

(2021) 01 CHH CK 0007

Chhattisgarh High Court**Case No:** Acquittal Appeal No. 747 Of 2019

R.S. Mishra

APPELLANT

Vs

Shiv Kumar Vaishnav

RESPONDENT

Date of Decision: Jan. 28, 2021**Acts Referred:**

- Negotiable Instruments Act, 1881 - Section 138
- Code Of Criminal Procedure, 1973 - Section 394, 394(1)

Hon'ble Judges: Sanjay K. Agrawal, J**Bench:** Single Bench**Advocate:** Jitendra Gupta, Shikhar Bakhtiyar**Final Decision:** Allowed

Judgement

Sanjay K. Agrawal

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.Â FeelingÂ aggrievedÂ andÂ dissatisfiedÂ 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.

(f) 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.

(g) 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 ?

(h) 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.

(b) 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. (1975) 3 SCC 343 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.

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 Kumar (2006) 5 SCC 683 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. Works 2006 SCC Online Ker 487, 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 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 AIR 1971 SC 66).

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.