

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

**CRIMINAL WRIT PETITION NO.5439 OF 2018**

Thirumalai Chemicals Ltd. ... Petitioner

Vs.

M/s.Ketan Marketing & anr. ... Respondents

**With  
CRIMINAL WRIT PETITION NO.5440 OF 2018**

Thirumalai Chemicals Ltd. ... Petitioner

Vs.

M/s.Ketan Marketing & anr. ... Respondents

Mr.Y.M. Thakur with Uma Sharma I/b M/s.Dharam & Co. for the  
Petitioner  
Mr.Atul Pande I/b I/b Wasim Ansari for Resp. No.1  
Mr.Vinod Chate, APP, for the Respondent – State

**CORAM: Mrs.MRIDULA BHATKAR, J.**

**DATED: JANUARY 21, 2019**

**P.C.:**

1. Rule. Learned Counsel for the respondent No.1 and the  
learned APP waive notice. By consent of the parties, Rule made  
returnable forthwith and heard finally.

2. In these two petitions, the complainant while invoking the powers of this Court under Article 227 of the Constitution of India, challenges the orders dated 31.10.2018 passed by the learned Metropolitan Magistrate 33<sup>rd</sup> Court, Ballard Pier and order below exhibit 34 in C.C. No.511/SS/2015 dated 30.10.2018 by which the learned Metropolitan Magistrate has rejected the application under section 311 of the Criminal Procedure Code made by the complainant/petitioner.

3. The complainant had sent certain goods to respondent No.1 i.e., chemicals, as per the case of the complainant, through a consignment agent, namely, M/s.BMG Chemicals Private Limited. After examination of the complainant, cross-examination was over on 21.7.2018. Thereafter, a statement under section 313 was recorded and on 14.9.2018, the application recalling the complainant in order to prove the consignment letter and acknowledgement was moved by the complainant. The said application was contested by Respondent No.1 and it was rejected by the learned Metropolitan Magistrate on the ground of admission given by the complainant that a witness has admitted that the

complainant company has no concern with M/s.BMG Chemicals, which is a separate company. The application was rejected also on the ground that it was made at a belated stage when the matter was fixed for final arguments.

4. The learned Counsel for the petitioner/complainant fairly submits that the application made under section 311 is a defective one as no substantial application is made for production of the minutes/resolution of the board meeting of the complainant company directors, which is required to prove authority given to any of the directors to give evidence. He submits that the said minutes of the board meeting which were in existence could not be produced. He further submitted that instead of the complainant, he wants to examine a person from M/s.BMG Chemicals, the consignment agent, to prove the acknowledgement of the goods and authority to deliver the goods.

5. The learned Counsel for Respondent No.1 while opposing these petitions submitted that the documents were within the knowledge of the petitioner/complainant. Moreover, the cross-examination is already over and at this stage, no such permission can be granted. Further, the learned Judge has made a pertinent

observation in para 5 of the order that the complainant has admitted that the complainant has no concern with the consignment agent.

6. Perused the orders, the applications and considered the submissions. What is written in the application and what is now prayed in the Writ Petition are different. The documents of acknowledgement or delivery now cannot be proved from the complainant who is already cross-examined on this point. The submissions of the learned Counsel that he wants to examine the officer from the consignment agent, however, can be considered as it appears from the submissions that the issue of privity of contract between the complainant and the accused is raised. On this point, the person from M/s.BMG Chemicals is the correct witness and is required to be examined in order to find out the truth. I do not want to comment on the finding in para 5 of the order.

7. In view of this, the order passed by the learned Judge of not allowing the application under section 311 of recalling the complainant to prove the letters of M/s.BMG Chemicals cannot be faulted with except para 5. Otherwise, this order of refusing

examination of the complainant in respect of proving the documents of M/s.BMG Chemicals or acknowledgement of the delivery of the goods cannot be faulted with.

8. Hence, the petitions are dismissed. However, the complainant is given liberty to move appropriate application with specific averments and the pleadings before the trial Court, which shall be decided on its own merits.

**(MRIDULA BHATKAR, J.)**