



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3334 OF 2025

Manohar Radhakishan Chitalkar,
age 69 years, occu. Pensioner,
R/o. Police Colony, Ambajogai,
now at Bagpimpalgaon,
Tq. Georai, Dist. Beed.

...Applicant.

Versus

1. The State of Maharashtra

2. Vasant Shamrao Gitte,
age 46 years, occ. Agri.,
R/o. Selu, Tq. Parli Vaijnath,
Dist. Beed.

...Respondents

...

Advocate for Applicant : Mr. Vivek Vasantrao Bhavthankar
APP for Respondent No. 1 : Mr. P.M. Kulkarni

...

CORAM : ABHAY J. MANTRI, J.

DATE : 17TH DECEMBER, 2025

ORAL JUDGMENT :

1. Heard. **Rule.** Rule is made returnable forthwith and heard finally by the consent of the learned Advocate for the applicant and learned APP for respondent no. 1. None appears for respondent no. 2, though served.

2. By this application, the applicant/petitioner is challenging the order dated 06.08.2025, passed by the learned Additional Sessions

Judge, Ambajogai, below exhibit 1 in Criminal Revision Application No. 39/2023, whereby allowed the Revision and permitted the complainant to lead secondary evidence.

3. Learned Advocate for the applicant vehemently contended that the learned Additional Sessions Judge has not recorded the reason while setting aside the order passed by the learned Magistrate, which was just and proper, as the learned Magistrate has recorded the reasons for rejection of the application. Therefore, he urged that the said order be set aside.

4. He further argued that after rejection of the application by the Trial Court, learned Magistrate on 15.07.2022, has recorded the statement of the accused under Section 313 of the Code of Criminal Procedure (for short 'the *Cr. PC.*') and the matter was posted for argument. At that time, the complainant had filed this application to fill up the lacuna in the case. Therefore, it would not be appropriate to permit him to lead the secondary evidence.

5. He further propounded that at the time of evidence, the complainant was aware of the non-filing of the original notice before the Court, and the copy of the notice was marked as Article 'A'. However, despite the foregoing, the complainant has not taken any steps since 2018 and has filed the application at a belated stage; therefore, it would

cause prejudice to the rights of the accused. Hence, he urged that the Additional Sessions Court's passing of the order without recording the reasons is improper and liable to be set aside.

6. He further canvassed that the application filed by the complainant is not maintainable under Section 311 of the Cr. p. c. Moreover, the reasons disclosed in the application are vague and improper. Therefore, the application is liable to be rejected. Similarly, in the application, the name of the witness whom the complainant seeks to examine has not been provided. During the argument, the learned Advocate for the applicant produced a copy of the notice, evidence of the complainant, and a statement of the accused under Section 313 of the Cr.P.C., on record. Therefore, he urged that the impugned order be quashed.

7. Having heard the arguments of the learned Advocate for the applicant and gone through the impugned order and record, at the outset, it appears that the original complainant has moved an application to permit him to lead the secondary evidence to prove the xerox copy of the notice as the original notice is misplaced. However, Section 311 of the Cr. P. C. was incorrectly mentioned in the application, but upon perusal of the averments in the application, it is evident that the complainant failed to produce the original notice on record;

therefore, he has sought permission to lead secondary evidence. Thus, merely mentioning the wrong provision/Section does not mean that the application has been filed under the said Section. Therefore, in that regard, I do not find substance in the contention of the learned Advocate for the applicant that the application is not maintainable under Section 311 of the Cr. P. C.

8. It is pertinent to note that the accused, i.e. applicant, is not disputing his signature on the cheque, but his defence was only that he had signed the blank cheque and kept it in the Almarh of the Police Station, and one Police Naik Kamne gave the said cheque to the complainant. However, the applicant has not lodged any complaint regarding the theft of the cheque or its misplacement, nor has the applicant taken any action against Police Constable Kamne. The defence itself indicates that the applicant does not dispute his signature on the cheque in question.

9. Therefore, in my view, the presumption under Sections 118 and 139 of the N.I. Act would attract. Similarly, the defence was raised that the handwriting on the cheque's contents differs from that on the cheque. However, pursuant to Section 20, the payee of the cheque is entitled to complete the cheque, which is incomplete.

10. It further appears from the evidence on record that the respondent – original complainant has produced the xerox copy of the notice on record, and the same is marked as Article 'A'. However, despite searching, he was unable to find out the original, and therefore has moved the application to permit him to lead secondary evidence to prove the said notice. No doubt, it appears that the respondent concluded his evidence on 19.10.2018, and until the argument, he has not taken any steps; therefore, a delay has occurred in filing the application. For that purpose, indeed, he is liable to pay the costs instead of rejecting his application by denying him the opportunity to lead the secondary evidence, as he has produced a copy of the notice on record and marked the same as Article 'A'.

11. Therefore, in my view, it would be appropriate to permit the respondent to lead secondary evidence in support of his case, which he failed to do at the earliest. If the respondent is permitted to lead the secondary evidence, it would not cause prejudice to the rights of the applicant. But if he has refused to lead the secondary evidence, then he would certainly cause prejudice, as he would not be able to prove the said notice.

12. Similarly, in case the respondent is permitted to lead the secondary evidence, that does not mean that the Court is enabling him

to fill up the lacuna, but the said notice is already produced on record and is part of the complaint; he only wants to prove the said document by leading the secondary evidence, in accordance with the law. Therefore, it cannot be said that permitting the complainant to lead secondary evidence would fill the lacuna.

13. On the contrary, by permitting the respondent to lead the secondary evidence, the Court is giving an opportunity to the complainant to prove the notice produced on record. Apart from that, the applicant has not led any evidence in support of his defence to rebut the case of the respondent.

14. Perused the impugned order passed by the learned Magistrate. It appears that the learned Magistrate erred in holding that the application was filed under Section 311 of the Cr.P.C. and, therefore, the same was rejected for want of a specific name of the witness whom the respondent seeks to examine. However, the said finding appears to be contrary to the settled position of law that the averment in the application has to be considered, rather than merely the title under which it was filed.

15. Similarly, it was rejected on the ground that it was within the knowledge of the respondent about the marking of the notice at Article 'A' instead of exhibiting the same, and at the stage of final

argument, the application was filed. Therefore, the learned Magistrate has rejected the same. However, in light of the said finding, the learned Magistrate is depriving the respondent of leading evidence in support of his case, and the learned Magistrate has also not considered that, if the respondent is permitted to lead secondary evidence, it would not cause prejudice to the rights of the accused.

16. On the other hand, if the application is refused, then it would cause prejudice to the rights of the respondent, and therefore, the passing of the order by the magistrate is unjust and improper. However, the learned Additional Sessions Judge has considered the said fact and rightly observed in paragraph nos. 5 and 6, that under Section 65 of the Indian Evidence Act, the complainant/respondent can file an application for permitting him to lead the secondary evidence, of which a copy of the notice was already produced on record, as the original is lost and misplaced. If the respondent is permitted to lead additional evidence, the applicant would have the opportunity to cross-examine him. Therefore, it would not cause prejudice to the rights of the applicant.

17. Similarly, the learned Additional Sessions Judge has observed that no material has been produced to suggest that the loss of the original notice was deliberate or with an ulterior motive. Therefore, the learned Additional Sessions Judge has set aside the order of the

magistrate and allowed the respondent to lead the secondary evidence. Hence, the order passed by the learned Additional Sessions Judge is just and legal.

18. On the other hand, the learned Advocate for the applicant failed to point out that the said order is illegal or perverse. As such, it would not be appropriate to interfere with the impugned order in writ jurisdiction. As a result, the petition, being devoid of merit, stands dismissed. The rule is discharged. No order as to costs.

19. Needless to clarify that the original complaint has been pending since 2016, the learned Magistrate has to dispose of the same as early as possible within a period of four months from the receipt of the copy of this order.

20. The respondent is further directed to lead the secondary evidence within a period of one month from the receipt of a copy of this order by the Trial Court. No further time will be granted. If the respondent fails to lead the evidence within one month, the learned Magistrate shall proceed with the matter in accordance with the law.

21. It is pertinent to note that due to negligence on the part of the complainant, the matter has been prolonged from 2018 to this date. Therefore, it would be necessary to impose the costs on the complainant (i.e., the respondent). Hence, the respondent is directed to deposit the

costs of Rs. 5,000/- (Rupees five thousand) with the Legal Services Authority, Aurangabad, within one month from receipt of a copy of this order, failing which his right to lead evidence shall be forfeited.

22. Needless to clarify that the Trial Court shall not be influenced by the observations made in the above order as the same are, prima facie, in nature.

(ABHAY J. MANTRI, J.)

SPC