



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

CRIMINAL WRIT PETITION NO. 267 OF 2025

Sulochana w/o. Sudam Ragade .. Petitioner
Age. 60 years, Occ. Household,
R/o. Plot No.1, Sonai Market,
Tuljabhavani Chowk, Mayur Park,
Harsul, Chh. Sambhaji Nagar.

VERSUS

Vijaykumar Bandu Dandge, .. Respondent
Age. 49 years, Occ. Service,
R/o. Building No. C-3, Plot No.3-6,
Bhagatsing Nagar, Harsul Parisar,
Chh. Sambhaji Nagar.

Mr. B.A. Dhengle, Advocate for the petitioner.
Mr. S.M. Biyani, Advocate for the respondent-sole.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 07.07.2025
PRONOUNCED ON : 23.07.2025

ORDER :-

01. This Criminal Writ Petition is filed by the complainant in a case under section 138 of the Negotiable Instruments Act [for short "NI Act"], challenging an order passed by the learned Judicial Magistrate, First Class, Aurangabad, on application below Exh.31 in SCC No. 8363 of 2020 dated 31.01.2025. The learned JMFC by way of the order, allowed the application of the accused seeking recall of witness i.e. the complainant for cross-examination.

02. Facts in short giving rise to the present petition are that the petitioner filed complaint under section 138 of the NI Act against the respondent/accused. In the complaint, it is stated that, the petitioner's son wanted to start a business of Super Shopping. She therefore made enquiry with the respondent – who was working in the bank, namely, Aurangabad District Central Cooperative Bank, Harsul Branch. The complainant and the accused know each other and they are also related to each other. Since the accused was working at bank, the complainant asked as to whether her son can get loan from the bank. The accused told her that the bank can give loan of Rs.1 Crore. The complainant, therefore, gave 20% amount of loan i.e. Rs.20 lakhs to the accused in two installments, first installment of Rs.10 lakhs in July, 2018 and another installment of Rs.10 lakhs in the month of December, 2018. However, no loan amount was sanctioned. The complainant, therefore, asked for refund of Rs. 20 lakhs. The accused, therefore, gave a cheque on 28.08.2020, drawn on Maharashtra Gramin Bank, Rashmi Nagar Branch, Harsul for an amount of Rs. 20 lakhs. When the said cheque was presented, the cheque was returned with an endorsement "funds insufficient". On return of the cheque, the complainant sent notice to the accused demanding the amount of cheque. Said notice was replied

denying the liability. The complainant, thus, filed complaint in the Court of learned JMFC.

03. The complainant filed affidavit of evidence. Thereafter, she was cross-examined. The cross-examination was over on 15.04.2023. After evidence of the complainant was over, the defence evidence started. After the defence evidence, the accused filed an application seeking recall of complainant for cross-examination. It is stated in the application that re-examining the complainant is necessary on Exhs.21 and 22. It is stated in the application that previous Advocate was changed and the accused was forced to engage another Advocate. Therefore, certain questions were not asked about Exh.21 and the document at Exh.22 filed by the complainant on 26.05.2022. Copies of the documents are also not supplied to the accused. Said documents were produced after commencement of the trial. It is prayed that to give fair opportunity, the complainant needs to be recalled, as the cross-examination was conducted without knowledge of Exhs.21 and 22.

04. Said application Exh.31 was opposed by the complainant. It is submitted that the application is devoid of merit. The cross-examination of the complainant is already over on 15.04.2024. It is

stated that documents Exhs.21 and 22 are produced on record on 26.05.2022; whereas cross was over on 15.04.2023. The statement under section 313 of the Cr.P.C. was also recorded on 28.11.2023 and prayed that the application be rejected.

05. The learned JMFC on hearing the parties allowed the application. He considered that the documents were brought on record within time. It was expected of the accused to go through those documents and proceed accordingly. The accused, however, failed to do so and now the application is filed. The Trial Court further considered that considering the right of the accused and considering the principles of natural justice, every party should get ample opportunity to put up his defence and is heard properly. It is fault of the earlier advocate. Any mistake done by the Advocate should not affect case of the accused. In that view he allowed the application by imposing costs of Rs.2000/- to be paid to the complainant. The accused was directed to complete the cross-examination within two dates after it is commenced. It was further directed that failure by the accused to comply with the above mentioned conditions shall automatically nullify the order.

06. The learned Advocate for the complainant vehemently argued

that the documents were placed on record on 26.05.2022. The cross-examination was over on 15.04.2023. There is nothing to indicate that the accused could not get knowledge of those documents. Change of Advocate, cannot be a reason to recall witness. It is duty of the accused to diligently conduct the trial. Failure of the accused cannot be to the prejudice to the complainant. The complainant's evidence is over and at the stage of defence, such application is filed. The learned JMFC though observed that case is four years old, the approach of the parties was casual, still allowed the application, instead of rejecting the same.

07. Learned Advocate for the accused vehemently argued that the learned Trial Judge has rightly appreciated facts on record. The Court while allowing the application has restricted the cross only to the extent of Exhs. 21 and 22. It is necessary to bring on record the truth. In view of presumption under section 139 of the NI Act, there is reverse burden on the accused and it is in that view a liberal view is taken. He thus supports the impugned order and prays for dismissal of the petition.

08. This Court has gone through the impugned order and the documents annexed with the petition. This Court has heard learned Advocates for both the parties. About the dates, there is no dispute. The

only question is as to whether the learned Magistrate is justified in allowing the application. The learned Trial Judge considered the judgments in the case of **Varsha Garg Vs. State of Madhya Pradesh reported in AIR 2022 SC (Cri) 1253** and **Hoffman Andreas Vs. Inspector of Customs, Amritsar reported in (2000) 7 Supreme 489.**

09. In the case of **Varsha Garg (supra)**, the Hon'ble Apex Court has dealt with the provisions of Sections 311 and 91 of the Cr.P.C. In that case the Hon'ble Apex Court held that effort of prosecution to produce decoding register, which is crucial and vital piece of evidence, ought not to be obstructed and in that view the application was held to be rightly allowed. The judgment of the High Court was set aside and consequently order passed by the Additional Sessions Judge, whereby application of the prosecution for production of decoding register and for summoning of the witness was dismissed. Ultimately, said application came to be allowed by the Hon'ble Apex Court.

10. In the case of **Hoffman Andreas (supra)**, an application for recall of witness for further cross-examination was filed. During the pendency of the Trial the defence Counsel expired. The subsequent

lawyer engaged by the accused was not aware of the scheme of the defence strategy and was also not aware of the reasons for which former Counsel had not put to the accused questions on certain aspects. In that view, the application was filed for further cross-examination. The Trial Court dismissed the application on the ground that there was nothing on record to show that earlier Advocate was under mental pressure and that he was not keeping well or he could not concentrate during the proceeding. Said order was confirmed by the High Court. The Court considered that there was unfortunate development that took place during the trial i.e. passing away the defence Counsel midway trial. The Counsel who was engaged for defending the appeal had cross-examined the witness but he could not complete the trial because of his death. When the new Counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. It is held that the Trial is basically for the prisoners and courts would afford the opportunity to them in the fairest manner possible. In that view the Trial Court was directed to allow the prosecution witness to cross-examination again by putting certain documents. This case is somewhat similar to the case in hand.

11. Learned Advocate for the petitioner further relied on the judgments in the case of **Mannan Shaikh and Ors. Vs. State of West Bengal & Anr., (2014) 13 SCC 59** and **Vinod s/o. Vikram Paithankar Vs. State of Maharashtra, 2022(2) Mh.L.J. (Cri) 647.**

12. In the case of **Mannan Shaikh (supra)**, it was held that in the application under section 311 of the Cr.P.C., the Court should consider that it is essential to do decision of case. While allowing the application the Court has first confirmed opinion that it is essential to just decision of the case. In that case the prosecution made an application at the stage of arguments. There was no explanation given as to why the statement of the deceased in that case was not brought on record by the Investigating Officer. In that view, the Trial Court rejected the application with the above observations. The High Court reversed the order of the Trial Court. The High Court observed that non-accepting statement of the deceased was mistake of the prosecution. The accused cannot be given advantage of the mistake of the prosecution. The Hon'ble Apex Court did not interfere with the order passed by the High Court. Said order of the High Court was upheld.

13. In the case of **Vinod (supra)**, the question was about recalling of witness on a statement recorded under section 164 of the Cr.P.C., which was part of the charge-sheet. It was held that the accused was aware of the contents of the statement and still the witness was not confronted with the aid of such statement. It is held that the accused cannot take stand that he was unaware of the contents of the statement. In that case the witness to be recalled was a victim of rape case. The High Court considered that recalling of such witness would cause trauma to her and held that recalling was not proper in that case. In the said case what was considered was that the statement under section 164 of the Cr.P.C. was already supplied to the accused.

14. In the present case, there was no question of sending document along with charge-sheet as it is a private case. The learned Trial Court was conscious of the fact and therefore had allowed the application to cross-examine the witness on certain documents with costs. After considering the above, this Court finds that the accused should get fair opportunity. In the present case the documents were already placed on record. The complainant could not show that specific notice was given to the accused and that it was within the knowledge of the accused person that the documents are produced on record. It is

clear from the record that the documents were produced on record subsequent to filing of the complaint. Another aspect that needs to be considered is that now the application is already allowed by granting opportunity to the accused. Now, it would not be proper to take away the opportunity granted. That would be denying fair opportunity. Secondly, the Trial Court was within its power to consider the application under section 311 of the Cr.P.C. There is nothing to show that the discretion exercised by the Trial Court is arbitrary or against the settled principles. This Court does not find any illegality in the order calling for interference at the hands of this Court under Article 227 of the Constitution of India.

15. This Criminal Writ Petition, being devoid of merit, stands dismissed with no order as to costs.

[KISHORE C. SANT, J.]