

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

CRIMINAL WRIT PETITION NO. 4656 OF 2021

RWE Supply and Trading (India) Pvt, Ltd.	...Petitioner
Versus	
The State Of Maharashtra And Ors.	...Respondents

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Mr. Karan Kadam with Mr. Ishwar Nankani and Ms. Rhea Sinkar i/b
Nankani and Associates, Advocates for the Petitioners.

Mr. Kushal Mor with Mr. Kunal Bilaney, Advocates for Respondent
Nos.2 to 4.

Mr. S. R. Agarkar, APP for the Respondent – State.

CORAM	:	PRAKASH D. NAIK, J.
DATE	:	2nd AUGUST, 2022

PER COURT:

1. The Petitioner is aggrieved by order dated 28th October, 2021 passed in C. C. No. 2379/SS/2015 pending before the Court of learned Metropolitan Magistrate, 58th Court at Bandra, Mumbai the Petitioner is the complainant in C. C. No. 2379/SS/2015 pending before the Court of learned Metropolitan Magistrate, 58th Court at Bandra, Mumbai process was issued against the accused under 138 of Negotiable Instruments Act.

2. The complainant has alleged that, the complainant is private limited company carrying on business of wholesale trading operation in India involving sourcing, sailing, distributing, transportation, storage

and marketing of coal. The accused No.1 is partnership firm and accused No.2 and 3 are partners of accused No.1 under coal, sales and purchasing agreement dated 23rd July, 2014 executed between the complainant and accused No.1, the complainant agree to sale and deliver 28,000 metric tons and 10% of non coking steam coal of Indonesia origin to accused No.1. The contract was signed by accused No.3. Pursuant to amendment agreement dated 21st August, 2014 executed between complainant and accused No.1, the date for delivery of the coal and certain other terms were modified. The agreement was signed by accused No.3, on 30th July, 2014 load port test result was issued by P.T. SGS Indonesia certifying that, the coal was within specifications prescribed between the parties. The contract provides that, accused No.1 shall conduct a full visual inspection of the coal of terminal prior to start of delivery and if any, extraneous material are common parties will in good faith discuss any price detection to the extent of cost of removing such contamination, prior to coal living the terminal. The contract further stated that, accused No.1 acknowledges that, the quality of the coal has been independently certified and that accused No.1 had the opportunity to conduct a full visual inspection of the coal prior to delivery. The contract further provides that, the coal is warranted to be free from encumbrances and as is where is basis and

accordingly, accused No.1 shall not have the right to reject the coal. A request to price reduction once the coal has been removed by accused No.1 from the terminal under a coal sales and purchase agreement dated 13th November, 2014 executed between complainant and accused No.1, the complainant agreed to sale and deliver approximately 33,201.38 metrics tones of non-cocking steam coal of Indonesian origin to accused No.1 being the quantity of 41,245 metrics tones of such coal discharge from the vessel M. V. Blumenau at Kandlapur, less the quantity of 8,043.62 metrics tones which has been delivered pursuant to contract. November contract recorded that, coal had been tested on lodging the vessel at the origin and certified by P.T. HGS Indonesia has meeting the specifications recorded therein. The November contract also contain the same term as July contract relating to contamination by extraneous material. The accused issued cheque on 9th May, 2015 for amount of Rs.23,33,100/-, cheque dated 10th May, 2015 for Rs.9,33,240/-, cheque dated 11th May, 2015 for Rs.23,33,100/- and various other cheques. The cheques were presented by the complainant. The cheques were dishonoured. Demand notice was forwarded, calling upon the accused to pay amount of Rs.3,03,30,300/-. Complaint was filed.

3. The affidavit of evidence of Mr. Vikesh Mundra (PW-1) was filed

on 27th September, 2017 and the documents were marked on 2nd February, 2017. The cross was not proceeded from November, 2017. On 31st January, 2018 trial Court passed order closing the cross of PW-1. The accused filed application under Section 311 of Cr.P.C. to recall witness. The said application was allowed on 10th April, 2018. The trial Court again closed the cross on 11th October, 2018 and the Court proceeded to record the statement of accused under Section 313 of Cr.P.C. The accused filed another application for reopening of evidence on 27th December, 2018 which was allowed on 4th July, 2019. The accused filed Criminal Writ Petition Nos.783, 784 and 785 of 2019 before this Court. This court by order dated 20th June, 2019 recorded that, the learned counsel appearing for the Petitioners, on instructions makes statement that, the Petitioners are therein ready to appear on each and every date fixed by trial Court in C. C. No.2379/SS/2015 and 2380/SS/2015 statement accepted. The Petitioner to remain present before trial Court whenever, their presence is necessary and as ordered by the trial Court. The Petitioner will extend full cooperation for early decision of the said case to the trial Court, statement accepted. The learned counsel appearing for the respondent No.2 therein prays for early disposal of the aforesaid cases prior to his reasonable since the learned counsel for the Petitioner made a statement that, the Petitioner

will extend full co-operation for early decision of the cases, there is no impediment to give directions to the concerned Court to decide the said cases as expeditiously as possible. The cross-examination began. About which went on for 174 pages evidence recorded was for above 25 days.

4. The accused filed application under Section 91 read with 254(2) Cr.P.C. on 22nd October, 2019 seeking directions to the Petitioner to produce various documents. The Petitioner filed reply opposing the said application on 24th October, 2019 vide order dated 6th November, 2019. The application was rejected.

5. On 17th February, 2020 the accused filed second application under Section 91 of Cr.P.C., read with Section 254(2) Cr.P.C., seeking production of documents mentioned therein. The Petitioner filed reply on 3rd March, 2020 and written submissions on 15th December, 2020. The said application was allowed on 1st March, 2021 and the Petitioner was directed to produce all the documents regarding delivery of coal in their process. The said order dated 1st March, 2021 was challenged before this Court vide Criminal Writ Petition No.1826 of 2021. This Court allowed Criminal Writ Petition No.1826 of 2021 and by order dated 11th August, 2021 directed the trial Court to hear the second fresh application on merits and pass appropriate orders within four weeks.

6. The Advocate for the Petitioner filed pursis before the trial Court,

bringing on record order dated 11th August, 2021 passed in Writ Petition No. 1826 of 2021. The earlier order was also placed on record. The application Exhibit-85 was again argued and it was adjourned from time to time. On 28th October, 2021 the trial Court allowed the application.

7. Learned Advocate for the applicant submitted that, the second application preferred by the accused was not maintainable. The order was passed mechanically without considering the fact that, the first application under Section 91 of Cr.P.C., was rejected by order dated 6th November, 2019 which was not challenged by the respondents and the said order has attained finality. The trial Court has as good as review its previous order. The cross-examination went on for several days running into several pages and the application was preferred to cause inconvenience and harass the complainant. Vide second application the accused sought document signed by accused Nos.2 and 3 to show that, the motor vehicle referred in annexure, invoices forming part of Exhibit-24 which had been previously sought in the previous application which was rejected. The respondent had merely tweaked prayers which were already sought in the first application.

8. Learned Advocate for the Petitioner has relied upon several decisions.

9. The respondent No.2 has filed affidavit-in-reply alongwith documents. The Petitioners have filed affidavit-in-rejoinder.

10. Learned Advocate for respondent No.2 submitted that, the trial Court has considered the importance of documents while allowing the said application. There is no infirmity in the said order. The accused must be given fair opportunity to defend themselves in Criminal prosecution and rebut the permission under Section 138 of Negotiable Instruments Act. The Petitioners are delaying proceedings. The transactions between the parties revolved around supply and purchase of coal over number of years. The complainant/PW-1 had deposed that, he can produce documents to show the supply and delivery of coal, on the basis of his admission the application was filed seeking production of documents instead of producing the documents. The complainant had preferred this Petition. This Court had remanded the application for fresh consideration. The prayers in first application and second application can be distinguished. The documents are in possession of complainant and he is required to produce them. The cross-examination of respondent is depending upon the said documents. The second application was preferred only after the complainant agreed to produce the relevant documents pertaining to supply of coal. The delivery of coal is always denied by respondents which is evident from the cross-

examination of complainant. The Petitioner is unable to produce delivery challan, lorry receipt, consignment notes, loading slips and deliver order as per their case. The offence under Section 138 of Negotiable Instruments Act is of strict liability. The accused are required to rebut the burden of presumption under Section 139 of Negotiable Instruments Act. Both the applications under Section 91 were distinct and the bar under Section 362 of Cr.P.C. would not be attracted.

11. Learned counsel for the respondent has also relied upon the decisions in the case of *Mansingh Pawar Vs. Kailash Chavan* delivered in Criminal Writ Petition No.153 of 2011, *Abdul Kazi Vs. Sayeed Ali and others* 1978 (19 GLR) 1038, *Assistant Collector of Customs Bombay Vs. L.Rs Melwani and Anr.*, AIR 17 SC 962, *Sachin Food Process Vs. Sanjay Pathak and others* 2016(4) MHLJ 245 and *Jadhavlal Patel Vs. Lalit Patel* delivered in Criminal Writ Petition No.607 of 2008.

12. The respondents are tried for offence under Section 138 of N.I. Act. The Petitioner is the complainant. Affidavit-in-lieu of evidence of PW-1 alongwith compilation of documents was filed before the trial Court on 27th September, 2017, vide order dated 20th June, 2019. Respondents preferred application under Section 91 read with 254(2) Cr.P.C. on 22nd October, 2019. In the said application it was prayed that, the complainant be directed to produce the office copies of invoices at

Exhibit-24, courier receipt by which invoices of Exhibit-24 were sent to accused No.1, corresponding delivery challans bearing the acknowledgment of accused No.1. Pertaining to the invoices forming the part of Exhibit-24, delivery order, delivery request and delivery instructions bearing the signature of accused No.2 and accused No.3 which was received by complainant in-pursuance of agreement dated 13th November, 2014, delivery order, delivery instructions delivery request under signature of accused Nos.2 and 3 received by complainant against which complaint issued number 75 and 76 original service agreement signed by complainant in August, 2014 providing storage solution to the complainant at Kandla, correspondence/supporting lorry receipts or goods consignments not in respect of the truck numbers as mentioned on page 25, 26, 29, 30, 33 and 36 of annexure to Exhibit-24, corresponding lodging slips on the basis of which complainant used to record the details. The complainant filed reply to the said application and opposed the prayer for protection of documents. The learned Magistrate passed detailed order and rejected the said application on 6th November, 2019. While rejecting the said application it was observed that, the accused only disputed the quality of coal. The accused admitted supply of coal. The sub-standard quality and non supply of the coal are different aspects. PW-1 during his

cross-examination admitted to the some documents, and was ready and willing to produce them, but as per reply Exhibit-72 the complainant had denied to produce the documents. The accused demanded the documents relating to the office copies of invoices Exhibit-24 courier receipt by which invoices of Exhibit-24 were sent to the accused, corresponding delivery challans bearing acknowledgments of the accused, delivery orders bearing signature of accused No.2 or accused No.3 which are received by the complainant in pursuance of agreement dated 13th November, 2014, two receipt request in the nature of delivery orders etc. In all the documents there is no reference about quality of the coal. The accused failed to show the nexus of the documents in relation to quality of the coal which is disputed in reply of demand notice. The majority of documents are related to acknowledgment of the accused. It shows that, the accused wanted to dispute supply of coal which is admitted in reply of notice. The accused disputed arbitral award. As per reply supply of coal is not disputed. Therefore, it is not desirable to direct the complainant to produce the documents. It is pertinent to note that, cross-examination was recorded into several pages and for several months. Within short span of time the respondents preferred another application under Section 91 of Cr.P.C. read with 254(2) of Cr.P.C. The respondent had sought directions to

produce the documents and furnish information. The application was vague, the prayer clause indicates that in exercise of jurisdiction under Section 91 of Cr.PC. read with 254(2) of Cr.PC. The complainant may be directed to produce or cause to be produced the documents signed by accused Nos.2 and 3. The Petitioner oppose the said application by filing reply. The Petitioners also filed written arguments. The learned Magistrate allowed the application on 1st March, 2021 without assigning cogent reasons and complainant was directed to produce documents about delivery of coal which is in his possession. The only reason which was assigned to allow the said application is that, the complainant had filed affidavit-in-evidence during cross-examination and admitted that, relevant documents are in his possession but he will file it before the Court only if it is directed by the Court. The Court held that, the documents which are in possession of the complainant may be helpful to proper decision of the case. This reasoning assigned for allowing the application preferred by the accused No.3 was set aside by the High Court vide order dated 11th August, 2021. The High Court has observed that, there are no reasons assigned by the Magistrate allowing the application, which was earlier rejected. The matter was remitted back to the trial Court. However, the learned Magistrate once again allowed the application vide order dated 28th October, 2021. The learned Magistrate

had observed that, the documents about the delivery of the coal in relation to motor vehicle mentioned in Exhibit-24 are relevant to the dispute between the parties. The said documents are necessary and desirable. The complainant has custody over the said documents. The production of documents would not cause any loss to the complainant. The complainant can be directed to produce the said documents. The principle on which previous application was rejected is indirectly overcome while allowing the second application. The accused is apparently trying to dispute the supply of coal which was admittedly in reply dated 24th June, 2015 which is marked as Exhibit-69 in the evidence. It was reply to notice dated 9th June, 2015. Which is marked as Exhibit-68 in evidence. The accused have admitted the receipt of coal in the consent terms dated 21st September, 2016 and arbitration award dated 16th November, 2016 which are on record. Although the accused are trying to suggest that, the nature of documents are different under in second application, the previous application is similar and the grounds were also similar. The trial is already delayed. Lengthy cross is conducted by the accused. It is clear that, the accused have filed the application to delay the proceedings.

13. Considering the aforesaid circumstances, the impugned order dated 28th October, 2021 passed by trial Court deserves to be set aside.

Hence, I pass the following order.

ORDER

- (i) Writ Petition No. 4656 of 2021 is allowed and disposed of;
- (ii) The order dated 28th October 2021 passed by Metropolitan Magistrate, 58th Court, Bandra, Mumbai in C.C. No. 2379/SS/2015 below Exhibit-85 is quashed and set aside;
- (iii) Trial is expedited;
- (iv) The Trial Court is requested to make an endeavour to conclude the trial within a period of nine months from the date of receipt of this order.

(PRAKASH D. NAIK, J.)