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THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. Appeal No.949/2011

Reserved on: 30.11.2011

Pronounced on: 09.12.2011

Khatema Fibres Ltd.

..... Appellant

Through: Mr. Manish Garg, Advocate

Versus

M/s NK Paper Tube Industries & Anr.

..... Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. This is an appeal under Section 378(4) of the Cr.PC against the order dated 15.2.2011 passed by learned MM, New Delhi in CC No.139/1.
2. The appellant herein filed a complaint on 19.5.1997 in the Court of learned MM under Section 138 of the Negotiable Instruments Act ("the Act" for short) against respondent no.1 M/s NK Paper Tube Industries and its partner Mr. Krishan Kumar Lohia for dishonor of the cheque dated 29.8.1997 which was signed by the partner Mr. K.K. Lohia for an amount of Rs.4,08,971/- in favour of the appellant. The cheque got dishonoured on account of instructions of 'stop payment'. In the said complaint, the evidence of the complainant post notice was recorded and the statement of respondent Mr. K.K. Lohia was also recorded. It was brought to the notice of the court that since the partnership consisted of only two partners i.e. Mr. K.K. Lohia and his father Mr. N.K. Lohia, and the later having passed away

on 28.2.2001, the partnership stood dissolved. Subsequently, during the pendency of the complaint Mr. K.K.Lohia also died on 19.5.2003

3. The partnership deed which was executed between Mr.K.K. Lohia and his father Mr. N.K. Lohia on 19.12.1994 had clause (13) which reads as under:-

“On the death or retirement of any partner or for any other reasons, the firm shall be dissolved but shall be carried on by the remaining partners with or without the heirs or successors of the “deceased partner.”

4. The factum of death of Mr. N.K. Lohia on 28.2.2001 and that of Mr. K.K. Lohia on 19.5.2003 is not in dispute. It is also not in dispute that the complaint was filed against the firm and Mr. K.K. Lohia who was the signatory of the said cheque. After death of Mr. N.K. Lohia , the business was carried by Mr. K.K. Lohia under the name and style of same firm i.e. N.K. Paper Tube Industries. After his death on 19.5.2003, a new partnership firm under the same name was constituted with respondent no.2 Mr. Saurabh Lohia and his mother Smt. Manju Devi Lohia by virtue of partnership deed dated 29.5.2003.

5. Vide the impugned order dated 15.2.2011, the learned MM ordered abatement of the proceedings against the firm and also against Mr. Saurabh Lohia. In arriving at this conclusion, the learned MM observed as under:-

“It is thus clear that if a partnership consists of two partners and when one of them dies, the firm is dissolved. If one of the two partners of a firm dies, the firm on the death of one of the partners will come an end. Therefore, in view of the judgment of CIT vs. Seth Govindram Sugar Mills (Supra), M/s N.K Paper Tubes Ltd. i.e accused no.1

stood dissolved on death of one of the two partners namely Shri N.K. Lohia on 28.2.2001. As mentioned aforesaid, accused no.2 i.e. Kishan Kumar Lohia had also expired on 19.5.2003.

Therefore, criminal proceedings against accused no.1 and accused no.2 cannot be continued in view of dissolution/ death. Since the accused no.1 firm got dissolved on 28.2.2001, therefore, Shri Saurabh Kumar Lohia cannot be said to be representing accused no.1 when it is no more in existence and by any subsequent constitution of a new partnership firm under the same name i.e. of accused no.1, it cannot be said that he has stepped into the shoe of AR of accused no.1.”

6. The impugned order has been assailed mainly on the grounds that as per clause 13 the partnership deed, being a legal entity in the eyes of law continue to exist and the proceedings could not abate against it. It has been submitted that the said firm was carrying on the same business at the same premises and so it cannot be said that the partnership firm was distinct and separate from the erstwhile partnership firm and had no role or connection with the earlier firm. It is submitted that the firm M/s NK Paper and Tube Industry took over all the assets and liabilities of the erstwhile firm in letter and spirit of Clause 13 of the earlier partnership deed of 19.12.1994. In view of all this it was submitted that the firm as well as respondent no.2 Mr. Saurabh Lohia were liable to be prosecuted under Section 138 of the Act. The learned counsel referred to the proceedings before the court of M.M. of 19.9.2005 and 14.10.2005 to contend that respondent No 2 Saurabh Lohia had appeared in person and represented the firm being its partner.

7. Before proceeding to discuss the merits of submissions, it may be noted that when after the death of respondent Mr. K.K. Lohia no one

appeared in the court, the learned MM issued NBWs in the name of the partners of firm. It was thereafter that an application was moved by Mr. Saurabh Lohia for cancellation of NBWs on 19.9.2005 since by that time a new firm comprising of himself and his mother doing the business under the same name and style of M/s NK Paper Tube Industries had come into existence. On 19th September, 2005, the warrant issued against the partner of the firm were stayed till the next date of hearing and the counsel representing the firm as also Saurabh Lohia were directed to inform the court as to who will represent the partnership firm before the court. The matter was adjourned to 14.10.2005, and on that date, Saurabh Lohia appeared in person. Though it was recorded by the learned M.M. that he represented the firm being henceforth its partner, but it is seen to have been recorded as by that time a partnership firm of the same name and style had come into existence.

8. Mr. Saurabh Lohia had made an application for dropping of the proceedings against him on the averment that a new firm has come into existence comprising of himself and his mother and that it had no role or connection with the earlier firm. He had also prayed that though he was son of late Mr. K.K. Lohia, but had no connection with erstwhile partnership firm and the cheque in question was not issued by him, nor he had any connection with the same.

9. Section 42 of the Indian Partnership Act provides for dissolution of partnership on the happening of certain contingencies. The relevant part of this Section reads thus:

*“42. Dissolution on happening of certain contingencies.—
Subject to contract between the partners a firm is dissolved,—
(c) by the death of a partner; and...”*

10. Plain reading of the aforesaid would show that subject to the contract between the partners, a firm stands dissolved by death of a partner. It is trite that this Section does not apply between the two partners. Since there cannot be a contract between the partners that on the death of one of them, the partnership will not be dissolved. In the case **CIT Vs. Seth Govindram Sugar Mills**, AIR 1966 SC Page 24, the firm consisted of two partners who represented their joint families. In the partnership deed, there was a provision for a heir or nominee taking the place of the deceased partner. One partner out of the two died leaving his widow and minor sons. The question that arose as to whether the firm which consists of two partners was dissolved after the death of one of the partners. The Supreme Court held as under:

“Partnership, under s. 4 of the Partnership Act, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 5 of the said Act says that the relation of partnership arises from contract and not from status. The fundamental principle of partnership, therefore, is that the relation of partnership arises out of contract and not out of status. To accept the argument of the learned counsel is to, negative the basic principle of law of partnership. Section 42 can be interpreted without doing violence either to the language used or to the said basic principle. Section 42(c) of the Partnership Act can appropriately be applied to a' partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. On the other hand, if one of the two partners of a firm dies, the firm automatically comes to an end and, thereafter, there is no partnership for a third party to be introduced therein and, therefore, there is no scope for applying cl. (c) of s. 42 to such a situation. It may be that pursuant to the wishes of the directions of the deceased partner the surviving partner may enter into a new partnership with the heir of the deceased partner, but that would constitute a new partnership. In this light s. 31 of the Partnership Act falls in line with s. 42 thereof. That section only recognizes the validity of a contract between the partners to introduce a third party without the consent of all the existing partners: it presupposes the subsistence of a partnership; it does not apply to a partnership of two partners which is dissolved by the death of one of them, for in that

event there is no partnership at all for any new partner to be inducted into it without the consent of others”.

11. Clause (13) of the partnership deed dated 19th December, 1994 stipulated that on the death or retirement of any partner or for any other reasons, the firm shall be dissolved, but shall be carried on by the remaining partners with or without the heirs or successors of the deceased partners. Thus, it could not be said that despite the death of one of the partners N.K.Lohia on 28th February, 2001, the partnership continued with Mr.K.K.Lohia as the only surviving person. What Clause (13) of the partnership deed provided was that though the firm stood dissolved, but the business could be carried on by remaining partner with or without the heirs or the successor of deceased partner. That would not mean that the partnership continued to exist after the death of one of the two partners. The saving clause of Section 42 was not applicable in the case of partnership firm consisting of only two partners when one of them has died.

12. After the death of N.K.Lohia, the business was continued by Mr.K.K.Lohia. The said business was continued by him not in his capacity of partner in the said firm, but as a proprietor thereof. With the death of K.K.Lohia also on 19.5.2003, even the proprietorship came to end. The constitution of a new firm by Saurabh Lohia along with his mother by virtue of partnership deed dated 29.5.2003 could not be said to be the reconstitution of erstwhile firm. It also could not be said that Mr. Saurabh Lohia had stepped into the shoes of his father. What had come into existence was a new firm which was an entirely independent legal entity and had no criminal liability of any kind of the acts done by partners of the erstwhile firm. The plea regarding this firm having inherited assets and liabilities of the erstwhile firm was foreign to the criminal liability of the

respondents. That would be the civil remedy that may be available with the petitioner if it was so proved that the new firm had taken over the assets and liabilities of the erstwhile partnership firm. Since the respondent Saurabh Lohia and his mother Madhu Jain are the partners of the newly constituted firm and had no concern whatsoever with the cheque issued by one of the partners of the erstwhile firm, they could not be held liable for the criminal liability of dishonoured cheque under Section 138 of the Act. I do not find any merit in the appeal. In view of the foregoing reasons, same is accordingly dismissed.

M.L. MEHTA, J.

December 09 , 2011

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