

National Small Industries Corporation Ltd. Vs State (NCT of Delhi) and Others

Court: Supreme Court of India

Date of Decision: Nov. 17, 2008

Acts Referred: Companies Act, 1956 â€” Section 617, 617
Criminal Procedure Code, 1973 (CrPC) â€” Section 190, 2, 200, 249, 256
Essential Commodities Act, 1955 â€” Section 11
Negotiable Instruments Act, 1881 (NI) â€” Section 13

Citation: (2009) 1 ACR 208 : AIR 2009 SC 1284 : (2009) AIRSCW 713 : (2009) 1 ALD(Cri) 419 : (2008) 57 BLJR 251 : (2009) 4 BomCR 463 : (2008) 147 CompCas 11 : (2009) CriLJ 1299 : (2008) 154 DLT 669 : (2009) 3 GLR 2109 : (2008) 13 JT 428 : (2008) 4 KLT 798 : (2009) 4

Hon'ble Judges: R. V. Raveendran, J; Dalveer Bhandari, J

Bench: Division Bench

Advocate: Shobha, Harish Sharma, R.P. Yadav, Sanat Kumar and Sanjay Sharawat, for the Appellant; Vijay Kumar Agarwal, Prabhjit Jauhar, S.S. Jauhar, Manish Shanker Verma, Anupam Lal Das and Amit Sharma, Advs, for the Respondent

Final Decision: Disposed Of

Judgement

R.V. Raveendran, J.

Leave granted. Heard the counsel for the parties. The following question of law arises for consideration in these

appeals : Where a complaint in regard to dishonour of a cheque is made by a Government company, represented by its officer who is a public

servant, whether the exemption made under Clause (a) of the proviso to Section 200 of Code of Criminal Procedure, (' Code" for short) is

available?

Crl. Appeal No. 1802/2008 (@ SLP(Crl.) No. 2009/2007)

2. The National Small Industries Corporation Limited ('NSIC" for short) - the appellant herein, is a `government company" within the meaning of

that expression u/s 617 of the Companies Act, 1956. Its object is to extend financial and other assistance to small scale industries. The appellant

lodged a complaint in the Court of the Metropolitan Magistrate, Delhi, alleging that the second respondent company had issued a cheque drawn in

favour of the appellant, towards discharge of its liability, and the said cheque was dishonoured when presented for payment. The appellant

therefore prayed for summoning and punishing the second respondent and its Directors (respondents 3 and 4).

3. On 4.2.2002, the learned Magistrate took cognizance and summoned the accused. He did not examine the complainant and its witnesses, u/s

200 of the Code. He recorded the following reasons in that behalf:

Complaint has been filed by a public servant in discharge of his public duties. Hence his examination is dispensed with. I have perused the record

and considered the submission. I have also perused the original documents also. I consider that prima facie case under Sections 138/142 of

Negotiable Instruments Act is made out.

Respondents 2 to 4 filed a petition u/s 482 of the Code challenging the summoning order. They contended that as the complainant was a

government company and not a public servant, the exemption under Clause (a) of the proviso to Section 200 of the Code was not available; and

that the learned Magistrate could not have dispensed with the mandatory requirement of examining the complainant on oath, u/s 200 of the Code.

The High Court accepted the said contention on the following reasoning:

Public servant is defined in Section 21 of the IPC and a government company would not fall under any of the descriptions mentioned in the said

section. Once it is held that NSIC is not a public servant, mandate of Section 200 Cr.PC was to be followed by the learned MM, which provides

compulsory examination of the complainant and the witnesses present, if any, on oath and on the basis of such pre-summoning evidence, the

Magistrate is to decide as to whether cognizance of the offence is to be taken and summons are to be issued to the accused persons or not. This is

the unambiguous mandatory procedure prescribed u/s 200 Cr.P.C.

Consequently, by order dated 12.1.2007, the High Court allowed the petition and quashed the summoning order. It however made it clear that the

learned Magistrate would be at liberty to record the statement of the complainant and the witnesses and thereafter take appropriate decision in the

matter in accordance with Section 200 of the Code. The said order is challenged in this appeal.

Contentions:

4. The appellant company submitted that being an incorporeal person, it acts through its officers. In the complaint lodged against respondents 2 to

4, it is represented by its Development Officer, who is a public servant, and he has signed the complaint on its behalf. The appellant contended that

though the appellant was the de jure complainant, its Development Officer who represents it in the complaint was the de facto complainant; and

when the complaint by a government company is signed and presented by its employee who is a public servant, it should be deemed to be a

complaint by such public servant acting in the discharge of his official duties. Consequently, Clause (a) of the proviso to Section 200 of the Code

would be attracted and the Magistrate was not required to examine the complainant and the witnesses, on taking cognizance. It is therefore

contended that a complaint by a government company represented by its officer who is a public servant, should be treated as complaint by a public

servant.

5. On the other hand, the second respondent submitted that the wording of Clause (a) of the proviso to Section 200 of the Code made it clear that

the Magistrate was not required to examine the complainant and the witnesses only where the complaint was made in writing by : (a) a public

servant acting or purporting to act in discharge of his official duties; and (b) a court. The second respondent contended that if the intention was to

exempt such examination even where the complainant was a government company or statutory corporation, Clause (a) would have read : if a

public servant acting or purporting to act in the discharge of his official duties, or a court, statutory corporation or Government company, has made

the complaint"" instead of ""if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint"". It is

argued that the use of the words ""public servant acting or purporting to act in the discharge of his official duties"", would show that the exemption is

intended to apply only where government servants or employees of statutory bodies are required to file complaints in the discharge of statutory

duties. Reference was made by way of illustration to Section 11 of the Essential Commodities Act, which provides that ""No court shall take

cognizance of any offence punishable under the Act except on a report in writing of the facts constituting such offence made by a person who is a

public servant as defined in Section 21 of IPC...

6. The second respondent next contended that if all the employees of a government company are public servants, the government company does

not become a public servant, as it has an identity distinct from its employees. In support of the said contention, the second respondent relied upon

the following observations in State Trading Corporation of India Ltd. v. Assistant Superintendent of Commercial Taxes AIR 1963 SC 1811:

We are dealing here with an incorporated company. The nature of the personality of an incorporated company which arises from a fiction of law,

must be clearly understood.... Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its

members, an incorporated company has a separate existence and the law recognizes it as a legal person separate and distinct from its members.

This new legal personality emerges from the moment of incorporation and from that date the person subscribing to the memorandum of association

and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an

entity. But the members who form the incorporated company do not pool their status or their personality. If all of them are citizens of India the

company does not become a citizen of India any more than if all are married the company would be a married person. The personality of the

members has little to do with the persona of the incorporated company. The persona that comes into being is not the aggregate of the personae

either in law or in metaphor.

In reply, the learned Counsel for appellant clarified that the appellant had never contended that it was a public servant. The contention always was

that the employee who represented the appellant in the complaint was the de facto complainant and he being public servant, the exemption was

available.

Legal provisions:

7. Section 138 of the Negotiable instruments Act (for short 'NI Act') provides that dishonour of a cheque for insufficiency of funds in the bank

account etc., is an offence punishable with imprisonment for a term which may be extended to two years or with fine which may extend to twice

the amount of the cheque or with both. Section 142 of the NI Act provides that notwithstanding anything contained in the Code, no court shall take

cognizance of any offence punishable u/s 138 except upon a complaint in writing made by the Payee (or where it has been endorsed in favour of

another, the holder in due course) of the cheque.

8. Section 190 of the Code enumerates the various modes of taking cognizance of offences by Magistrates. It provides for taking cognizance upon

receiving a complaint of facts which constitutes such offence. Section 200 of the Code relates to examination of complainant. Relevant portion of

which reads as under:

200. Examination of complainant. - A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the

witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the

witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) xxxxx

The term `public servant' is not defined in the Code. However, Section 2(y) of the Code provides that words and expressions used but not

defined in the Code will have the meaning assigned to them under the Indian Penal Code. Section 21 IPC defines `public servant', the relevant

portion of which is extracted below:

21. `Public servant'.- The words "'pubic servant'" denote a person falling under any of the descriptions hereinafter following; namely -

Twelfth - Every person - xxxxx (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State

Act or a Government company as defined in Section 617 of the Companies Act, 1956.

Having regard to the aforesaid definition, it is clear that the appellant which is a government company is not a `public servant', but every employee

of the appellant is a `public servant'.

The issue

9. The object of Section 200 of the Code requiring the complainant and witnesses to be examined, is to find out whether there are sufficient

grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the

persons arrayed as accused. See: 287138 . Where the complainant is a public servant or court, Clause (a) of proviso to Section 200 of the Code

raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of

such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before

issuing process. When an employee of a Government company or statutory corporation, who is a public servant, acts or purports to act in the

discharge of his official duties, it necessarily refers to doing acts done or duties discharged by such public servant, for and on behalf of his

employer, namely, the government company/statutory corporation. Any complaint by a public servant (if he happens to be an employee of a

government company) acting or purporting to act in the discharge of his official duties, can only be in regard to the transactions or affairs of the

employer company. When an offence is committed in regard to a transaction of the Government company, it will be illogical to say that a complaint

regarding such offence, if made by an employee acting for and on behalf of the company will have the benefit of exemption under Clause(a) of the

proviso to Section 200 of the Code, but a complaint in regard to very same offence, if made in the name of the company represented by the said

employee, will not have the benefit of such exemption. The contention of the second respondent, if accepted, would mean that a complaint by `The

Development Officer, NSIC" as the complainant can avail the benefit of exemption, the same complaint by `NSIC represented by its Development

Officer" as complainant will not have the benefit of exemption. Such an absurd distinction is clearly to be avoided.

10. The term `complainant" is not defined under the Code. Section 142 NI Act requires a complaint u/s 138 of that Act, to be made by the payee

(or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee

in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence

and the manner of taking cognizance of offences punishable u/s 138 of that Act. However, the procedure relating to initiation of proceedings, trial

and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an

offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced

to writing and shall be signed by the complainant and the witnesses. The requirement of Section 142 of NI Act that payee should be the

complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of

the company. Section 142 of NI Act does not specify who should represent the company, if a company is the complainant. A company can be

represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a

power of attorney.

11. Section 138 NI Act mandates that payee alone, whether a corporeal person or incorporeal person, shall be the complainant. Section 200 of

the Code contemplates only a corporeal person being a complainant. It mandatorily requires the examination of the complainant and the sworn

statement being signed by the complainant. If Section 142 of NI Act and Section 200 of the Code are read literally, the result will be : (a) the

complainant should be the payee of the cheque; and (b) the complainant should be examined before issuing process and the complainant"s

signature should be obtained on the deposition. Therefore, if the payee is a company, an incorporeal body, the said incorporeal body can alone be

the complainant. The mandatory requirement of Section 200 of the Code is that a Magistrate taking cognizance of an offence on complaint, shall

examine upon oath the complainant, and that the substance of such examination reduced to writing shall be signed by the complainant. An

incorporeal body can obviously neither give evidence nor sign the deposition. If literal interpretation is applied, it would lead to an impossibility as

an incorporeal body is incapable of being examined. In the circumstances, a harmonious and purposive interpretation of Section 142 of NI Act and

Section 200 of the Code becomes necessary. Section 142 only requires that the complaint should be in the name of the payee. Where the

complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the

Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and where

the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company

becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto

complainant. Thus in every complaint, where the complainant is an incorporeal body, there is a complainant -- de jure, and a complainant -- de

facto. Clause (a) of the proviso to Section 200 provides that where the complainant is a public servant, it will not be necessary to examine the

complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public

servant is the de facto complainant and in signing and presenting the complaint, he acts in the discharge of his official duties. Therefore, it follows

that in such cases, the exemption under Clause (a) of the first proviso to Section 200 of the Code will be available.

12. We are fortified in our view by two decisions of this Court. In 297350 , this Court held as follows:

Chapter XV of the new Code contains provisions for lodging complaints with magistrates. Section 200 as the starting provision of that chapter

enjoins on the Magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory

as can be discerned from the words "'shall examine on oath the complainant...". The Magistrate is further required to reduce the substance of such

examination to writing and it "'shall be signed by the complainant'". u/s 203 the magistrate is to dismiss the complaint if he is of opinion that there is

no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complainant on oath can be dispensed

with only under two situations, one if the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties

and the other when a court has made the complaint. Except under the above understandable situations the complainant has to make his physical

presence for being examined by the magistrate. Section 256 or Section 249 of the new Code clothes the Magistrate with jurisdiction to dismiss the

complaint when the complainant is absent, which means his physical absence.

The above scheme of the new Code makes it clear that complainant must be a corporeal person who is capable of making physical presence in the

court. Its corollary is that even if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a

natural person represents such juristic person in the court and it is that natural person who is looked upon, for all practical purposes, to be the

complainant in the case. In other words, when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a

human being as de facto complainant to represent the former in court proceedings.

(emphasis supplied)

In 284896, the facts were that the Delhi Municipal Corporation had by a resolution authorized the Municipal Prosecutor to launch a prosecution

u/s 20 of the Prevention of Food Adulteration Act. Accordingly, one S.S. Mathur, the Municipal Prosecutor, filed a complaint against the

respondent. The learned Magistrate acquitted the respondent. Section 417 of the old Code provided that where an order of acquittal was passed

in any case instituted upon complaint by the High Court granting special leave to appeal from the order of acquittal on an application made to it by

the complainant, the complainant may present an appeal to the High Court. The Delhi Municipal Corporation made an application to the High

Court for special leave u/s 417 against the order of acquittal. The application was granted. When the appeal came up for hearing, the respondent

raised a preliminary objection that as the complaint had been filed by S. S. Mathur, the Municipal Prosecutor, he alone was competent to file the

appeal and not the Municipal Corporation. It was contended that as the application seeking leave was not filed by the complainant but by the

Municipal Corporation, the appeal itself was not maintainable. The said contention was negatived by this Court. This Court expressed its inability

to accept the contention that as S.S.Mathur, Municipal Prosecutor, was the complainant, the Delhi Municipal Corporation was not competent to

make an application for special leave. This Court noted that S.S.Mathur, Municipal Prosecutor, filed the complaint under the authority given to him

under the resolution of the Municipal Corporation. This Court held that in filing the complaint, S.S. Mathur was not acting on his own personal

behalf but was acting as an agent of the Delhi Municipal Corporation and therefore, it must be deemed that the Delhi Municipal Corporation was

the complainant in the case; and that as S.S. Mathur was only acting in a representative capacity and as the Delhi Municipal Corporation was the

complainant, the application for special leave filed by the Municipal Corporation was properly instituted.

13. Resultantly, when in a complaint in regard to dishonour of a cheque issued in favour of a company or corporation, for the purpose of Section

142 NI Act, the company will be the complainant, and for purposes of Section 200 of the Code, its employee who represents the company or

corporation, will be the de facto complainant. In such a complaint, the de jure complainant, namely, the company or corporation will remain the

same but the de facto complainant (employee) representing such de jure complainant can change, from time to time. And if the de facto

complainant is a public servant, the benefit of exemption under Clause (a) of proviso to Section 200 of the Code will be available, even though the

complaint is made in the name of a company or corporation.

14. Thus, the answer to the question raised is:

Where an incorporeal body is the payee and the employee who represents such incorporeal body in the complaint is a public servant, he being the

de facto complainant, Clause (a) of the proviso to Section 200 of the Code will be attracted and consequently, the Magistrate need not examine

the complainant and the witnesses.

The appeal is accordingly allowed, the order of the High Court is set aside and summoning order of the Magistrate stands restored.

Crl. Appeal Nos. 7276-7294/2008 (@ SLP (Crl.) Nos. 7276-7294/2007)

Following the decision in the main matter, these appeals are allowed.

The impugned orders of the High Court are set aside. The summoning orders are restored.

*A reproduction from ILR (Kerala Series)