Y. G. KHOBRAGADE, J.

Dated : 05th March, 2025

JUDGMENT :-

1. Rule. Rule made returnable forthwith. With consent of both the sides, it is heard finally at the stage of admission.

2. In both these petitions, the petitioner/Accused takes exception to the Judgments dated 08.01.2025 passed by the learned Additional Sessions Judge-11, Aurangabad, in Criminal Revision Application Nos. 286 of 2023 and 296/2023, thereby set aside order dated 26-09-2023 passed by the learned 10th Judicial Magistrate First Class, Aurangabad, below Exh. 137 and 138 in SCC No. 3107 of 2014 and SCC No. 3108 of 2014.

3. In both these petitions, the petitioner is the original complainant and Respondent no. 1 is the accused in complaint SCC Nos. 3107/2014 and 3108/2014. For the sake of brevity, parties to the present petitions would be referred as complainant and accused.

4. The complainant filed two complaints SCC Nos. 3107/2014 and 3108 of 2014 under Sec. 138 of the Negotiable Instruments Act, (in short NI Act) alleging that, on different dates and under different invoices he sold TMT steel bars worth of Rs. 32,08,653/- on credit to the Accused. In order to repayment price of TMT steel bars, the accused issued cheques described in the memo of both the complaints, however, those cheques were returned unpaid on ground that drawer of cheques stopped the payment. Therefore, independent mandatory notice u/s 138 of NI Act was issued, however, inspite of service of notice, the accused fail to comply with the same.

5. After service of summons, the accused appeared in both the complaints and his plea independently recorded in both complaints. Since the accused pleaded not guilty and claimed for trial, therefore, the learned Judicial Magistrate called upon the complainant to prove his case by adducing evidence. The complainant has filed evidence affidavit in both the complaints on 07.02.2015 and undergone cross-examination conducted on behalf of the accused on 06.10.2013.

6. Thereafter, on 16.11.2015, the complainant filed evidence affidavit of Complainant's Witness No. 2 (C.W. 2) Mr.

Nitin Bangad but his cross-examination was not conducted till 04.11.2017, hence, learned Judicial Magistrate passed an order on 04.11.2017 and closed evidence of PW.2 because the complainant filed evidence clousure Pursis in both the complaints and posted said complaints for recording statement of the accused under Section 313 of Cr.P.C. Since, the accused was remain absent, hence, the learned Magistrate has not recorded statements of the accused. However, on 21.04.2018, the accused filed an application and prayed for setting aside order of no cross and sought permission to cross examine the complainant. On 23.01.2019, learned Magistrate passed an order and had granted applications in both complaints by setting aside order of no cross. Inspite of said fact, the accused failed to cross-examine the P.W. 2 for more than 3 ½ years. Ultimately, on 16.09.2022, the learned Magistrate passed an order and proceeded both complaints without cross examination of P. W. 2 holding that, the Accused fail to cross examine said witness even after lapse of five years from the date of filing of evidence affidavit of P.W. 2.

7. Thereafter, on 21.08.2022, the accused filed Exh. 81 the application and prayed for setting aside order of no cross passed on 16.09.2022. On 01.03.2023, the learned Magistrate passed an order below Exh. 81 in SCC No. 3107/2014 and exhibit 75 in SCC No. 3108/2014 and rejected both the applications holding that,earliedr twice order of no cross was set aside but the accused fail to cross-examine the C. W. 2.

8. Irrespective of above, on 21.10.2022, the accused again filed Exh. 82 an application under Section 311 of Cr.P.C., and

prayed for recall of witness P. W. 1 (complainant) and P.W. 2. On 01.03.2023, learned Judicial Magistrate passed orders below applications under Section 311 of Cr.PC., in both complaints and rejected said applications holding that, the accused already conducted cross examination of the P. W. 1/ complainant but he fail to cross-examine the CW2. The claimant filed Pursis Exh. 65 on 30.12.2017 and closed his evidence.

9. Being aggrieved by said order dated 01.03.2023, passed below Exh. 81 in SCC No. 3107/2014 and Exh. 75 in SCC No. 3108/2014, the accused filed two criminal writ petition bearing nos. 559/2023 and 560/2023 before this Court. On 28. 06. 2023, this Court Coram (R.M. Joshi, J.) passed the follwing common order and operative part of order reads as under :

ORDER

“a) Petitions are allowed. All impugned orders are hereby set aside.

b) Parties are directed to appear before the Trial Court on 04th July, 2023.

c) The cross-examination of both witness i.e., witness to be cross-examined and recalled shall be done within a period of one week from the appearance of the parties before the trial Court.

d) Trial Court to permit the accused to cross-examine the complainant only to the extent of document which is on record and which is not

referred in earlier cross-examination. It would be responsibility of the trial Court to ascertain the said fact and to restrict the cross-examination to this extent only.

e) In case, Accused or his Counsel fail to remain present for whatsoever reason before Court, it is open for the trial Court to close cross-examination as well as evidence of complainant.

f) This order is passed subject to payment of cost of Rs. 10,000/- (Rupees Ten Thousand Only) in each Petitions payable to the complainant on or before 04th July, 2023. Learned trial Court to ascertain fact about payment of cost before proceeding with matter.

g) If cost is not paid within time, this order shall stands vacated without further reference to the Court.

h) The amount which is deposited pursuant to the order passed by this Court on 19th April, 2023 be remitted to trial Court and same shall be kept in fixed deposit, which will be subject to the outcome of the proceedings.

i) Trial Court to decide both complaints being SCC No. 3107/2014 and SCC No. 3108 of 2014 within period of three months from today.

It is clarified that no further extension on whatsoever ground shall be granted for the disposal of the matter.

j) Rule made absolute in above terms.

k) Parties to act upon an authenticated copy of this order.”

10. Subsequent to the above order of this Court, on 10.07.2023, the Complainant filed Exh. 95 Pursis stating that evidence affidavit of P.W. 2 Exh. 52 may be discarded as he does not wish to examine the P. W. 2 Mr. Nitin S/o. Satyanarayan Bangad, the Charter Accountant. Thereafter, on 13.08.2023, the accused filed Exh. 116 in SCC No. 3107/2014 and Exh. 115 in SCC No. 3108/2014 and prayed for issuance of witness summons to C. W. 2 Mr. Nitin Satyanarayan Bangad because he wanted to cross-examine the P. W. 2.

11. It is the contention of the Respondent/accused that, on 28-06-2023 this Court passed the order in Criminal Writ Petition No. 559 and 560/2023 and the accused was permitted to cross-examine the witness P.W. 2 in order to prove defence, therefore, it is necessary to cross examine the C.W. 2. However, the complainant filed Pursis Exh. 95 for discarding evidence affidavit of P.W. 2. Therefore, on 31.08.2023, the accused filed Exh. 116 in SCC No. 3107/2014 and Exh. 115 in SCC No. 3108/2014 and prayed for issuance of witness summons to (i) the Branch Manager, Akola Urban Co-operative Bank Limited, Gopichand

Complex, Jalna Road, Aurangabad and (ii) Mr. Nikhil P. Kacheshwar, the Chartered Accountant. On 13.09.2023, learned Magistrate passed the order below Exh. 116 in SCC No. 3107/2014 and Exh. 115 in SCC No. 3108/2014 and thereby, rejected both the applications.

12. Being aggrieved by said orders, the respondent/accused filed Criminal Revision Application No. 286 arising out of order dated 26.09.2023 passed below exhibit 137 in SCC 3107/2014 and Criminal Revision Application No. 296/2023 arising out of order dated 26.09.2023 passed below exhibit 138 in SCC No. 3108/2014.

13. The complainant appeared in both the revisions and filed reply which reads as under :

“2.It is submitted that the complainant filed complaint on 11/04/2014 for dishonoured of cheques issued by accused for the payment of goods supplied to accused by the complainant. The complainant filed his evidence affidavit on 07/02/2015. Earlier advocate of accused completed his cross examination on 06/10/2015. Thereafter complainant submitted evidence affidavit of PW No.2 on 16/11/2015. But accused failed to cross examine PW No.2 till 04/11/2017. Therefore on that day no cross order came to be passed and complainant also close his evidence by passing pursis on 03/12/2017 and matter was posted for statement of accused U/sec. 313 of Cr.PC. but accused continuously remained absent. However on 21/04/2018

accused filed application for setting aside no cross order, which came to be allowed on 23/01/2019. Thereafter also accused failed to cross examine PW No. 2 and therefore trial court again passed no cross order on 16/09/2022 i.e. after five years of filing of evidence affidavit. In view of these situation, it can not be stated that trial court is bias in rejecting the application filed by accused for setting aside no cross order or recalling of complainant for further cross examination, though High Court might have taken liberal view in this matter.

3. It is further submitted that as per the order of High Court, both advocate appeared before trial court and with consent of both advocate, next dates were fixed as 06/07/2023 for cross of complainant by accused and on 10/07/2023 for cross of PW No.2. Accordingly, complainant remained present and accused cross examine the complainant and during cross examine some documents filed by the complaint came to be exhibited and therefore complainant took decision not to rely on evidence of PW No. 2 and complainant accordingly passed pursis on 10/07/2023 at 11 am only. However accused was absent on that day and therefore his advocate filed exemption application. Of-course no order is required to be passed by the Hon'ble Court on pursis but court has to take note of facts stated in the pursis and continue the further proceeding of the case as per law. Accordingly trial court noted the facts of the pursis

and fixed the next date of statement of accused u/sec.313 of Cr.P.C. Though the matter was time bound by Hon'ble High Court, the trial court co-operated the accused for fixing matter after one month on 10/08/2023 as per request of advocate of accused. In spite of the such co-operation in time bound matter by trial court, the accused is blaming the trial court unnecessary. It is submitted that advocate of accused never appeared before trial court prior to 2.30 pm on any date and therefore there is no question of filing exemption application by accused at 11 am.

4. *That, it is further submitted that on 10/08/2023 also on the request of the accused court adjourned the matter, though matter was time bound. After recording the statement of accused, matter was fixed on 24/08/2023 for evidence of accused, on this date only advocate of the complainant sought adjournment and court granted short time and fixed matter on 29/08/2023. On 29/08/2023 the accused produced near about 12 new documents, which accused could have produced on 24/08/2023 if he really desire to co-operate the court for disposal of the matter in time. It is denied that accused was ready to give oral evidence on 29/08/2023 and complainant seek date. It is submitted that on 30/08/2023, accused started his examination in chief after interval of about 3.30 pm and therefore there was no sufficient time to complete the cross examination by the complainant on that day and as*

such matter was fixed just on the next date and on next date complainant completed the cross examination of the accused. On the contrary on 30/08/2023 itself advocate of the complainant asked to submit list of witness to be examined by accused but the accused did not submit on that day. Even before commencing cross examination on 31/08/2023 in the morning session, advocate of complainant asked to submit list of witness to be examined by the accused, but accused did not submit the same. Therefore after interval complainant submitted written application for same and court also accordingly gave direction but accused submitted two application for issuance of witness summons after completion of the cross examination. Court immediately passed order on one application to call witnesses i.e. financial advisor Nikhil, Bank managers of Akola Urban Bank and City Union Bank. In the said application, accused himself agreed that witness summons be handover for service and he will get it served. On the application to issue of summons to CA Bangad the complainant filed his say and after hearing of the parties the Hon'ble court passed order rejecting the said application on 13/09/2023. In spite of the rejection of the said application, the petitioner again filed another application on dated 18/09/2023 for calling CA Bangad for cross examination or as court witness. After hearing both side, the said application came to be rejected by the trial court on 26/09/2023 and therefore petitioner filed the present revision

petition in this Hon'ble court."

14. On 08.01.2025, learned Revisional Court passed impugned common Judgment in Criminal Revision Application Nos. 286/2023 and 296/2023 and set aside orders dated 26.09.2023 passed by the learned trial Court below Exh. 137 in SCC No. 3107/2014 and Exh. 138 in SCC No. 3108/2014. The learned Revisional Court held that, "Interlocutory Order" does not decide or touch right or liabilities of the parties. It is further held that, rejection of application by the learned trial Court despite direction of this Court amounts to be deciding rights of the parties and it is amount to denial of opportunity to the defence, hence, it is not interlocutory order.

15. Upon hearing both the sides at length, following questions are arises for consideration of this this Court as under :

(a) Whether the order passed on an application under Section 311 of Cr.P.C., can said to be interlocutory order or it is final adjudication of rights of the parties ?

(b) Whether the complainant has right to discard evidence affidavit of any witness, if said witness does remain unavailable for further examination-in-chief and cross-examination ?

(c) Whether the accused has right to recall witness of the complaint under Section 311 of Cr.P.C., in case evidence affidavit of said witness is sought to be discarded by the complainant due to non-availability of said witness for testifying contents thereof and for cross examination?

16. In order to ascertain the question (a), the learned counsel appearing for the petitioner/complainant canvassed in vehemence that, though the complainant filed evidence affidavit of the CW2 the Chartered Accountant Shri Nitin Bangad, but the said witness was remain unavailable either for further examination-in-chief or cross-examination. Further though sufficient opportunities were granted to the accused for cross-examination of the CW2 but the accused failed to cross-examine said witness even after laps of 5 years from the date of filing of affidavit. Ultimately, the complainant filed pursis and closed the evidence.

17. Thereafter, the matter was listed for recording statement of the accused under Section 313 of Cr.PC., however, on 21.04.2018, the accused filed an application for setting aside the order of no cross, which was granted on 23-01-2019 but again the accused fail to cross examine the C. W. 2 Mr. Nitin Bargad for considerable period. Again on 16.09.2022, after lapse of five years from the date of filing of affidavit of CW2, learned trial Court passed an order and proceeded both complaints without cross-examination of CW2 on behalf of the accused. The petitioner/complainant filed Pursis Exh. 95 on 10.07.2023 stating that, he do not want to examine the CW2/Nitin Satyanaran Bangad and he do not want to press evidence affidavit of the CW2 filed at Exh. 52. Therefore, the accused has no right to call upon the complainant to examine C.W. 2 and the accused has no right to cross-examine said witness.

18. It is further canvass on behalf of the complainant that, the order passed by learned Magistrate below Exh. 137 in SCC No.

3107/2014 and Exh. 138 in SCC No. 3108/2014 are interlocutory and no rights of parties have been adjudicated. Therefore, revision under Section 397 of Cr.P.C. is not maintainable. However, learned Sessions Court wrongly interpreted the word “Interlocutory order” and illegally consider about adjudication of right between the parties. Therefore, prayed for quashed and set aside the impugned order dated 08.01.2025 passed in Criminal Revision Nos. 286/2023 and 296/2023.

19. In support of this submissions, learned counsel appearing for the complainant relied on ***Setu Raman Versus Rajamanikam, 2009 AIR SCW 2066***, wherein an application under Section 91 and 311 of Cr.P.C, seeking directions for production of bank passbook, Income Tax Accounts and LDS deposit receipts of the appellant as also for calling him for cross-examination was rejected by the learned Trial Court. Being aggrieved by said order, the accused had filed Criminal Revision before the High Court under Section 397 of Cr.P.C. The High Court had allowed said revisions. Being aggrieved by said order, the complainant approached before the Hon’ble Supreme Court. Under these circumstances, the Hon’ble Supreme held that, the order passed by trial Court refusing to call the documents and rejecting the application under Section 311 of Cr.P.C., are interlocutory orders and as such, the revision against those orders are clearly barred under Section 397 (2) of Cr.P.C. It is further observed that, the trial Court in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that he signed cheques were lost and that the appellant/complainant had falsely used one such cheque.

The trial Court also recorded the findings that, the documents were not necessary. This order did not in any manner decide anything finally. Therefore, both the orders i.e., one of the application under Section 91 of Cr.P.C. for production of documents and other on the application under Section 311 of Cr.P.C. for calling the witness, were the orders of interlocutory nature in which case, under Section 397 (2) revision was clearly not maintainable.

20. Per contra, Mr. Biyani, learned counsel appearing for the respondent/accused has tried to distinguish judgment in case of Seturaman's (supra) and contended that, when the application under Section 91 of Cr.P.C. and Section 311 of Cr.P.C. was made seeking direction for production of bank passbook, income tax account and the LDS deposit receipts of the appellant and calling for cross-examination and if said application is rejected it would certainly amount of curtailing rights of the accused for cross-examination of the witness. Therefore, the order passed under Section 311 of Cr.P.C. is amount to final adjudication of right of the parties. Therefore, the revision under section 397 of Cr.P.C. is not barred.

21. The learned counsel appearing for the respondent/accused relied on *Himanshu Sharma Versus State of Madhya Pradesh* decided on 28.02.2024 and *Maria Margardia Sieueria Farnandes and others Versus Erasmo Jack de Sequeria (Dead) through L.Rs.*, AIR 2012 Supreme Court 1227, however, law laid down in both cited cases so not applicable to the facts and

circumstances of the present case.

22. In case in hand, it is prima facie appears that, on 11.04.2014, the complainant lodged both complaints bearing nos. 3107/2014 and 3108/2014. After service of summons, the accused appeared and his plea came to be recorded long back. It further appears that, the complainant filed his evidence affidavit on 07.02.2015 and his cross-examination has been completed on 06.10.2015. Thereafter, on 16.11.2015, the complainant filed evidence affidavit of CW 2 the Chartered Accountant Mr. Nitin Bangad, however, the accused failed to cross examine the CW 2 till 04.11.2017. It is apparent on face of record that, the accused availed several opportunities to conduct cross-examination of CW2 but it was in vain. Therefore, ultimately, on 04.11.2017, learned trial Court passed an order and closed cross-examination of CW 2 on behalf of the accused.

23. It is also not in dispute that, the complainant has filed Pursis and closed his evidence in both complaints on 03.12.2017. Therefore, both complaints were ripe for recording statement of accused under Section 313 of Cr.P.C., but the accused was continuously remain absent. Thereafter, for the first time on 21.04.2018, the accused filed an application and prayed for setting aside the order of no cross, which was allowed vide order dated 23.01.2019 passed by learned Magistrate but in spite of availing several opportunities, the accused fail to cross-examine the CW 2 even after lapse of five years from date of filing of evidence affidavit of CW2 i.e. dated 16.09.2022.

24. On 18.09.2023, the respondent/accused filed exhibit 137 in SCC 3107/2014 and exhibit No. 138 in SCC No. 3108/2014. An application under Section 311 of Cr.P.C. and prayed for recall of witness CW2 the Chartered Accountant Shri Nitin Bangad for further cross-examination as per directions of the Hon'ble High Court or call the Chartered Accountant Shri Nitin Bangad as Court Witnesses.

25. On 26.09.2023, learned Judicial Magistrate passed an order below exhibit 137 in SCC No. 3107/2014 and exhibit 138 in SCC No. 1308/2014 and rejected both the applications holding that the complainant failed to produce or made available the witness CW2 whose evidence affidavit on record but not been made available for cross-examination to the accused. Therefore, evidence of C.W. 2 though available on record but it cannot read as a being evidence. Therefore, no question of examining or cross-examination of said witness arises under Section 311 of Cr.P.C.

26. It is a matter of record that, in earlier round of litigation this Court passed an order on 28.02.2023 in Criminal Writ Petition no. 559/2023 and 506/2023 and had permitted the respondent/accused to cross-examine the complainant's witness and scheduled of trial was fixed but the trial has not concluded trial within the period of three months from the date of order. Therefore, on request of the learned trial court, on 21.11.2024 this Court passed an order and extended period of six months being last chance to conclude the trial.

27. It is submitted that, the prosecution or the

complainant in a private complaint having right to examine as many as witness as per list of witness to prove their case beyond the reasonable doubt. The examination of the witnesses is a statutory right of the parties to decide controversy between the parties. However, it is the prerogative right of the complainant/prosecution to examine or not examine the particular witness, though evidence affidavit of said witness is filed.

28. In the case in hand it appears that, though the complainant has filed evidence of CW2 the Chartered Accountant Mr. Nitin Bangad, on 16.11.2015 but subsequently the complainant decided not to rely on evidence affidavit of C. W. 2 Shri Nitin Bangad. Therefore, the accused has no right to cross examine said witness and the accused cannot compel the complainant to examine the C. W. 2 and to cross-examine said witness. Therefore, the order passed in application under Section 311 of Cr.PC., for recalling or summoning additional witness does not adjudicate rights of the parties. Therefore, considering the law laid down in case of *Setu Raman, cited supra*, the order passed below application under Section 311 of Cr.PC., is an interlocutory order, hence, revision under Section 397 (2) of Cr.p.c. is not maintainable. Therefore, the trial Court could have dismissed the revision as not maintainable. However, learned Divisional Court misconstrue the word “Interlocutory order” and wrongly held about maintainable of Revisions u/s 397 of Cri. P. C., against the orders passed below exhibit 137 and 138. Therefore, the impugned order needs to be quashed and set aside on this count alone.

29. In regard to the questions (b) and (c) are concerned,

it is submitted that, no either party to any litigating cause can compel either party to examine the particular witness to prove or disprove their claim or defence. There is no provision either under the Cr.P.C. or the evidence Act that in any civil or criminal litigation the adverse party can compel assertive party to call particular person as a witness. Sec. 137 of Evidence Act, provides for examination of the witnesses by the party who calls the witness. Sec. 138 provides that the witnesses shall be first examined-in-chief, then the adverse party may cross-examine the witness and then the party calling the witness may re-examine, if desires. However, if the examination-in-chief of the witness is recorded but presence of witness cannot be secured due to unavoidable reason or any reason his examination-in-chief can not be read in evidence. In case in hand, though the complainant filed evidence affidavit of C.W. 2 but subsequently, the complainant filed pursis and prayed for discarding evidence affidavit of C.W. 2 and he does not wish to examine said witness, therefore, to my view, the accused cannot compel the complainant to examine or recall of C. W. 2, whose evidence affidavit already discarded by the trial Court. Therefore, the accused has no right to recall C. W. 2 under Section 311 of Cr.P.C..In view of above discussion, the present petitions are deserve to be granted and impugned orders needs to be quash and set aside. Accordingly, I proposed to pass following order :

ORDER

- i. Criminal Writ Petition Nos. 117/2025 and 118/2025 are allowed.

ii. The impugned order dated 08.01.2025 passed by learned Additional Sessions Judge – 11, Aurangabad, in Criminal Revision Application Nos. 296/2023 and 286/2023 are hereby quashed and set aside.

iii. The order dated 26.09.2023 passed by the learned Judicial Magistrate First Class, Court No. 10 below exhibit 137 in SCC No. 3107/2014 and below Exhibit 138 in SCC No. 3108/2014 are hereby restored.

iv. Learned trial Court shall proceed with the matter expeditiously and shall decide it within time frame as per order dated 28.06.2023 passed by this Court in Criminal Writ Petition No. 559/2023 and 563/2023 as well as the time schedule extended by this Court vide order dated 21.11.2024.

(Y. G. KHOBRADE, J.)