

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

WRIT PETITION NO. 1213 OF 2026

Deepak Vitthal Rao

..Petitioner

Versus

The State of Maharashtra & anr.

...Respondents

AND

WRIT PETITION NO. 1214 OF 2026

AND

WRIT PETITION NO. 1215 OF 2026

Mr. Vincent D'Silva a/w Mr. Sujit Mane, Ms. Pranali Auti &
Mr. Rizwan Shaikh, for the Petitioner in all.

Mr. D J Haldankar, APP for the Respondent – State.

Mr. Jugal Kanani, a/w Ms. Shrinidhi A Sonak, for Respondent
No. 2.

CORAM : N. J. JAMADAR, J.

DATE : 27th MARCH 2026

ORDER :

1. Heard the learned Counsel for the parties.
2. These petitions under Article 227 of the Constitution of India assail the legality, propriety and correctness of identical orders passed by the learned Additional Sessions Judge on the applications filed by the petitioner/appellant in the criminal appeals thereby rejecting the permission to lead additional evidence under Section 391 of the Code of Criminal Procedure, 1973 ('the Code').

3. Shorn of superfluities, the background facts can be stated as under:-

3.1 The Respondent No. 2 filed complaints against the petitioner for an offence punishable under Section 138 of the N. I. Act, 1881, with the assertion that the petitioner/accused had induced him to enter into a term-sheet to jointly develop the property and made him to part with huge consideration. The accused committed default in the performance of his obligations and towards the discharge of the said liability, the accused had drawn the cheques which were dishonored on presentment and the accused failed to pay the amount covered by the cheques despite service of demand notice.

3.2 Eventually, by the judgments and orders dated 10th February, 2021, the accused came to be convicted for an offence punishable under Section 138 of the N. I. Act, 1881 and sentenced to suffer simple imprisonment for two months and was also directed to pay compensation of varying amounts, in each of the complaints.

3.3 Being aggrieved, the petitioner has preferred appeals before the Court of Session.

3.4 In the said appeals, the petitioner preferred the applications under Section 391 of the Code, seeking permission to lead additional evidence. It was *inter alia* contended that, the then advocate for the accused did not diligently defend the complaints. The right of the cross-examination of the accused was unjustifiably forfeited midway. Instead of challenging the said order before the High Court, the then Advocate committed a mistake in advising the accused to file revision applications before the Court of Session and, consequently, those revision applications were rejected.

3.5 Secondly, it was further contended that, despite there being no specific instruction from the accused, the then advocate for the accused gave statement on behalf of the accused under Section 313 of the Code and admitted the complainant's case, without any authority from the accused, and those admissions were used by the trial Court in rendering the judgments of conviction.

3.6 Thirdly, the accused intended to lead evidence in defence. The accused wanted to examine himself as well as witnesses to dislodge the complainant's case. Yet, the erstwhile advocate even did not seek the permission to lead defence evidence.

3.7 Lastly, the learned Magistrate also committed an error in convicting the petitioner/accused without providing an efficacious opportunity of hearing. Therefore, the accused be permitted to adduce additional evidence; the complainant be recalled for further cross-examination, the statement of accused under Section 313 of the Code recorded through the Advocate be discarded; the trial Court be directed to examine the accused personally under Section 313 of the Code afresh and the accused be permitted to examine himself and also examine witnesses in his defence.

3.8 The application was resisted by the Respondent No. 2/complainant. By the impugned order, the learned Additional Sessions Judge rejected the applications observing *inter alia* that, the record of proceedings before the learned Magistrate would indicate that sufficient opportunity was given to the accused to cross-examine the complainant's witnesses and adduce evidence in his defence. By the instant application the accused, in effect, intended to have a second trial. In the view of the learned Additional Sessions Judge, no case for permitting the accused to lead additional evidence by invoking the power under Section 391 of the Code, was made out.

3.9 Being aggrieved, the accused/petitioner has preferred these applications.

4. Mr. Vincent D'Silva, the learned Counsel for the petitioner, would submit that, the learned Additional Sessions Judge completely misdirected himself in rejecting the application for leading additional evidence by posing unto himself a wrong question. The learned Magistrate ought to have considered whether the additional evidence proposed to be led by the accused, was necessary for a just decision of the case. It was submitted that, the power under Section 391 of the Code has been conferred on the Appellate Court to ensure that, there is no failure of justice.

5. In the case at hand, according to Mr. D'Silva, it becomes abundantly clear that, the erstwhile advocate for the accused had taken missteps at every stage of the trial. The order of no cross-examination passed by the learned Magistrate was not challenged before the High Court, nor the order of closing of the evidence of the accused was assailed before the High Court. Instead, without there being any express authority the learned advocate gave statement under Section 313 of the Code and virtually admitted the incriminating portion of the evidence. In

such circumstances, if the accused is not permitted to lead additional evidence, the accused would suffer grave prejudice and, eventually, it would entail failure of justice.

6. Mr. Jugal Kanani, the learned Counsel for Respondent No. 2/complainant, controverted the submissions of Mr. D'Silva, and stoutly supported the impugned order. The attention of the Court was invited to the conduct of the accused before the learned Magistrate as is evincible from the material on record.

7. The learned Additional Sessions Judge has encapsulated the manner in which the trial in the complaints progressed before the learned Magistrate from the point of view of ascertaining whether the accused have had an effective opportunity to defend himself.

8. It is a matter of record that, the complainant had filed affidavit in lieu of examination-in-chief on 14th March, 2017. The accused did not cross-examine for a long time and on 13th October, 2017, the learned Magistrate passed no cross-examination order as the advocate for the accused expressed his disinclination to cross-examine the complainant. On 20th October, 2017, however, the learned Magistrate recalled the said order and the accused was permitted to cross-examine the

complainant. Yet, on 22nd December, 2017, the accused cross-examined the complainant, partly. Thereafter, despite several opportunities the accused did not conclude the cross-examination of the complainant. Thus, after almost one year, i.e. on 15th November, 2018, the learned Magistrate again passed 'no cross' order. Warrants were required to be issued to secure the presence of the accused. The statements of the accused under Section 313 of the Code came to be recorded through the Advocate for the accused.

9. The learned Additional Sessions Judge notes, the matter was posted for recording defence evidence on more than 10 occasions thereafter. Eventually, after one year; on 03rd December, 2019, the defence evidence was closed. Incontestably, after hearing final arguments on behalf of the accused, the judgments came to be delivered by the learned Magistrate.

10. The aforesaid narration of facts belies the submissions sought to be canvassed by Mr. D'Silva that, the learned Magistrate did not provide the accused an efficacious opportunity to defend. On the contrary, it seems the learned Magistrate had provided ample opportunities to the accused and was extremely considerate.

11. The further submissions sought to be advanced by Mr. D'Silva that, the erstwhile advocate for the accused had committed blunders, one after another, is required to be appreciated in the light of the aforesaid conduct of the accused; as emerged from the record. At no point of time, till the application for leading additional evidence under Section 391 of the Code was made, the accused had raised any grievance regarding the manner of the conduct of the proceedings by his erstwhile advocate. The learned Additional Sessions Judge was, therefore, justified in observing that, laying the blame at the doorstep of the advocate is the easiest way to mask the conduct of the party.

12. These petitions raise an even more fundamental question as to whether, a party can be permitted to seek virtually a re-trial under the guise of an application to lead additional evidence under Section 391 of the Code. As noted above, the accused seeks to recall the complainant for further cross-examination, the accused wants the Court to discard the statement of the accused recorded under Section 313 of the Code and record the statement of the accused afresh and also

permit the accused to examine himself and witnesses in his defence.

13. Section 391 of the Code empowers the Appellate Court to admit additional evidence if it considers it to be necessary to enable it to render justice. If the Court finds that, the additional evidence is necessary to obviate the resultant failure of justice, the Appellate Court can admit additional evidence. The power is, as is evident, plainly discretionary. Such power is required to be exercised sparingly and in suitable cases. However, once the Court comes to the conclusion that the additional evidence is necessary, there are no fetters on the power of the Court.

14. The scope of Section 391 of the Code, however, cannot be so expanded as to admit the additional evidence in such manner as would amount to a re-trial virtually. The Appellate Court under Section 386(b) has indeed power to reverse the finding and sentence and order that the accused be re-tried. However, that power is required to be exercised, of necessity, at the final adjudication of the appeal. A re-trial, which the prayers in the instant application unmistakably indicate to be the intent of the

accused, cannot, however, be ordered as a disguise for additional evidence.

15. A profitable reference, in this context, can be made to a three-Judge Bench judgment of the Supreme Court in the case of *Rajeshwar Prasad Mishra Vs. State of West Bengal & anr.*¹, wherein the Supreme Court while expounding the scope of provisions contained in Section 391 of the Code, has cautioned against admitting additional evidence as a disguise for a re-trial. The observations in Paragraph No. 10 are material and hence extracted below : -

“10. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to

1 AIR 1965 SC 1887

change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. Commentaries upon the Code are full of cases in which the powers under Section 428 were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy. The facts in the cited cases are so different that it would be futile to embark upon their examination. We might have, attempted this, if we could see some useful purpose but we see none. We would be right in assuming the existence of a discretionary power in the High Court and all that we consider necessary is to see whether the discretion was properly exercised.”

16. Applying these principles to the facts of the case at hand, especially the sweep of the prayers in the applications, this Court is of the considered view that, the petitioner is seeking a re-trial. Thus, the learned Additional Sessions Judge was justified in rejecting the applications.

17. It is, however, clarified that, this order shall not be construed as an impediment for the Appellate Court to examine at the final adjudication of the appeals whether there was indeed a failure of justice and re-trial is warranted.

18. Subject to aforesaid clarification, the Writ Petitions stand dismissed.

[N. J. JAMADAR, J.]