**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO. 657 OF 2022
NANDKUMAR BHANUDAS KULKARNI
VS
VISHWAS BHARGAV JOSHI (DIED)
THROUGH LEGAL HEIR
SANTOSH VISHWAS JOSHI**

Mr. S. B. Rajebhosale, Advocate for the petitioner
Mr. Sunita G. Sonwane, Advocate for the respondent

CORAM : KISHORE C. SANT, J.
RESERVED ON : 07th DECEMBER, 2022
PRONOUNCED ON : 09th FEBRUARY, 2023

P. C.

1. The petitioner-original accused being aggrieved by an order of rejection of his application for dropping the proceeding under Section 256 of the Code of Criminal Procedure has filed this petition. The petitioner is the original accused in the proceeding lodged for the offence under Section 138 of the Negotiable Instruments Act by father of the present respondent. Father of the respondent expired during pendency of the trial at a stage where affidavit of evidence was filed and matter was pending for his cross examination. Since on many occasions adjournments were taken by the petitioner an order of no-cross also was passed. This fact hss bearing on the case.

2. Facts giving rise to the complaint are that the petitioner-accused had issued cheque for an amount of Rs.25,00,000/- to the complainant. It is averred that the complainant is a partner in M/s. Vishwanath Electric Company, Nageshwarwadi, Aurangabad. He had friendly relations with the accused. Accused had received work order for doing the underground cabling work in Aurangabad city from the Municipal Corporation, Aurangabad. Since the accused was busy with the other activity, he entered into an agreement on 01-07-2013 with the complainant. The complainant was engaged as sub-contractor to carryout the work. To complete the work, the complainant obtained loan from the bank by mortgaging his own property and purchased material on credit. After completion of the work, the accused was to pay the complainant amount of contract. Accused however, did not pay and thus the complainant was required to face the financial difficulties. He could not repay the loan and therefore, bank attached his house property and took symbolic possession. The accused after much persuasion issued four cheques but all came to be dishonored. Again on 25-08-2015 an agreement came to be executed between the complainant and the accused. The accused accepted the liability of an amount of Rs.1,10,00,000/-. The accused issued cheque No. 727371 drawn on IDBI Bank for an amount of Rs. 25,00,000/-. Same was deposited on 02-03-2016. Said cheque however was returned for the reason ‘funds insufficient’. The complainant issued notice of demand. In spite

of notice the accused did not repay an amount and therefore complaint came to be lodged in the court of JMFC, Aurangabad. The accused appeared in the matter. The complainant filed its evidence affidavit in 2016. However, he was not cross examined for long time and therefore, no cross order came to be passed. After No-cross order was set aside the cross-examination started and some part was over on 28-04-2017. As a matter of fact the cross could not be completed of the original complainant.

3. During the trial unfortunately original-complainant i.e. father of present respondent died on 22-01-2020. The respondent therefore, filed an application below Exh.65 seeking permission to prosecute the complaint being legal heir of the complainant by filing death certificate of the deceased. He also filed a certificate of registration of the partnership firm and partnership deed showing that he and his father were partners in the firm.

4. The petitioner also filed an application on 06-02-2021 below Exh. 63 and prayed for dismissal of the complaint under Section 256 of the Code of Criminal Procedure for acquittal. Respondent also filed an application Exh. 65 22-06-2021 as stated. The application of the respondent was objected by filing say. It is submitted that in the complaint there is no reference of the partnership firm as well as in the examination-in-chief. The cheque in question was not issued in personal

capacity and the same was in the name of M/s. Vishwanath Electrical and now the partnership is dissolved. There is no question of legal heir of a partnership firm prosecuting a complainant. As legal heir of deceased partner cannot be brought on record. It is further submitted that the application is filed at belated stage and on that count also the same deserves to be rejected.

5. The learned trial judge on hearing the parties rejected the application Exh.63 and allowed the application Exh.65 filed by the respondent to bring himself as a legal representative of the deceased on record. The learned JMFC, Aurangabad held that the name of the respondent is shown as the Proprietor of Vishwanath Electric Company which sufficiently establishes that he has connection with the deceased. The petitioner, therefore, filed a Criminal Revision Application No. 13 of 2022 before the Sessions Court, Aurangabad. The learned Sessions Judge observed that the petitioner prolonged the matter by remaining absent or by filing the application for adjournment. The court was even required to issue non-bailable warrant against the petitioner. It is held that the respondent has succeeded in establishing that he can prosecute and that he has a right to continue the proceeding as a legal heir of the deceased. It is held that Section 42 of the Indian Partnership Act is not hurdle in continuing the proceeding as the death of the partner has occurred during the proceeding of the complaint

and not prior to lodging of the complaint. After death of the original complainant the business is continued by the respondent. The right to cross-examination of the petitioner is in existence and rejected the criminal revision application by order dated 17-03-2022.

6. Now the questions are that whether the respondent can continue the proceeding under Section 138 after death of his father who was partner of Vishwanath Electric Company; in view of Section 42 after the partnership is dissolved and in view of death of one of the two partners whether the partnership business would continue; if the partnership is dissolved then whether surviving partner can continue the proceeding.

7. The learned advocate for the petitioner has relied upon the judgment reported in *(2010) 2 SCC 407 in the case of Mohammad Liaquiddin and another Vs Kamala Devi Misra and others.* This judgment deals with Section 42 (c) and Section 4 of the Partnership Act and effect on account of death of one of the partners in a firm having two partners. It is held that the legal representative of the deceased partners were not interested to continuing with the firm and to constitute the fresh firm and therefore, held that the heirs cannot be asked to continue the partnership, as there is no legal obligation upon them to do so as partnership is not a matter of heritable status but purely one of contract. The Hon'ble Apex Court held that appellants in that

case would be entitled to exclusive possession of the land and respondents are entitled to take away the movable from the property and recover the value of the building and structures embedded to the land. Thus, the petition was dismissed. It was the case where the suit was filed by the plaintiff who died during the pendency of the suit and legal representatives were brought on record.

8. Another judgment is reported in *1980 SCC Online Kar 83 in the case of Subbanna Hedge and others Vs Dyavappa Gowda*. It is pointed out that if the summons are issued in the event of death of the complainant, only alternative left to the Magistrate is to acquit the accused. It was a case where the proceeding was lodged for the offences punishable under Sections 143, 147, 149, 324, 326, 342 read with Section 506 of the IPC. During the course of the argument, the learned advocate for the petitioner further relied upon the judgment reported in *2016 ALL MR (Cri) 3194 in the case of Sai Accumulator Industries Vs M/s. Sethi Brothers*. This is in respect of the right of the unregistered partnership firm in view of section 69 of the Indian Partnership Act. The facts were that the partnership firm was unregistered when the complaint under Section 138 was filed. The firm was registered subsequent to filing of the complaint. This court has held that since the complaint under Section 138 in due course has to show that there was legally enforceable debt or other liabilities it is held

that in view of Section 69(2) of the Partnership Act the unregistered partnership could not have legally enforced the debt and therefore said firm cannot file a complaint under Section 138. It was a case that when the complaint was filed complainant had no locus to file a complaint as it had no right to enforce any liability being unregistered firm. In this case, it is not so.

9. The another judgment reported in *2009 ALL MR 2165 in the case of Shivakumar Vs Natarajan* in which it is held that the strict interpretation is required in the cases under Section 138-A. It is held that legal presumption in regard to crime has been raised when condition precedent specified in clauses (a)(6) & (c) are complied with. Next relied upon judgment is reported in *2010 (1) Lawdigital 1349 in the case of Vishnupant Chaburao Khaire Vs Kailash Balbhir Madan,* in this case it is held that only a person who is authorized by succession certificate, letters of administration or probate granted by the court, is entitled to call upon the drawer to pay the amount of dishonor of cheque by issuing notice and by filing the complaint. In this case, cheque was given to the father of the complainant. The cheque was issued on 28-08-2007. Father of the complainant died on 05-09-2007 in an accident. The cheque was presented on 05-02-2008 and after it's dishonour, the complainant had issued legal notice of demand. It is thus clear that on the date of presentation of cheque itself the father of the

complainant was dead and in that view the court has held that the complainant was not entitled to lodge the complaint and even to demand the amount without getting succession certificate. In this case several judgments are considered. The court in this case relying upon the case of *Roy Joseph Creado Vs Sk. Tamisuddin reported in 2008 (2) Mh.LJ (Cri) 118* has held that once complaint is filed and verification of complainant-payee or complainant-holder in due course is recorded, his subsequent death will not prevent his legal heir from continuing with the complaint. In the said case the complainant died without signing and verifying the complaint and respondent was permitted to continue the prosecution as a special power of attorney. However copy of the power of attorney did not show that respondent had undertaken the liability to indemnify the accused persons if the complaint was found to be frivolous or false. The facts of the case before the court are clearly distinguishable. In this case as already discussed the evidence of the original complainant was also filed it was because of the delaying tactics on the part of the petitioner himself the case could not be decided in time. Now the complainant cannot take benefit on his own wrong.

10. Another judgment reported in *2020 ALL SCR 170 in the case of S. P. Misra and others Vs Mohd. Liaquaddin Khan and another*. It was the case where the decree was passed against the judgment debtor. Suit was filed against the decree holder by his

partner on the basis of partnership deed. However, before the execution of the decree, the judgment debtor died. In that case it was held that after death of the judgment debtor partnership came to an end and thus, there was no partnership is in existence and as a result there was no question of legal heirs being liable to satisfy the decree. It was considered that in view of Section 42 (c) of the Indian Partnership Act it that there cannot be any contract by unilateral Act without acceptance and by agreement by the legal heirs of the partners.

11. In the judgment *reported in 1965 ALL MR Online 167 in the case of Commissioner of Income Tax M. P. Nagpur and Bhandara Vs Seth Govindram Sugar Mills,* it was held that even one of the partners died there will not be any partnership existing to which legal representatives of the deceased partner could be taken in and in such a case partnership would come to an end. Next judgment reported in *2011 (185) Delhi Law Times 0710 in the case of Khatema Fibres Ltd Vs M/s. N. K. Papers Tube Industries & Anr*. In that judgment the two partners of partnership firm died. New firm was constituted consisting of son of the deceased and his mother. In that view it was held that new firm is not liable under Section 138 of the Act.

12. Considering all the facts in this case which are discussed above, one striking feature in view of the facts which distinguishes the present case from the cases considered is that

in the case in hand there was already the proceeding initiated under Section 138 for dishonour of the cheque. The person who lodged the complaint had even filed his evidence affidavit. From the record it is seen that the accused did not cross examine the complainant for long time and therefore even no cross order was passed as the petitioner did not participate in the proceeding or was trying to delay the proceeding. The rights of the parties are to be considered as on date of filing of the proceeding in the court. If during the proceeding the complainant dies, certainly there is a right with the surviving partner or legal heir as the case may be is entitled to continue the proceeding. Here it is not the case of the petitioner that he was not liable to pay the amount. Case is that now the respondent who happens to be a surviving partner would not be entitled to continue the proceeding already initiated.

13. The learned advocate for the petitioner further argued that one of the grounds is also that in view of Section 9 of the N. I. Act the respondent cannot be said to be holder in due course. The respondent is not payee as per the definition given in Section 7 of the N. I. Act. All the questions now needs to be gone into in the trial. It is clear that here the complaint was lodged in the year 2016. The notice of demand was sent by the person who had received the cheque. Thus, the deceased died after four years of filing of the compliant. The courts below have rightly considered this aspect. Though the application for

legal heir for substitution of the complainant was filed after about one and half year after death still the court has rightly considered that it was the corona period and the lockdown has started from 22-03-2020 and therefore, the delay was rightly considered. Even the learned Sessions Court has rightly considered all the aspects and has come to a conclusion that the order passed by the trial court was correct. There is no dispute about the fact that, the respondent was a partner in the firm with the deceased and also happens to be a son of the deceased. Thus, he is entitled to receive property of partnership as surviving partner of the firm and also as a son. In this view of the matter, this court finds that no case is made out to call for interference at the hands of this court. Thus, the petition stands dismissed.

[KISHORE C. SANT, J.]

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