

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Cr1.M.C.No.2962/2009

% Reserved on: 22<sup>nd</sup> February, 2010  
Date of Decision: 25<sup>th</sup> February, 2010

# BASAB GHOSH ..... Petitioner  
! Through: Mr.D.P.Mukherjee &  
Mr.Nandin Sen, Advs.

versus

\$ M/s.OUTLOOK PUBLISHING  
(INDIA) PVT. LTD. .... Respondent  
^ Through: Mr.A.J.Bhambhani,  
Ms.Nisha Bhambhani,  
Ms.Lakshita & Ms.Ranjita,  
Advocates.

\* **CORAM:**  
**HON'BLE MR. JUSTICE V.K. JAIN**

1. Whether the Reporters of local papers  
may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be  
reported in the Digest? YES

: **V.K. JAIN, J.**

1. This is a petition under Section 482 of the Code of Criminal Procedure challenging the order dated 24.3.2009, whereby the petitioner was summoned for having committed offences punishable under Sections 408, 409, 418 & 422 of

IPC.

2. The petitioner was appointed as an Executive with the complainant/respondent, which is a Company engaged in the business of publication of various magazines such as Outlook, Outlook (Hindi), Outlook Traveler, Outlook Money, Outlook Business. The duties of the petitioner included distribution and sale of magazines published and/or distributed by the complainant to various distributors, retail venders, hawkers, small book shops, etc., and to collect money from them, principally in the States of West Bengal, Orissa, Bihar, Jharkhand and Assam. The petitioner was also responsible to maintain a true, correct and accurate account and record of the magazines returned unsold so that adjustment in respect of returned magazines could be made which calculating the money owed by the parties to whom the magazines were supplied to the complainant Company. The number of parties within the areas in which the petitioner used to operate is believed to be around 5,000, most of them being small operators, operating from kiosks, small shops, street corners, pavements, etc. It has been alleged in the complaint that on scrutiny of the amount owed to the

complainant Company, by the parties to whom magazines used to be supplied, it transpired that the petitioner had failed to collect a sum which he himself represented to be about Rs.41,62,492/-. He was asked by the complainant Company to collect outstanding amounting to Rs.30,71,475/- from 16 major distributors but out of that he collected a sum of Rs.2,34,382/- and, eventually, he submitted his resignation letter dated 6.8.2008. He was thereupon asked to render true, correct and complete account of the money owed to the complainant Company for the magazines. The petitioner was also asked to render a full account of the magazines returned unsold, in stipulated manner which involved cutting-out the mast-heads of the unsold magazines and returned them to the Head Office of the complainant Company in New Delhi.

3. It was informed that two of its relatively bigger distributors M/s.Vishal Book Centre and M/s.Prasad News Agency informed the complainant Company that unsold portion of the magazines was controlled by the petitioner and as per system, every month they used to prepare actual Must-Head Cuttings and hand over the same to the peon of

Calcutta Office along with a Must-Heads letter and the office copy of the letter was used to be acknowledged by the peon. It was further informed that thereafter the petitioner used to come to their office to finalise the claim and instruct them as regards the figures of returned magazines. If in a month, the actual Must-Head was 5,000 copies per month, he would instruct them to make claim of 3,000 copies. It was further informed to the complainant Company that the petitioner took undue advantage of the faith which the distributors had in him and the ignorance and callousness of his staff, and had shown sale graph of his territory higher than what it actually was. M/s.Prasad News Agency informed the complainant Company that a sum of Rs.4,18,352/- had been worked out for the returned magazines and the petitioner had been promising that the same would be adjusted. Thus, according to the complainant, the petitioner was also making M/s. Prasad News Agency to show lower returns than the copies actually received back, thereby claiming higher than the actual sale of the magazines.

4. The summoning order has been challenged primarily on the ground that the learned Metropolitan Magistrate did

not examine the complaint before summoning him and, therefore, the order of summoning is bad in law. It has also been claimed that no criminal offence is made out against the petitioner since the dispute between the parties was civil in nature.

5. Admittedly, before summoning the petitioner, the learned Metropolitan Magistrate did not personally examine the person who had filed this complaint on behalf of the respondent/complainant and he took into consideration the affidavit which was tendered by him in evidence for the purpose of forming an opinion as to whether there was sufficient ground for proceeding and taking cognizance of the offence alleged to have been committed by the petitioner.

6. Section 200 of the Code of Criminal Procedure, to the extent it is relevant, 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) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192:”

7. It is quite clear from a bare perusal of the above noted provision that before a Magistrate takes cognizance of the offence on a complaint under Section 190(1)(a) of the Code of Criminal Procedure, it is obligatory for him to examine, not only the complainant but also his other witnesses, if any, to whom he wants to produce in support of the complaint filed by him. The examination of the complainant and his witnesses can be dispensed with only in cases envisaged by clauses (a) and (b) above, i.e., if the complaint is made by a public servant acting or purporting to act in discharge of his official duties or the Magistrate to whom the complaint is made makes over the case to another Magistrate for inquiry and trial. The requirement of reducing the substance of the examination of the complainant and witnesses to writing and such substance being signed not only by the complainant/witnesses, as the case may be, but also by the

Magistrate, leaves no reasonable doubt that the examination envisaged in the Code is physical examination and not examination on affidavit. Therefore, a Magistrate before he takes cognizance of an offence under Section 190(1)(a) of Code of Criminal Procedure, needs to personally examine the complainant and witnesses and he cannot for this purpose act upon the affidavit of the complainant and/or witnesses, unless, the complaint is governed by a statute which empowers him to accept the affidavit of the complainant/witnesses, as the case may be, for this purpose, e.g., in a complaint under Negotiable Instruments Act, Section 145 of Negotiable Instruments Act which overrides the provisions contained in the Code of Criminal Procedure in this regard, specially provides that the evidence of the complainant may be given by him on affidavit and may subject to all just exceptions be read in evidence in enquiry, trial or other proceedings under the Code. Even in such complaint the Magistrate is entitled to summon and physically examine any person who gives evidence on affidavit. This power can be exercised by the Magistrate even while examining the complainant/witnesses under Section

200 of the Code of Criminal Procedure, in a complaint alleging commission of offence punishable under the provisions of Negotiable Instruments Act. Since the complaint filed in this case alleges commission of offence punishable under IPC, the provisions of Negotiable Instruments Act have no application and, therefore, it is difficult to deny that the procedure adopted by the learned Metropolitan Magistrate before taking cognizance of the offence was not correct since he could not have acted merely upon the affidavit tendered by the complainant in evidence and was required to personally examine him and his witnesses, if any.

8. The next question which comes up for consideration is as to whether the order taking cognizance and summoning the petitioner is liable to be set aside merely on account of failure of the Magistrate to personally examine the complainant. The petitioner has not shown how he has been prejudiced on account of the Metropolitan Magistrate acting upon the affidavit tendered by the complainant in evidence instead of examining him personally and reducing the substance of his examination into writing. The accused in a

criminal case is concerned primarily with the evidence which has been produced by the complainant against him and not with the procedure adopted by the trial court for taking that evidence on record. It is one thing to say that the Metropolitan Magistrate should have adopted a particular procedure but quite another thing to say that the order passed by him should be set aside merely because the procedure adopted by him was not in consonance with the procedure prescribed in the Code of Criminal Procedure.

9. Section 460 of the Code of Criminal Procedure, which deals with irregularities which do not vitiate proceedings, to the extent it is relevant, provides as under:

“460. Irregularities which do not vitiate proceedings.- If any Magistrate not empowered by law to do any of the following things, namely:-

(a).....

(e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of Section 190”

10. On the other hand, Section 461 of the Code which deals with irregularities which vitiate the proceedings, to the extent it is relevant, provides as under:

“461. Irregularities which vitiate proceedings:- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(k) takes cognizance of an offence under Clause (c) of sub-section (1) of Section 190”

11. It is, thus, obvious that the legislature, in its wisdom, has not considered even cognizance taken by a Magistrate upon a complaint, despite his not being empowered by law to do so, to be such an irregularity as would vitiate the proceedings. It has rather expressly provided that such an exercise of power will not vitiate the proceedings.

12. Section 465 of the Code of Criminal Procedure provides that the order passed by a court of competent jurisdiction shall not be reversed or altered by a court of appeal, confirmation or revision on account of an error, omission or irregularity in the proceedings before or during trial or in any enquiry or other proceedings under the Code unless in the opinion of that court a failure of justice has taken place on account of such error, omission or irregularity. The legislative mandate, therefore is quite clear; unless the irregularity is of the nature referred in Section 461 of the Code of Criminal Procedure or unless it has resulted in failure of justice, the

superior court would not be justified in reversing an order merely on account of an irregularity in the proceedings conducted or the order passed by the Magistrate.

13. In “**Dipak Ghosh Dastidar Vs. Sanat Kumar Mukherjee & State**”, 2003(1) Crimes 297 Calcutta High Court was dealing with a case where complainant was not examined before issue of process, it in that case issued a warrant of arrest. It was held that it was at best a mere irregularity curable under Section 165 of the Code since no prejudice to the accused had been caused on account of non-examination of the complainant.

14. In “**R.Basu & etc. Vs. National Capital Territory of Delhi & Another etc.**”, 2007 Cri.L.J. 4254, it was observed by this Court that even where the complainant is not examined and cognizance is taken on the basis of allegations which make out the offence, non-examination of the complainant would not vitiate the order of cognizance.

15. In “**Ranbir Singh Kharab Vs. Smt.Santosh**”, 2007 (1) JCC (NI) 65, it was noticed that the Magistrate had acted only upon the affidavit and had not personally recorded the pre-examining evidence. It was held that since the complainant

was present in the Court and evidence on affidavit was filed, it could not be said that pre-summoning evidence was not recorded. The case before this Court was a complaint under Section 138 of the Negotiable Instruments Act.

16. In “**Satish Dayal Mathur Vs. M/s.Mackinnon Mackenzie & Company and Another**”, ILR (1986) II Delhi 92, it was held that though the provisions of Section 200 of the Code of Criminal Procedure requiring the Magistrate to examine the complaint and witnesses and reducing the substance of such examination into writing are mandatory and should be strictly complied with, non-compliance thereof by itself would not vitiate the subsequent proceedings and such an error would be only a procedural lapse.

17. In “**Dilip Kumar Kundu & Others Vs. Madan Chandra Dey & Another**”, 1992 (1) Crimes 171, a Division Bench of Calcutta High Court in a complaint pertaining to an offence under various provisions of Indian Penal Code, held that examination of the complainant on solemn affirmation is not a condition precedent for taking cognizance and that issuance of summons by a Magistrate without examining the complainant on solemn affirmation is merely an irregularity.

18. In “**Dharmendra Singh & Another Vs. State of Orissa & Another**”, 2001 Cri.L.J.439, Orissa High Court, inter alia, held as under:

“In the instant case, on receiving the complaint the learned Magistrate without recording the statement of the complainant as required under Section 200, Cr. P.C. posted the case for inquiry under Section 202, Cr.P.C. Therefore, a question arises whether the omission to examine the complainant on oath is an illegality or a mere irregularity. Such a question came up for consideration before this court in Mahabir Prasad Agarwala v. State, reported in (1957) 23 Cut LT 395 : (1958 Cri LJ 63), and this court held that omission to examine the complainant on solemn affirmation on a protest petition may prejudice the complainant but it cannot prejudice the accused. It is merely on irregularity. Here in the instant case the complainant and her witnesses have been examined on solemn affirmation in course of inquiry under Section 202, Cr.P.C. and their statements are available to the petitioners for the purpose of cross-examining the witnesses. The petitioners, thereafter, cannot urge that the omission has in any way prejudiced them. So non-examination of the complainant on oath as required under Section 200, Cr. P.C. being an irregularity cannot vitiate the proceeding.

19. In “**Jasman Rai Vs. Smt.Sonamaya Rai & Another**”, 1980 Cril.L.J.500 (1), Sikkim High Court, inter

alia, held as under:

“The failure to examine a complainant before issuing a process is not obviously an irregularity mentioned in Section 530 of the Code. Nor can the said provision providing for such examination before issuance of process be regarded to be one regulating the jurisdiction and competency of the Court to entertain a proceeding. Such a failure, therefore, is a breach which can be regarded to have affected the validity of the subsequent proceedings only if the accused can be said to have been prejudiced thereby and/or there has been a failure of justice as a result thereof. If no prejudice or no failure of issuance, such breach by itself is not of any material effect and is cured by the comprehensive curative antidote provided in Section 537.....”

20. The learned counsel for the petitioner has referred to the decisions in “**National Small Industries Corporation Limited Vs. State (NCT of Delhi) & Others**”, (2009) 1 SCC 407; “**S.W.Palanitkar & Others Vs. State of Bihar & Anothers**”, (2002) 1 SCC 241; “**Pepsi Foods Limited & Another Vs. Special Judicial Magistrate & Others**”, (1998) 5 SCC 749; “**M/s.Morgan Tectronics (P) Limited & Others Vs. State & Another**”, 2007 (1) JCC (NI) 69; “**Dr.Ritu Rawat & Another Vs. Tej Singh & Others**”, 154 (2008) DHC 605; and “**A.R.Antulay Vs. Randas Srinivas Nayak &**

***Another***", (1984) 2 SCC 500.

21. In the case of National Small Industries Corporation (supra), the issue before the Hon'ble Supreme Court was whether when an offence is committed in regard to a transaction of a Government company, could it be said that benefit of exemption under Clause (a) of the proviso to Section 200 of the Code will be available to an employee acting for and on behalf of the company or not. While holding that such exemption will be available to an employee of a Government company, the Hon'ble Supreme Court, inter alia, observed:

"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."

"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."

22. During the course of judgment, the Hon'ble Supreme Court referred to its earlier decision in the case of "**Associated Cement Co. Ltd. Vs. Keshvanand**", (1969) 3 SCC 389, where it had, inter alia, observed as under:

"22. Chapter XV of the new Code contains provisions for lodging complaints with 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'. Under Section 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."

23. This judgment though upholding the mandatory requirement of Section 200 of the Code to examine the complainant on oath and to reduce the substance into writing does not deal with the issue before this Court and nowhere has the Hon'ble Supreme Court said that if the Magistrate acts upon the affidavit instead of personally examining the complainant that by itself would vitiate the order of summoning passed by him.

24. In the case of S.W.Palanitka (supra), the Hon'ble Supreme Court, inter alia, observed as under:

“In case of a complaint under Section 200 Cr.P.C. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding.”

The above referred observation only indicates what has been prescribed in Section 200 of the Code of Criminal Procedure and does not anywhere say that failure to examine the complainant in Court, while acting upon the affidavit

tendered by him in evidence would be an irregularity vitiating the cognizance taken by him.

25. In the case of Pepsi Foods (supra), the Hon'ble Supreme Court, inter alia, observed as under:

“Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

26. This judgment only emphasizes the need for the Magistrate to be an active participant and not merely a silent

spectator at the time of examination of the complainant and his witnesses and to apply his mind to the facts of the case instead of passing mechanical orders. It does not deal with the issues before this Court.

27. In M/s. Morgan Tectronics (supra), this Court held that since NSIC is a company, and therefore, not a public servant, the mandate of Section 200 of the Code of Criminal Procedure requiring compulsory examination of the complainant and witnesses was required to be followed by the learned Metropolitan Magistrate. The issue before this Court being altogether different, this judgment is of no help to the petitioner.

28. In the case of Dr.Ritu Rawat (supra), this Court, inter alia, observed as under:

“A Magistrate taking cognizance of an offense on a complaint filed before him Under Section 200 of the Cr.P.C. is obliged to examine the complainant on oath and the witnesses present at the time of filing the complaint. In the present case the Magistrate has not examined the complainant on oath and therefore it cannot be said that the Magistrate has taken cognizance under Section 200 of Cr.P.C.”

In the present case the issue before the Court is not as

to whether cognizance has been taken on a complaint or on a police report and, therefore, this judgment is of no help to the petitioner.

29. In the case of A.R.Antulay (supra), the Hon'ble Supreme Court, inter alia, observed:

“When a private complaint is filed, the court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 Cr.P.C.”

There is no quarrel with the aforesaid proposition based upon the provisions contained in Section 200 of the Code of Criminal Procedure. But, nowhere has the Hon'ble Supreme Court said in this case that for the purpose of proceeding on the basis of a private complaint, the Magistrate cannot act upon the affidavit of the complainant and/or witnesses.

30. For the reasons given in the preceding paragraphs, I am of the considered view that the order summoning the petitioner need not be quashed merely because the Metropolitan Magistrate instead of personally examining the concerned officer of the complainant and reducing the substance of his examination into writing chose to act upon the affidavit tendered by him in evidence.

31. The petitioner has been summoned under various provisions of IPC, including Sections 408 & 409 thereof. Admittedly, the petitioner was employed with the complainant at the relevant time. The case of the complainant, as disclosed in the complaint and affidavit filed in its support, is that the Mast-Heads of unsold magazines used to be returned to the petitioner who was in charge of its Calcutta Office, by the vendors to whom the magazines used to be supplied by the complainant Company. This is also the case of the complainant/respondent that the petitioner who was entrusted with this property of the Company or who being in charge of its Calcutta Office had domain over it, did not return these Mast-Heads to the complainant Company and thereby committed criminal breach of trust punishable under Section 408 of IPC. The Mast Heads of unsold magazines were definitely property of the complainant Company and were in fact very important for it since it was only on the basis of mast head of the unsold magazines that the complainant Company could have given adjustment to the vendors for the magazines which remained unsold with them. Therefore, offence under Section 408 of IPC is prima facie

made out against the petitioner from the averments made in the complaint and the primary evidence produced by the complainant. Hence, it cannot be said that the allegations made in the complaint, even if taken as true and on their face value, do not disclose commission of an offence by the petitioner. However, I am not going into the question as to whether other offences for which the petitioner has been summoned to face trial are made out against him or not. It will be open to the petitioner to contend either before the trial court at an appropriate stage or before a superior court, in appropriate proceedings that the other offences attributed to him are not made out from the allegations made against him in the complaint.

32. The petition is, hereby, dismissed. The observations made in this order will, however, not affect the decision of the case on merit, at any stage of the proceedings. The record of the trial court be sent back within seven days along with a copy of the judgment.

**(V.K.JAIN)**  
**JUDGE**

**FEBRUARY 25, 2010**  
**RS/**