

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 12<sup>TH</sup> DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

**WRIT PETITION NO.13145 OF 2022 (GM-RES)**

BETWEEN:

G VARADARAJU,

...PETITIONER

(BY SRI. G VARADARAJU, PARTY IN PERSON)

AND:

1. UNION OF INDIA,  
REP BY SECRETARY MINISTRY OF LAW AND JUSTICE  
NEW DELHI-1.
2. UNON OF INDIA,  
REP BY SECRETARY,  
MINISTRY OF PARLIAMENTARY AFFAIRS,  
NEW DELHI-1.
3. PRINCIPAL SECRETARY,  
DEPARTMENT OF PARLIAMENTARY  
AFFAIRS & REGISTRATION  
VIDHANA SOUDHA,  
BENGALURU 560 001.

... RESPONDENTS

(BY SRI.KUMAR M N, CGC FOR R1 & R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE SECTION 394(1) READ WITH SECTION 378(4) OF THE C.R.P.C. IS UNCONSTITUTIONAL FOR WANT OF DIFFERENTIATING THE DEATH OF ACCUSED AS BEFORE DEATH AND AFTER DEATH TAKING INTO CONSIDERATION SECTIONS 138 AND 139 OF THE N.I. ACT, SINCE I AM A HONEST PRAYER TO THE ACCUSED IN THE LOWER TRIAL COURT AND SINCE I SHOULD NOT BE DEPRIVED OF THE BOUNCED CHEQUE WITH FINE etc. AS PER N.I. ACT. THIS IS TO BE DONE TO ACHIEVE THE OBJECT OF N.I. ACT. THE LEGAL HEIR OF THE DECEASED ACQUITTED ACCUSED IS GETTING AROUND RUPEES TWO LAKHS PER MONTH FROM THE PROPERTY OF THE DECEASED ACQUITTED ACCUSED.

THIS PETITION COMING ON FOR PRELIMINARY HEARING THIS DAY, THE COURT MADE THE FOLLOWING:-

### **ORDER**

Petitioner, a party-in-person is knocking at the doors of Writ Court for assailing the constitutional validity of section 378(4) r/w section 394(1) of the Code of Criminal Procedure, 1973. Going by the haphazard structure of the petition and equally haphazard submissions made by the petitioner, this Court gathers an impression that his essential grievance happens to be against the statutory abatement of criminal proceedings on the death of accused, in certain circumstances. He contends that this selective abatement is discriminatory

and therefore, violative of the Equality Clause enshrined in Article 14 of the Constitution of India.

2. After service of notice, the respondent Nos.1 & 2 i.e., Union of India has entered appearance through its Senior Panel Counsel. Similarly, the 3rd respondent-Principal Secretary of the State Government is represented by the learned AGA. Both the counsel appearing for the respondents resist the Writ Petition making submission in support of constitutionality of the impugned statutory provisions contending that the said provisions have been there since more than a century in one or the other form and *pari materia* provisions do obtain in all civilized jurisdictions. They also submit that there is a strong presumption of constitutionality of legislations, for rebutting which, no case is made out. They also find fault with the petition in which none from the side of deceased accused, is arrayed as a party. So contending, they seek dismissal of the Writ Petition.

### 3. BRIEF FACTS OF THE CASE:

(a) Petitioner was the complainant in a Cheque Bounce case in C.C.No.13156/2016 for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881. After the trial, the same came to be dismissed by the learned XIX ACMM Court at Bangalore vide acquittal order dated 2.8.2017. Petitioner had filed Criminal Appeal No.1453/2017 against the said order. A Co-ordinate Bench of this Court disposed off the said appeal as having abated, the respondent-accused having died *pendente lite*.

(b) Petitioner submits that the provisions of section 394 of Cr.P.C. which provide for abatement of criminal appeals on the death of accused, firstly, do not apply to the Cheque Bounce cases which are governed by the Negotiable Instruments Act, 1881 (for short 'NI Act' hereafterwards) which is as a complete Code in itself; secondly, if the said provisions are held to be applicable, the same are liable to be voided on the ground of being

discriminatory & arbitrary. Petitioner argues that to the extent the Parliament has not enacted an appropriate provision for continuing the criminal proceedings in general and criminal appeals in particular, despite the death of accused, who has left the persons representing his estate, Court should step in and provide a remedy to the aggrieved.

4. Having heard the petitioner-party-in-person and the learned advocates appearing for the respondents, this Court declines indulgence in the matter for the following reasons:

(a) The grievance of the petitioner is essentially against the provisions of section 394 of Cr.P.C. which cause the final abatement of criminal proceedings on the death of accused, subject to certain exceptions into which his case does not fit. Therefore, for ease of understanding, the text of said section is reproduced:

*"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."*

This Court hastens to add that a *pari materia* provision had been there even in the Code of Criminal Procedure, 1898, which had the following text:

*"431. Every appeal under Section 411-A, subsection (2), or Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."*

(b) The focal point of all actions at criminal law is the person offending so that as long as he is alive, he avails for trial & punishment, if found guilty. Ordinarily,

this punishment concerns life, liberty or status of the convict. Legislature if it chooses, may provide for levy of fine or forfeiture of property of the deceased, is beside the point. The proceedings for criminal prosecution of offenders involve personal elements such as *mens rea* which pertain to the domain of mind; if commission of offence is proved, the person of the offender as such, is required for undergoing the punishment for purging the guilt. Therefore, ordinarily, the criminal proceedings abate on the death of accused. On the death of the complainant, the legal heirs of the deceased complainant can move an application under section 302 of the 1973 Code to prosecute the cheque bounce case vide CHAND DEVI DAGA v. MANJU K.HUMATANI<sup>1</sup>, does not come to the aid of the petitioner inasmuch as, the prosecution is of the offender and therefore, it can continue despite the death of the complainant.

(c) Legal systems in most civilized jurisdictions operate with a premise that personality of an individual

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<sup>1</sup> *Criminal Appeal No. 1860 of 2017 disposed off on 03.11.2017*

begins with birth and ends with death. In certain systems, personality may be assumed even for a '*child in the womb*', is not much relevant. "*If birth is necessary to create rights, so death in general ends rights. In English Law, to libel the dead is not an offence... The dead have no rights and can suffer no wrongs...*" writes G.W.Paton<sup>2</sup>. [In Roman law, an heir could sue for *injuria* if an insult was offered to the body of deceased at the funeral and similarly, an action for *injuria* lied if the statue of one's deceased father was stoned]. It is relevant to advert to the observations of Hon'ble Justice Hidayatullah<sup>3</sup>:

*"...One would expect that an appeal of this character would normally abate on the death of the appellant because a criminal prosecution is concerned primarily with the punishment of an offender and not with the trial of an abstract issue about the truth or falsity of a prosecution case. The maxim actio personalis moritur cum persona is often invoked in this behalf...".*

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<sup>2</sup> G.W. Paton, 'A Textbook of Jurisprudence', 4th Edition. Oxford (2017)

<sup>3</sup> BONDADA GAJAPATHY RAO vs. STATE OF ANDHRA PRADESH AIR 1964 SC 1645



(d) It is pertinent to refer to a decision of US Supreme Court in DURHAM vs. UNITED STATES<sup>4</sup> which recognizes the *doctrine of abatement ab initio* on the death of accused or convict *pendente* criminal proceedings including appeals. The Court observed as under:

*"The status of abatement caused by death on direct review has recently been discussed by the Court of Appeals for the Eighth Circuit in Crooker v. United States, 325 F.2d 318. In reviewing the cases, that court concluded that the lower federal courts were unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal, but also all proceedings had in the prosecution from its inception."*

Similarly, the Supreme Court of Queensland in R vs. CHARDO<sup>5</sup> at paragraph 13 observed as under:

*"13. The provisions concerning appeals against sentence seem consistent with the same conclusion. Upon the death of an appellant who was sentenced to imprisonment (as in this case), the statutory remedy of quashing the sentence and passing a different sentence in substitution therefor would be meaningless; the right of appeal against a sentence of imprisonment and the Court's*

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<sup>4</sup> 401 U.S. 481 (1971)

<sup>5</sup> (2022) QCA 277

*power to make orders in such a case could not survive the appellant's death."*

Thus, the provisions of law such as section 394 of Code of Criminal Procedure, 1973 providing for abatement of proceedings are universal and time tested. The policy of the State as enacted in statutes which provide for the final abatement of appeals on the death of accused are animated with legislative wisdom & logic. It is a matter of pure legislative policy that death of the accused should put an end to criminal proceedings. Therefore, the said provision cannot be voided.

(e) The second contention that the impugned provisions are discriminatory inasmuch as, the abatement of appeal happens in select circumstances, is again bit difficult to countenance. As already observed above, it is a matter of legislative policy that in certain circumstances, the criminal proceeding should abate on the death of the accused. In what circumstances, abatement should happen, is left to the legislative wisdom gained through the experience of ages. It is not

that in the recent past, such a provision has been enacted and to a scrupulous complainant it is proving to be a bolt from the blue. The argument that appeal against conviction and sentence of death or of imprisonment, does not abate if the near relatives obtain leave to continue the same and therefore, similar facility not being provided for, there is discrimination offending Article 14 of the Constitution, is too farfetched an argument. A conviction resulting in the sentence of death or imprisonment stands on a different footing and such cases constitute a separate class from the rest, in the view of law maker. That per se does not render the law falling foul of the equality Clause. It is pertinent to refer to an English decision in *R vs. ROWE*<sup>6</sup>: A prisoner who was convicted and sentenced to a term of imprisonment died during the pendency of appeal. His widow applied for leave to continue the appeal arguing that she had an interest being the widow of an honest man and not of a man who had been convicted and that

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<sup>6</sup> [1955] 1 Q.B. 573

husband's conviction would affect her chances of employment and prejudice her position among her friends and relatives. A Three Judge Bench Court of Criminal Appeal declined leave holding that the sentimental interest of the widow in having her deceased husband's name cleared from stigma was insufficient. If that be the case, it is un-understandable as to how the petitioner can find fault with the regime of law concerned.

(f) The petitioner's Criminal Appeal No.1453/2017 having already been disposed off as having abated on 29.03.2022, what benefit would accrue to him should relief as sought for in this petition be granted, remains inscrutable, as rightly contended by learned CGC who is also justified in pointing out the defect in the petition which has not arrayed L.Rs of the deceased accused, against whom petitioner intends to proceed. No explanation is offered by him as to why the said L.Rs have not been made respondents to the

petition, though they answer the description of proper parties in the light of decision of Apex Court in RAZIA BEGUM Vs. SAHEBZADI ANWAR BEGUM<sup>7</sup>, if not necessary parties to the adjudication of *lis* at hands.

(g) The vehement submission of petitioner that the provisions of 1973 Code do not apply to the trial of cheque bounce cases and therefore, the appeal against the acquittal entered therein, could not have been disposed off as having abated on the death of the accused, does not merit acceptance. Section 4 of the Code r/w Sec. 143 of NI Act makes its provisions applicable to the trial of offences punishable under law other than IPC, 1862 as well. Some of the provisions of the Code are excluded from application does not mean other relevant provisions do not govern the criminal proceedings under the NI Act.

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<sup>7</sup> AIR 1958 SC 886

In the above circumstances, this petition being devoid of merits, is liable to be dismissed and accordingly, it is.

Costs made easy.

**Sd/-  
JUDGE**

Bsv