

Ex-parte proceeding against company in criminal trial: by Rakesh Kumar Singh

First of all, we need to understand that company is a separate legal entity and therefore whenever it commits any offence, it can be arrayed as an accused like any other person. There is no necessity to name or add any officer of the company in a complaint. In a case where there are two accused, both the accused will have their individual rights, claims & obligation. Position will not change if one of those accused is a company.

2. We know that unless the law specifically provides, an accused cannot be represented through any other person. Section-206 of CrPC and 208 of MV Act are general examples of such facility. The third provision in this regard is Section-305 CrPC which provides for representation of accused through other. It provides for the following:

“305. Procedure when corporation or registered society is an accused.-

(1) In this section, “corporation” means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub- section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs

of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court”.

3. Company may appoint one person to represent it in the case. The expression “**may appoint**” clearly shows a discretion with the company either to appoint or not to appoint any person to represent it. Since, the choice lies with the company in terms of statute, neither the court nor the complainant will have any right to compel anyone to represent the company.

4. Once a representative appears in the court, all the legal requirements which are required to be followed for any accused will have to be followed with reference to such representative.

5. What are the requirements:

Anything shall be done in the presence of accused:- We know that firstly, charge/notice needs to be given in the presence of accused. Secondly, evidence has to be recorded in the presence of accused.

Shall be read, stated or explained to the accused:- We know that charge needs to be read over & explained to the accused and particulars of offence need to be stated to the accused.

Accused shall be examined:- Under Section-239 & 313 CrPC, accused normally can be examined.

6. So all the aforesaid will be done with reference to the representative of the company once he appears. Interestingly, there is nothing in the aforesaid to invoke the bail jurisdiction or warrant jurisdiction and therefore, there is no necessity of bail for such representative and further that a court cannot issue warrants against the representative even if on any occasion he fails to appear.

7. We know that if any accused fails to appear in the court on summons having been served, court can issue a warrant against him. The tricky question is what will happen if the company is served but no one appears in the court. The answer lies in Section-305(4) which reads as “**Where a representative of a corporation does not appear, any such requirement as is referred to in sub-**

section (3) shall not apply". It clearly provides the answer. The aforesaid three requirements will not apply to a situation where no representative appears in the court. Meaning thereby that charge need not be framed, evidence need not be taken in the presence of an accused, SA of accused need not be recorded.

8. Mostly, cheque bounce cases (punishable under Section-138 NI Act) are covered under Section-305 CrPC for a simple reason that a cheque can be issued by a company and as such, it is liable for criminal prosecution. If we see the procedure for NI Act offence, we will find the following:

1. Filing of written complaint;
2. Cognizance & affidavit evidence;
3. Summons to accused;
4. Appearance of accused;
5. Notice u/s-251 CrPC;
6. Cross examination of complainant/witnesses;
7. Statement of Accused;
8. Defence evidence;
9. Final arguments;
10. Judgment/Sentencing.

9. Till the point number-3, there is no role of the accused. Due to non appearance of any representative, the point number-4 loses its significance. We have seen that in cases of non-appearance, the requirement of stating particulars of offence does not apply, so point-5 also goes. Now comes the evidence stage. We have also seen that in such cases, the concept that evidence should be taken in the presence of accused does not apply. So the court can take the evidence of the complainant which in NI Act cases will be the affidavit already filed. We have also seen that SA need not be recorded if representative has not appeared. So point-7 also goes. Since leading defence evidence is the propagative of an accused, we cannot compel anyone to lead evidence in defence. This step also goes. Concept of arguments (in magisterial trial) has been provided basically in Section-314 CrPC but it uses an expression "may" and therefore there is no compulsion at all. Judgment is the duty of court by virtue of Section-353 CrPC and none of the parties to the proceeding has any control over it. We know that a company for any offence can only be sentenced to fine. So there is hardly any prohibition in pronouncing the judgment in the absence of the accused company. Realization of fine is entirely a different thing and need not to be confused with the actual trial.

10. One may ask what to do if there are three accused, one is company and the other two are its directors but no one appears on behalf of the company and the directors are absconding. Answer is simple. Law nowhere says that a joint trial is mandatory. Once a company is served with the summons and it does not appoint a representative, Courts can invoke Section-305 (4) CrPC and proceed to decide the case against the company irrespective of appearance or non-appearance of other accused persons. Trial of remaining accused persons absconding can be separated. Joint and separate trial can however be made the subject matter of another paper as the same requires a detailed discussion.

11. However, if there are three accused, one is a company and other two its director, and directors are appearing in the case but are not representing the company, it would not be a prudent exercise to convict the company straight away. It would be better if the court notes the situation about non-appearance on the part of the company and that the court will follow Section-305(4) CrPC as consequence of non-appearance and then allow the trial to proceed wherein evidence of prosecution and the remaining accused may be taken. Thereafter the court should pronounce its judgment. The reason is obvious. A finding of guilt against the company would be a sine qua non for convicting the directors on vicarious count. During the trial, the directors may show that case of the complainant could not sustain due to want of existing liability or for any other justified reason and as such, the company was not liable at all and consequently, there was no question of invoking vicarious liability principle.

12. No doubt, the aforesaid procedure, with such variation as may be required, shall also be applicable for any offence which is committed by a company violating any law for the time being in force.

Some useful judgments:

Puneet Gupta vs State dated 15.07.2013 Delhi

Rajesh Agarwal vs State dated 02.07.2010 Delhi

Dow Agro vs CBI dated 19.08.2013 PHC

S.A.Khan vs Union of India dated 29.09.2011 MHC