

HIGH COURT OF CHHATTISGARH AT BILASPUR**Acquittal Appeal No. 747 of 2019****Order reserved on 15/01/2021****Order delivered on 28/01/2021**

R.S. Mishra, S/o Late B.L. Mishra, Aged about 74 years, R/o M.I.G. 530, Padmanabhpur, P.S. Durg, Tahsil and Distt. Durg, Chhattisgarh.

---Appellant

Versus

Shiv Kumar Vaishnav, S/o Shri Ganesh Das Vaishnav, Aged about 55 years, R/o A/97, Kendriya Karmachari Nagar, In front of Shiv Mandir, Dhamdha Naka, Durg, P.S. Mohan Nagar, Tahsil and Distt. Durg, Chhattisgarh.

--- Respondent

For Appellant	:- Mr. Jitendra Gupta, Advocate
For Respondent	:- Mr. Shikhar Bakhtiyar, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The short question involved in the instant acquittal appeal is with regard to the right of the appellant/complainant in proceeding with the appeal challenging the order of acquittal of the respondent/accused under Section 138 of the Negotiable Instruments Act, 1881 after the

death of the accused during the pendency of the appeal.

2. The aforesaid question arises in the following factual backdrop :-

2.1. That, the appellant/complainant filed the complaint under Section 138 of the Negotiable Instruments Act, 1881 (in short, "the NI Act") against the respondent/accused for dishonor of cheque, but ultimately, learned Judicial Magistrate, by its judgment dated 08/01/2019 (Annexure A/1) dismissed his complaint finding no merit and acquitted the respondent/accused from the charges under Section 138 of the NI Act.

2.2. Feeling aggrieved and dissatisfied with the judgment of acquittal, the appellant/complainant had preferred the instant acquittal appeal before this Court on 30/09/2019, but during the pendency of the appeal, the respondent/accused died on 08/11/2020 and thereafter, on 02/01/2021, the appellant/complainant has moved an application for bringing the legal representatives of deceased respondent/accused on record which has seriously been opposed by the legal

representatives of the respondent/accused and they have suo moto appeared, without any order of substitution, by filing an application under Section 394 of CrPC on 04/01/2021 stating that the instant appeal has abated as a whole and the substitution application cannot be entertained.

3. Heard on I.A. No. 1/2021, application under Section 394 of CrPC for abatement of appeal filed by the legal representatives of the respondent/accused and I.A. No. 2/2021, application for bringing the legal representatives of deceased respondent/accused on record filed by the appellant/complainant.

4. Mr. Jitendra Gupta, learned counsel for the appellant/complainant, would submit that though the respondent/accused has died during the pendency of the instant acquittal appeal, yet the his legal representatives have to be substituted and the appeal has not abated, as such, I.A. No. 2/2021, application for substitution of legal representatives of the respondent/accused be allowed.

5. Per contra, Mr. Shikhar Bakhtiyar, learned counsel for the respondent/accused (now, his

LRs.), would submit that the instant appeal has abated by virtue of the provisions contained under Section 394(1) of CrPC, as such, I.A. No. 2/2021, application for substitution of legal representatives of respondent/accused deserves to be rejected by holding that the instant acquittal appeal has already abated.

6. I have heard learned counsel for the parties on application for substitution as well as application for abatement, considered their rival submissions made herein-above and went through the record with utmost circumspection.

7. It is not in dispute that the sole respondent/accused Shiv Kumar Vaishnav has died during the pendency of the instant appeal and the question for consideration would be, whether the appellant/complainant is entitled to pursue the appeal further by substituting the legal representatives of the deceased respondent/accused ?

8. In order to consider the plea raised at the Bar, it would be appropriate to notice the provisions contained under Section 394 of CrPC, which states as under :-

"394. Abatement of appeals. - (1) Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal, and if leave is granted, the appeal shall not abate.

Explanation. - In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister."

9. A careful perusal of the aforesaid provision would show that Section 394(1) of CrPC clearly provides that every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.

10. The Supreme Court in the matter of **Harnam Singh v. State of H.P.**¹ considered the issue with respect to the para materia provision contained under Section 431 of the CrPC (old) and held that the appeal would abate on the death of the accused.

¹ (1975) 3 SCC 343

11. The principle of law laid down in Harnam Singh (supra) was followed subsequently by the Supreme Court in the matter of State of A.P. v. S. Narasimha Kumar² and after an elaborate discussion of the provisions contained under Section 394 of the Criminal Procedure Code, 1973, and Sections 431, 411 and 417 of the Old Code, 1898, Their Lordships came to the conclusion that the appeal preferred against the acquittal of the accused would finally abate on the death of the accused. The aforesaid legal position has been adopted, relying on the principle that the dead persons are beyond the processes of human tribunal and as had been recognised in the limb of Section 431 of CrPC (old) that appeals against acquittal, finally abate on the death of the accused.

12. In the matter of D. Dayananda Babu v. M/s Vijaya Automobiles & Genl. Engg. Works³, similar question had come up for consideration before the Kerala High Court wherein it has clearly been held that in case if there is a conviction, the accused had to be convicted and

² (2006) 5 SCC 683

³ 2006 SCC Online Ker 487

sentenced under Section 138 of the NI Act and now since the accused had already died and he is not before the Court to face such a verdict, the appeal would abate on the death of the accused. Thus, the appellant has got no right to continue with the appeal, preferred, challenging the acquittal of the accused in a complaint under Section 138 of the NI Act when the respondent/accused died during the pendency of the appeal and held as under in paragraph 9 :-

"9. In the case at hand, the complainant is before this Court, by preferring the appeal challenging the acquittal of the accused by the trial Court. If the case is proceeded with as per law, and ultimately if there is a conviction, the accused had to be convicted and sentenced under Section 138 of the Act. In case of imprisonment, he has to suffer the same and if there is fine, he has to pay the fine. As the accused is not before the Court, to face such a verdict under Section 394 of Cr.P.C., the appeal would abate on the death of the accused. Thus, the appellant has got no right to continue with an appeal, preferred, challenging the acquittal of an accused in a complaint, under Section 138 of the Act, when the respondent-accused died during the pendency of the appeal even if the same is preferred after obtaining special leave, as the appeal would abate on the death of the respondent-accused."

13. Reverting to the facts of the present case in light of the aforesaid legal position, it is

quite vivid that in the instant case also during the pendency of the appeal preferred by the appellant/complainant against the order of acquittal, the respondent/accused has died and even if at the end of the hearing, the appeal is ultimately allowed and the accused herein is convicted for offence punishable under Section 138 of the NI Act, but he is not before the Court for undergoing the sentence, if any, that would be awarded to him and the death of the respondent/accused is beyond the process of human tribunal, therefore, the instant appeal preferred by the appellant/complainant against the order of acquittal of the respondent/accused would finally abate on the death of respondent/accused and the appellant/complainant has no right to pursue the appeal further in light of the provisions contained under Section 378(4) of CrPC. The position would have been otherwise if the appellant/complainant had died, as under Section 394(1) of CrPC, the appeal would only abate on the death of the accused. (See : **Khedu Mohton v. State of Bihar**⁴).

14.As a fallout and consequence of the aforesaid legal discussion, I.A. No. 2/2021, application for substitution of legal representatives of the deceased respondent/accused is rejected whereas I.A. No. 1/2021, application under Section 394 of CrPC for abatement of appeal is hereby allowed and the instant acquittal appeal stands dismissed as abated. However, this will not bar the appellant herein to invoke the other remedy available to him for recovery of the amount under dispute in accordance with law.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet