

**(1974) 11 GUJ CK 0005**

**In the Gujarat High Court**

**Case No :** Civil Revision Application No's. 1069 to 1071 of 1974

Maganbhai Zaverbhai Patel

APPELLANT

Vs

Rameshbhai Bechardas Shah and Others

RESPONDENT

**Date of Decision :** 22-11-1974

**Acts Referred:**

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 31  
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, 115

**Citation :** AIR 1975 Guj 218 : (1975) 16 GLR 797

**Hon'ble Judges :** J.M. Sheth, J

**Bench :** Single Bench

**Advocate :** G.C. Patel, for the Appellant; M.C. Shah, for the Respondent

## **Judgement**

1. These three revision petitions arise out of common order passed by the learned Civil Judge, Junior Division, Nadiad dated 25-7-1974, in Civil Suits Nos. 436 of 1967, 409 of 1967 and 408 of 1967 respectively.

2. Petitioner Maganbhai Zaverbhai Patel is original defendant No. 1 in all the three suits. Opponent No. 3 deceased Maganlal Harjivandas Vyas was original defendant No. 2 in all these three suits. Opponents Nos. 1 and 2 Rameshbhai Bechardas Shah and Maheshbhai Bechardas Shah were original Plaintiffs Nos. 1 and 2 in Civil Suit No. 436 of 1967. Opponent No. I Kantilal Shanabhai Patel in Civil Revision Application No. 1070 of 1974 was original Plaintiff of Civil Suit No. 409 of 1974. Opponent No. 1 Jamnadas Chhotabhai Amin in Civil Revision Application No. 1071 of 1974 was original Plaintiff in Civil Suit No. 408 of 1967.

3. Maganlal Harjivandas Vyas, Original defendant No. 2, died during the pendency of the aforesaid suits on 24-8-1972. His heirs and legal representatives were not brought on the record within the Period of limitation prescribed for the same. Suits abated against him. No application was made for setting aside the abatement within the prescribed period.

4. Present petitioner who is original defendant No. 1 in all these suits, filed

applications in those suits, that looking to the nature of the suits, the entire suits abated in toto. That application in Civil Suit No. 436 of 1967 was Ex. 120; in Civil Suit No. 409 of 1967 it was Ex. 113; and in Civil Suit No. 408 of 1967 it was Ex. 131.

5. The learned trial Judge who heard these applications, reached the conclusion that the suits did not abate in the r Entirety. The suits had abated only against original defendant No. 2 Maganlal Harjivandas Vyas and the suits can well proceed against defendant No 1 (present petitioner).

6. Mr. G.C.Patel, appearing for the petitioner in all these three revision petitions, has contended that the plant clearly reveals that according to the plaintiff or plaintiffs, as the case may be present petitioner and deceased Maganlal Harijivandas Vyas were joint tenants of the suit property. The plaintiff or plaintiffs as the case may be, required the suit for recovery of possession of the suit premises on the grounds, that the landlord or landlords as the case may be, required the suit premises which the tenants have a factory and are running their business therein, for the purpose of construction of a new building, reasonably and bonafide, and secondly, that the tenants were in arrears for a period over six months and consequently, they were not entitled to Protection under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (which will be hereinafter referred to as "the Act"). The relief claimed against both the defendants was joint and indivisible. Interest of theirs was joint and indivisible. The suits having abated against defendant No. 2 Maganlal Harjivandas Vyas, his legal representatives having been not brought on the record, the entire suits will abate. If the entire suits do not abate. There will be conflicting decrees. So far as deceased Maganlal Hailivandas Vyas is concerned, his heirs and legal representatives will have a right to remain in occupation of the suit property. So far as the petitioner is concerned, if the Plaintiff or plaintiffs, as the case may be, succeeds or succeed, in establishing his/their case, there will be a decree for eviction. In that view of the matter, Mr. Patel contended that the suits must abate as a whole in view of the nature of the suits. In support of his submissions, he has invited my attention to three decisions of the Supreme Court and one decision of this Court.

7. In *The State of Punjab Vs. Nathu Ram*, , the Supreme Court has observed:

"It is not disputed that in view of Order 22. Rule 4. Civil Procedure Code, hereinafter called "the Code", the appeal abated against Labhu Ram deceased, when no application for bringing on record his legal representatives had been made within the time limited by law The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been. Consequently, divergence of opinion in the application of the principle"

In para 6, it is observed by the Supreme Court .....It may, however be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not factory and are running their business proceed with an appeal (a) when the success of the appeal may lead to the Court's of a new building, reasonably and bona coming to a decision which may 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; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."

In Para. 8, at page 91, it is observed:

"The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the Appellant and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the. decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

8. In *Sri Chand v. M/s. Jagdish Pershad Kishan Chand* AIR 1966 SC 1427 , after referring to the aforesaid observations in *The State of Punjab Vs. Nathu Ram*, . it is observed by the Supreme Court:

"The principle of this judgment was affirmed in Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others, , and later in an unreported judgment in Kishan Singh v. Nidhan Singh, Civil Appeal No. 563 of 1962, dated 14-12-1964 (SC). It may be pointed out that the three tests suggested by Raghubar Dayal, J., in Nathu Ram's case are not cumulative tests. Even if one of them is satisfied, the Court may, having regard to all the circumstances, hold that the appeal has abated in its entirety."

At page 1431, it is observed :

"Liability of the sureties is under the law joint and several. If a creditor seeks to enforce the surety bond against some only of the joint sureties the other sureties will not on that account be discharged: nor will release by the creditor of one, of them discharge the other: vide Sections 137 and 138 of the Contract Act, But the fact that the surety bond is enforceable against each surety severally, and that it is open to the creditor to release one or more of the joint sureties, does not alter the true character of an adjudication of the Court when proceedings are commenced to enforce the covenants of the bond against all the sureties. We are not concerned in this appeal with the privilege which a creditor may exercise, but with the effect of an adjudication which the Court has made in a proceeding to enforce the covenant of the bond. The mere fact that the obligation arising under a covenant may be enforced severally against all the covenantors does not make the liability of each covenantor distinct. It is true that in enforcement of the claim of the decree-holder the properties belonging to the sureties individually may be sold separately, But that is because the properties are separately owned and not because the liability arises under distinct transactions.

It must, therefore, be held that the appeal has abated. Because the representatives of the second appellant - Basant Ali - have not been brought on record within the time permitted . . . . ."

9. In Babu Sukhram Singh Vs. Ram Dular Singh and Others, , the Supreme Court has in terms observed:

"Where a joint claim against several defendants is made in a suit and during pendency of appeal by the plaintiff some of the defendants die and no separate claim is made against any of the defendants in appeal, the failure of the Plaintiff to bring on record their legal representatives results in abatement of appeal in toto." A similar view has been taken by a Division Bench of this Court, consisting of C, V. Rane, J., and myself. in Karimbhai alias Abdul Karim and Others Vs. Bai Mariambibi and Others, .

10. Mr. M. C. Shah, appearing for the Plaintiff or Plaintiffs as the case may be, did not dispute the settled position of law enunciated by the Supreme Court in the aforesaid decisions. His argument was, that it is a case of the plaintiff or Plaintiffs, as the case may be, that defendants Nos. 1 and 2 were statutory tenants. Tenancy was determined by efflux of period in year 1957 when the lease Period fixed in the rent-note of 1941 expired. It is an admitted -position,

submitted Mr. Shah, that the statutory tenant has merely a -personal right to remain in occupation of the suit premises till he is entitled to Protection under the Act. He has, therefore, contended that in such a case, there could not be any question of any abatement. It will be only a case of substitution of parties. At any time for getting an effective decree, the plaintiff may bring on record any person entitled to agitate the questions arising in the proceeding. In short, Mr. Shah wanted to challenge "the order regarding even abatement of suits so far as deceased defendant No. 2 Maganlal Hariivandas Vyas was concerned. He cannot be allowed to agitate this question as he had not preferred any revision petition against that order challenging even the abatement so far as deceased defendant No. 2 Maganlal Harjivandas Vyas was concerned, The position that obtains is, that so far as deceased defendant No. 2 Maganlal Harjivandas Was is concerned, the order has become conclusive.

11. The real question that arises for consideration in these three revision petitions is whether in view of the nature of the suits, such abatement of the suits against defendant No. 1 would also result in abatement of the entire suits or the suits can -proceed so far as defendant No. 1 is concerned.

12. If we now refer to the Plaints, it is clear that the plaintiff or Plaintiffs claimed to be the landlord or landlords in respect of the suit -property. There was one big plot of co-ownership. Two defendants were also co-owners. There was Special Suit No. 57 of 1950 filed, wherein father of plaintiffs in Civil Suit No. 436 of 1967, was defendant No. 7 and present defendants Nos. 1 and 2 were defendants Nos. 9 and 8 respectively. Similar was the position in other suits, and that suit was for partition of that joint land held as tenants-in-common. Admittedly, these defendants were tenants of the entire plot. Final decree came to be passed in that suit on 7-9-1959, Portion of that plot, which is referred to as "the suit property", came to the share of the father of the plaintiffs in Civil Suit No. 436 of 1967, and similarly in other suits, the plaintiff concerned became the owner of that particular portion which is the suit Property in those cases. Rights of defendants Nos. 1 and 2 as tenants, were kept intact. In this Civil Suit No. 436 of 1967. it is averred by the plaintiffs that, according to that decree, their father had become the owner of the suit property and after his death. they had become the owners and the defendants were and are their lawful tenants. After taking the original lease, these defendants were running business in partnership with one Babulal Nanalal and thereafter they alone were running that business and were executing the rent notes in favour of the owners and consequently, they had also executed rent-note in favour of their father's predecessor in title, on 16-6-1941 and that period of lease expired on 15-1-1957, and since then, they had not remained as contractual tenants either of their father or theirs, the tenancy having been determined by efflux of time. Possession is then sought on the aforesaid two grounds, to which I have already made reference earlier and it need not be repeated\_ In short the reliefs claimed are, that the defendants may be directed to hand over vacant Possession of the suit land after removing the structure constructed by the defendants on it. They may be directed to pay Rs.

171.15 Paise to the plaintiffs. They may be directed to pay mesne profits from the date of the suit till the date of possession at the rate of. Rs. 2.55. In short, the claim made by them is a joint and indivisible claim.

13. In written-statement, Ex. 14, filed by defendant No. 1 in Civil Suit No. 436 of 1967, defendants have also claimed joint interest and have in terms, in para. 6, controverted the position taken by the plaintiffs that they ceased to be their contractual tenants and there was valid termination of the contractual tenancy. On the contrary, they have stated that there was no end to relationship of landlord and tenant between the parties. It was denied that they had no right to remain in occupation of the suit premises. They have spent a large sum and installed machinery and are running a factory on the suit land on a large scale. Plaintiffs had no bona fides in asking for the land for construction of a new building. They had sent arrears of rent from time to time by cheques and even by money orders, and, they ,There all refused by the landlords in short, they have challenged the position that they are mere statutory tenants and on the contrary have averred that contractual tenancy has not ceased to be in force. In the amended written statement also they have claimed, that in view of the decree passed in Civil Suit, their tenancy is a permanent tenancy.

14. It is significant to note that defendant No. 2 also did not claim any separate interest in the suit property. He adopted the written-statement filed by defendant No.1, by his Pursis, Ex. 50. Similar is the position in other two suits. I, therefore, need not repeat the averments made in those suits.

15. In Civil Suit No, 436 of 1967, issues were framed at Ex. 19. Issue No.1 was, "whether the plaintiff proves that the contractual tenancy of the defendants has expired on 27-6-1957 by efflux of time" ? Issue No. 2 was, "whether the plaintiff proves that the defendants are statutory tenants-in-arrears for more than six months"? Issue No. 6 (B) was, "whether the defendant Drove that his right of tenancy is reserved as permanent tenant as regards the suit land in Special Suit No. 57 of 1950 ?" It is thus evident that the parties were at issue, on whether there was contractual tenancy existing at the date of the suit or not. As said earlier, even the defendants claimed permanent tenancy.

16. Mr. Shah, appearing for the Plaintiff or Plaintiffs, as the case may be, has invited my attention to -an order passed by the learned Joint Civil Judge. Senior Div., Nadiad, dated 30-4-1963, in Special Darkhast No. 23 of 1960, for the purpose of showing that one of these defendants in that Darkhast had claimed that the judgment-debtors in that suit were statutory tenants, Mr. Shah laid considerable emphasis on the position that would obtain if the defendants were statutory tenants. Mr. Shah submitted that in the case of statutory tenants, they had a mere personal right to be in occupation of the suit premises till they were entitled to protection under the Act. They had no interest in the Immovable property itself and consequently, such right cannot be inherited.

17. Section 2(11) of the CPC defines the expression "legal representative", as

under:

" "legal representative" meant a person who in law represents the estate of a deceased Person, and includes any Person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

18. Order 22, Rule 4 of the CPC reads:

" (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with a suit.

(2) Any Person so made a Party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

Mr. Shah submitted that abatement could arise in a case in which the right to sue survived and the legal representatives were not brought on the record within the period of limitation. Mr. Shah submitted that in the instant case defendant No. 2 being merely a statutory tenant, he had only a personal right to remain in occupation of the suit property and hence there could not be any question of legal representatives brought on the record and there could not be any abatement. At one stage he went to the length of urging that the Act is a self-contained Act and so, the Provisions of Order 22, Rule 4 of the Civil Procedure Code, would not have any application. This argument of his is devoid of any merits. In the Act itself, there is Section 31, which reads:

"The courts specified in Sections 28 and 29 shall allow the prescribed procedure in trying and hearing suits, proceedings, applications and appeals and in executing orders made by them."

It is, therefore, evident that these provisions of Order 22, Rule 4 of the CPC will have application also in such a rent suit filed.

19. Even in the decision of Supreme Court in Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another, , relied upon by Mr. Shah. in para. 10, the aforesaid observations have been made at page 2528:

"It is obvious that the appellant landlord's right to Proceed with the appeal with a view to obtain Possession of his premises did survive under Order 22, Rule 4 read with Rule 11, Civil Procedure Code. Where the right to sue and prosecute the appeal survives, the appellant is bound to cause the legal representatives of the deceased respondent to be made a party and Proceed with the appeal. Therefore, the heirs and legal representatives of the aforesaid B. N. Chatterjee were rightly brought on record and the appeal had to proceed."

These observations made by the Supreme Court, by a necessary implication, clearly indicate that the provisions of Order 22, Rule 4 of the CPC do apply in the suits like the present suits. It is further observed in para. 11 by the Supreme Court:

"Under sub-clause (ii) of Rule 4 of Order 22, CPC any Person so made a party as a legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the Court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

In my opinion, this decision is not in any manner assisting the submission made by Mr. Shah. It only states that if the legal representatives have got any other independent right in their personal capacity, that question can also be agitated. The observations made in this decision are:

"A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly, though in law not accurately, called a "statutory tenant". Such a person is not a tenant at all-, he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in Possession after the determination of the contractual tenancy, is personal, it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute.

On the death of a statutory tenant pending eviction suit or appeal his heirs and legal representatives brought on record cannot claim the status of tenant within Section 3(vii) of the Act (Rajasthan Premises (Control of Rent and Eviction) Act, 1950) as no rent is Payable by them. If the rent was Paid by them during the course of the proceedings it was not because they were recognised as tenants by the landlord but because the amount was received by him without prejudice to his rights under the orders of the Court. Therefore, the only contentions that they could put forward in the second appeal by the landlord were the contentions appropriate to their representative character and not one which was personal to the deceased. The defence of want of bona fide requirement by the landlord was personal to the statutory tenant and on his death the same is not open to his legal representatives."

That decision only lays down what will be the defence open to the legal, representatives. So far as our Act is concerned, position is not similar as the

Position obtaining under Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950). In our Act, the word "tenant" has been defined in Section 5 (11). Clauses (c) (i) and (c) (ii) of sub-section (11) of Section 5 of the Act are material for our purposes, which read:

"5. In this Act unless there is anything repugnant to the subject or context-

(11) "tenant" means any person by whom or on whose account rent is payable for any -premises and includes-

(c) (i) in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant as may be decided in default of agreement by the Court, and

(ii) in relation to premises let for business, trade or storage, any member of the tenant's family carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage, as the case may be, in the said premises and as may be decided in default of agreement by the Court."

It is thus evident that if the conditions of clause (c) (i) or (c) (ii) are satisfied, the members of the tenant's family, in case of residents, residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant, are entitled to protection. In case of premises let for business, etc., any member of the tenant's family carrying on business, etc., with the tenant in the said premises at the time of the death of the tenant as may continue after his death to carry on the business etc.. is entitled to protection, he being included within the inclusive definition of the word "tenant" given therein.

20. Mr. Shah submitted, relying upon Section 5(11) of the Act, that it is only such person who would be required to be substituted in Place of deceased tenant, as, according to him, the deceased tenant was a statutory tenant. Such a person, submitted Mr. Shah, can be brought on the record at any time by making an appropriate application and need not be brought on the record within the prescribed period for bringing on record the legal representatives. Section 5(11) of the Act has nothing to do with the legal representatives. It only defines the word "tenant". Clauses (c) (i) and (c) (ii) of sub-section (11) of Section 5 of the Act include within the definition of the word "tenant" the members of the tenant's family who satisfy the conditions mentioned therein. Even those - persons would be entitled to protection under the Act. The expression "legal representative" has been defined even in the Act in Section 5(4) as under:

"legal representative, means a legal representative as defined in the Code of Civil Procedure, 1908, and includes also, in the case of joint family property, the joint family of which the deceased person was a member."

It is thus evident that the expression "legal representative" in the Act means the legal representative as defined in Civil Procedure Code, 1908, to which I have

already made reference and also includes, in case of joint family Property, the joint family of which the deceased was a member. In the instant case, the legal representatives of deceased defendant No. 2 have been admittedly not brought on the record. It is significant to note that demand is made for recovery of arrears of rent jointly from both the defendants. Legal representatives of the deceased, meaning thereby, those who inherited the estate of deceased defendant No. 2, would in law be liable to pay the arrears of rent in case such a claim made by the plaintiff or plaintiffs, as the case may be, is found to be true. They would be in Possession of the property left by deceased defendant No. 2. Whether they have a right to remain in possession and they would be entitled to Protection under the Act is quite a distinct matter. If they or some of them satisfy the conditions mentioned in Section 5(11)(c)(ii) of the Act, they would also be entitled to protection under the Act. In my opinion, that question has no bearing with the question that is -posed before me. In the instant cases, the legal representatives of deceased defendant No. 2 having not been brought on the record, the suits abated against defendant No. 2, and in view of the nature of the suits to which I have already made reference. necessary consequence of it would be, that the suits in the entirety would abate.

21. Mr. Shah for the plaintiff or plaintiffs, as the case may be, tried to equate the Present cases with the case of defendants sued as trustees and one of the trustees having died, new trustees having not been brought on the record within the stipulated time. In my opinion, that argument is fallacious. Surviving trustees would represent the estate. Present cases are not the cases falling within the second Part of the definition of the expression "legal representative". viz.,

"where a Party sues or is. sued in a representative character the person on whom the estate devolves on the death of the Party so suing or sued."

In my opinion, in view of the nature of the suits and the reliefs claimed, and the nature of defence raised, there is no escape from the conclusion that the suits abate in their entirety..

22. xx xx xx xx

With respect to the learned Judge, I may say that he has made surmises and he has tried to refer to some ambiguous stray statements and tried to make out a case which is not the case of either of the Parties in the pleadings. There is no escape from the conclusion that the claim made by the Plaintiff or Plaintiffs, as the case may be, was a joint and indivisible claim. Relief claimed was also the same. Defendants" case was also the same. In view of the tests laid down by, the Supreme Court in the aforesaid decisions. to which reference is made earlier, it is evident that the suits will abate in their entirety. The learned trial Judge has committed an error in reaching the conclusion that they will abate only against deceased defendant No. 2 and they can Proceed against defendant No. I (present petitioner).

23. The result is that civil revision applications succeed.

24. Civil Revision Applications Nos. 1069 of 1974, 1070 of 1974 and 1071 of 1974 are allowed and the common order passed by the trial Court, referred to above, is set aside and it is held that all the three suits, Civil Suits Nos. 436 of 1967, 409 of 1967 and 408 of 1967 abate in their entirety. In view of the Peculiar circumstances of the case, each party is ordered to bear its own costs throughout in all the three matters. Rule is made absolute in each of these three revision petitions.

25. Revisions allowed.