

**(2010) 12 DEL CK 0406**

**In the Delhi High Court**

**Case No :** Regular Second Appeal No. 129 of 2002 and C.Ms. 355 of 2002 and 19788 of 2010

Aziz Ahmed and Others

APPELLANT

Vs

Sakina Begum (since deceased) through LRs. and Others

RESPONDENT

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**Date of Decision :** 07-12-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3

Delhi Rent Control Act, 1958 — Section 50

Slum Areas (Improvement and Clearance) Act, 1956 — Section 19

**Citation :** (2010) 12 DEL CK 0406

**Hon'ble Judges :** Indermeet Kaur, J

**Bench :** Single Bench

**Advocate :** M.R. Chawla, for the Appellant; Kumkum Jain, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Indermeet Kaur, J.

C.M. 19788/2010

1. By way of this application it is contended that Appellant No. 1 has expired on 13.9.2006; his legal heirs have not been brought on record; appeal stands abated. Prayer for abatement has been made.

2. Reply filed has opposed the application. It is not in dispute that Appellant No. 1 has died and admittedly his legal representatives have not been brought on record within the prescribed period of limitation.

3. Appellant has submitted that the appeal has abated only qua legal representatives of Appellant No. 1 in terms of Order 22 Rule 3 (ii) of the Code of Civil Procedure, the appeal has not abated in to.

4. Learned Counsel for the Respondents/applicants has placed reliance upon a judgment of the Supreme Court reported in Babu Sukhram Singh Vs. Ram Dular

Singh and Others, . It is submitted that the appeal has abated in toto as it was a joint claim which was made by the plaintiffs against all the Defendants of whom one such Defendant has died. Reliance has also been placed upon Union of India (UOI) Vs. Ram Charan and Others, .

5. Learned Counsel for the non-applicants/Appellants has placed reliance upon a judgment of the Apex Court reported in S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, . It is submitted that laws of procedure are meant to regulate effectively and aid the object of doing substantial and real justice; rights should not be foreclosed as procedure is always viewed as a handmaid of justice and not hamper the cause of justice.

6. Record shows that the present suit was a suit for recovery of possession and damages. Sakina Begum, the Respondent was the plaintiff before the trial court. There were six Defendants of whom Aziz Ahmed was Defendant No. 1; they were all the sons of Shariff Ahmed. The averments in the plaint were that the plaintiff is the owner of house bearing No. 6863, Hata Kedara, Bara Hindu Rao, Delhi; a portion of this house comprising of one room and a Dalan, kitchen, bath, courtyard, store, latrine on the ground floor had been tenanted out to Shariff Ahmed; Shariff Ahmed was a habitual defaulter in the payment of rent. Vide notice dated 28.12.1976, the tenancy of Shariff Ahmed was terminated. He did not vacate the property. Shariff Ahmed had become a statutory tenant after the termination of his tenancy vide notice dated 28.12.1976. There was no fresh agreement between the parties for continuation of the tenancy. It was a monthly tenancy. plaintiff filed proceedings for grant of permission u/s 19 of the Slum Areas (Improvement & Clearance) Act, 1956; in March 1982 Shariff Ahmed died leaving behind his legal representatives who were arrayed as Defendants No. 1 to 6 by the plaintiff in the present suit. Suit for possession had been filed; prayer was that a decree of possession be passed in favour of the plaintiff and against the Defendants.

7. Submission of the Defendants was that all the legal representatives of deceased Shariff Ahmed had inherited the tenancy from their deceased father; suit was barred u/s 50 of the Delhi Rent Control Act.

8. Vide judgment and decree dated 15.1.1994 the suit of the plaintiff/Respondent had been decreed for possession. It was a tenancy for residential purpose. It was held that the Defendants had not become fresh tenants as was their contention and for which specific Issue No. 5-E had been framed.

9. In appeal the judgment of the trial judge was endorsed vide the impugned judgment and decree dated 21.5.2002.

10. This is a second appeal. It had been admitted and on 6.10.2004, the following substantial question of law was formulated:

Whether the legal representative of late Shariff Ahmed can, on his death, be said

to be tenants of the Respondents in view of the provisions of Section 19 of the Slum Areas (Improvement and Clearance) Act, 1956?

11. It is not in dispute that during the pendency of this appeal on 13.9.2006 Appellant No. 1 has expired. It is also not in dispute that no application has been filed to bring on record the legal representatives of Appellant No. 1.

12. The question which has to be answered by this Court is as to whether this appeal has abated in toto or whether it has abated qua Appellant No. 1 only and the right to sue survives against the remaining Appellants.

13. The averments in the plaint show that the plaintiff had made a joint claim against all the Defendants who were six in number. This suit was decreed in his favour by the two courts below. During the pendency of the appeal before this Court i.e. in the second appeal one Appellant has expired. Claim of the plaintiff was not a distinct claim against each of the Defendants; one claim could not be segregated from the other. The relief claimed against all the Defendants was common.

14. In the case of Babu Sukhram Singh (*supra*) which was a suit for permanent injunction, the court held that where the claim against all the Defendants was a joint claim; on the death of one Defendant, during the pendency of the appeal, the claim abated as a whole and not against one Appellant alone. The judgment relied upon by the counsel for the non-applicants/Appellants in Sardar Amarjit Singh Kalra (*supra*) is distinct on its facts. That was a case where compensation had to be awarded under the provisions of the Land Acquisition Act; separate claims having no conflicting interest inter se had been filed; in such a case the court had held that death of some of the Defendants would not result in abatement of the entire appeal.

15. In the judgment of the Supreme Court reported in *The State of Punjab Vs. Nathu Ram*, , a bench of the Supreme Court had laid down the tests to determine as to when and under what circumstances an appeal would abate on the death of one party. It inter alia held as follows:

The test to determine this has been described in diverse forms. Courts will not proceed with an appeal:

when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the Appellant and the deceased Respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the Appellant and the deceased Respondent;

when the Appellant could not have brought the action for the necessary relief against those Respondents alone who are still before the Court and when the decree against the surviving Respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

16. The averments in the plaint and the prayer clause show that the relief claimed against all the Defendants was common; it was not divisible; it was based on the submission the father of the Defendants who had become a statutory tenant in his lifetime having expired, the legal representatives of Shariff Ahmed could not now remain in the suit property. The result of the death of the Appellant No. 1 is that even if a decree is passed against the remaining Appellants it would be ineffective and unexecutable; it could not be executed against the legal representatives of the Appellant No. 1 in the absence of their not having been brought on record.

17. Appeal accordingly stands abated a whole.

18. Application is disposed of.

RSA No. 129/2002 & C.M.355/2002 (for stay)

19. In view of the order passed in the aforesaid application, the appeal as also the pending application is dismissed.