

**(1976) 01 DEL CK 0009**

**In the Delhi High Court**

**Case No : Second Appeal No. 12 of 1975**

Prem Parkash Kapoor and Others

APPELLANT

Vs

Atma Ram Kirpa Ram

RESPONDENT

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**Date of Decision :** 30-01-1976

**Acts Referred:**

**Citation :** AIR 1976 Delhi 316 : (1976) 1 ILR Delhi 678 : (1976) RLR 204

**Hon'ble Judges :** B.C. Misra, J

**Bench :** Single Bench

**Advocate :** M. Ahmed, for the Appellant; G.L. Rawal, for the Respondent

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## **Judgement**

1. This is a defendant's Second Appeal filed u/s 100 of the Code of Civil Procedure, against the appellate judgment and decree of the Additional District Judge, Delhi, dated 14th January, 1975, by which he has dismissed the appeal with costs and affirmed the decree of the court of first instance dated 6th February, 1974, for recovery of possession of the premises in dispute

2. The premises in dispute consist of a portion of the ground-floor in house No. 4766, Partap Street, 23, Darya Ganj, Delhi. This property was and still is owned by the respondent. Prem Sarup Kapoor, deceased, (father of the 1st appellant) was a tenant in respect of the said premises. He died on 8th August 1969. The respondent has instituted the suit on 5th November 1969, on the allegations that a notice dated 24th May 1968, terminating the contractual tenancy had been served on the deceased tenant on 27th May 1968, and the tenancy stood determined with effect from 30th June 1968. Thereafter the deceased became a statutory tenant and his rights in the premises were neither transferable nor heritable and as such the defendant appellants were trespassers and had no legal right to continue to occupy the premises in dispute; hence a decree for recovery of possession was claimed. In the suit imp led as defendants were the son of the deceased, named Prem Parkash Kapoor (appellant No. 1 before me), besides his widow, Smt. Mangan Bai (who died during the pendency of the suit), and other defendants 3, 4 and 5 were the wife and daughters of Prem.

Parkash Kapoor, appellant No, 1.

3. The defense in substance was that the contractual tenancy of the deceased had not been terminated and the respondent before me had no locus standi to institute the suit. A replication to the written statement was filed and on the pleadings of the parties, the following issues were framed:

"1. Whether the plaintiff had validly terminated the tenancy of Prem Sarup Kapoor, deceased?

2. If issue No. 1 is proved, whether the defendants are still tenants?

3. Is the plaintiff owner of the suit property? If so, to what effect?

4. Relief."

The court of first instance after considering the entire evidence on record, including the sale deed (Ex. P-2) and the resolution of the Municipal Corporation permitting the plaintiff to construct the house on the said land as well as documents to show the payment of house-tax and the counter-foils of the receipts including the ones signed by the deceased- tenant, came to the conclusion that the respondent was the owner of the property and issue No. 3, was answered in the affirmative. With regard to issue No. 1, the court came to the conclusion that the contractual tenancy of the deceased tenant had been terminated by notice (copy Ex. P-7) which had been served under registered acknowledgment due (Ex. P-8) and the issue was answered in the affirmative. On issue No. 2 the version of the defendants was disbelieved and the issue was decided against the defendants. As a result, the suit was decreed with costs. Feeling aggrieved, the defendants filed an appeal before the District Court, which came up for hearing before Mr. H. K. S. Malik, Additional District Judge. During the course of arguments the finding on issue No. 3 was not challenged and the attack was confined to answer to issue No. 1. It was contended that the notice of termination of tenancy had not been served on the deceased tenant. This contention was repelled and the lower appellate court after examining the material on record agreed with the court of first instance and affirmed the finding. Nothing was, however, urged before the lower appellate court in regard to issue No. 2. As a result, the appeal was dismissed with costs. Hence this second appeal.

4. The widow of the deceased tenant, arrayed as defendant No. 2, died on 6th August, 1970, during the pendency of the suit and her son (appellant No.1 before me) was treated as her heir and legal representative,

5. Mr. M. Ahmed has challenged the finding of the lower appellate court on issue No. 1 with regard to the service of notice terminating the tenancy of the deceased tenant. He has also submitted that the law has since been changed by Ordinance 24 of 1975 and the appellants are entitled to the protection against eviction and notice be taken of the change in the law and the decree of the lower appellate court be reversed.

6. I shall now consider the first contention of the appellants. The copy of the notice served on the deceased tenant is Ex. P-7, dated 24th May 1968. The postal acknowledgment receipt of service on him is Ex. P-8. It is addressed to Prem Sarup Kapoor, House No. 4766, Partap Street, 23, Darya Ganj, Delhi, which is the correct address. The acknowledgment purports to have been signed by Prem Sarup Kapoor, himself under date 27th May, 1968. The receipt bears the postal mark and there is nothing suspicious about it brought out on the record and the presumption of its genuineness can be safely drawn. To conclude the matter further a reply to the said notice (Ex. P-7) had been sent by an Advocate on behalf of the deceased tenant, It is Ex. P-1, dated 15th June, 1968. It is addressed to Mr. Jiwan Lal Seth, Advocate, and the reply recites "My client Shri Prem Sarup Kapoor is in receipt of your notice dated. 24-5-1968 sent on behalf of Shri Atma Ram and I under instructions from my client do hereby reply you as under" and the reply is signed by Mr. Bharat Inder Singh, Advocate. Mr. Bharat Inder Singh, Advocate, was examined as a witness for the plaintiff as P. W. 1. He has stated that the reply to notice had been given under the instructions of the deceased tenant. Both the courts below have believed his statement and have found it as a fact that the notice to quit had been properly and legally served on the deceased tenant. I do not find any legal infirmity in the reasoning or conclusion of the court below and I endorse the finding that the notice had been validly served and the deceased was at the time of his death merely a statutory tenant.

7. This takes me to the consideration of the second contention raised by Mr. Ahmed. The definition of tenant as given in the Delhi Rent Control Act, 59 of 1958 prior to amendment was as follows:

"2 (1) "tenant" means any person by whom or on whose account or behalf the rent of any premises is or but for a special contract would be, payable and includes a sub-tenant and also any person continuing in possession after the termination of his tenancy but shall not include any person against whom any order or decree for eviction has been made."

Ordinance 24 of 1975 promulgated on 1st December 1975, has made a vital change in the definition. It has substituted a new definition and has given it retrospective effect. The Ordinance is said to have been replaced by an Act without any material change. Section 3 of the Ordinance may be quoted with advantage.

" 3. In Section 2 of the principal Act, for clause (1) the following clause shall be, and shall be deemed always to have been substituted, namely,

(1) "tenant" means any person by whom or on whose account or behalf the rent of any premises is, or, but for a special contract, would be, payable, and includes-

(i) a sub-tenant;

(ii) any person continuing in possession after the termination of the tenancy; and

(iii) in the event of the death of the person continuing in possession after the termination of the tenancy, subject to the order of succession and conditions specified, retrospectively, in Explanation I and Explanation II to this clause, such of the aforesaid person's-

(a) spouse,

(b) son or daughter, or, where there are both son and daughter, both of them,

(c) parents,

(d) daughter-in-law, being the widow of his pre-deceased son, as had been ordinarily living in the premises with such person as a member or members of his family up to the date of his death, but does not include,-

(A) any person against whom an order or decree for eviction has been made, except where such decree or order for eviction is liable to be re-opened under the proviso to Section 4 of the Delhi Rent Control (Amendment) Ordinance, 1975;

(B) any person to whom a license, as defined by Section 52 of the Indian Easements Act, 1882, has been granted.

Explanation I. - The order of succession in the event of the death of the person continuing in possession after the termination of the tenancy shall be as follows:

(a) firstly, his surviving spouse;

(b) secondly, his son or daughter, or both, if there is no surviving spouse, or if the surviving spouse did not ordinarily live with the deceased person as a member of his family up to the date of his death;

(c) thirdly, his parents, if there is no surviving spouse, son or daughter of the deceased person, or if such surviving spouse, son or daughter or any of them, did not ordinarily live in the premises as a member of the family of the deceased person up to the date of his death; and

(d) fourthly, his daughter-in-law, being the widow of his pre-deceased son, if there is no surviving spouse, son, daughter or parents of the deceased person, or if such surviving spouse, son, daughter, or parents, or any of them, did not ordinarily live in the premises as a member of the family of the deceased person up to the date of his death.

Explanation II. - If the person, who acquires, by succession, the right to continue in possession after the termination of the tenancy was not financially dependent on the deceased person on the date of his death, such successor shall acquire such right for a limited period of one year; and, on the expiry of that period, or on his death, whichever is earlier, the right of such successor to continue in possession after the termination of the tenancy shall become extinguished.

Explanation III.- For the removal of doubts, it is hereby declared that-

(a) where, by reason of Explanation 11, the right of any successor to continue in possession after the termination of the tenancy becomes extinguished, such extinguishments shall not affect the right of any other successor of the same category to continue in possession after the termination of the tenancy; but if there is no other successor of the same category, the right to continue in possession after the termination of the tenancy shall not, on such extinguishment, pass on to any other successor specified in any lower category or categories, as the case may be;

(b) the right of every successor, referred to in Explanation I, to continue in possession after the termination of the tenancy, shall be personal to him and shall not, on the death of such successor, devolve on any of his heirs".

8. It is obvious that the object of the amendment is to give a limited protection to the legal representative of a deceased tenant, whose contractual tenancy had been terminated and who had become a statutory tenant, which rights were, as held in the decision of the Supreme Court in *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, only personal and not heritable. The amended law has widened the definition of a tenant to the effect that in the event of the death of the person continuing in possession on the termination of tenancy, (which is merely for the sake of facility hereinafter referred to by me as a statutory tenant) will, subject to the order of succession specified in the clause, include his spouse, son or daughter or both of them, the parents and the daughter-in-law being the widow of the pre-deceased son, subject to two conditions, namely, the successor should have been ordinarily living in the premises with the statutory tenant as a member of his family up to the date of the death. The other condition as contained in Explanation II is that such successor should be financially dependent on the deceased. Should the conditions be satisfied, the order of successions provides that on the death of the statutory tenant, the right to continue in possession will devolve firstly on the surviving spouse and secondly on his son or daughter or both, if there is no surviving spouse, or if the surviving spouse did not ordinarily live with the deceased person as a member of his family up to the date of his death; thirdly, his parents, if the first two categories fail, and fourthly, his daughter-in-law, being the widow of his pre-deceased son, if the earlier categories of successors fail. An exception has been provided by the amendment that a person against whom an order for eviction has been passed will not be entitled to claim the right of succession to the tenancy except under the proviso to Section 4 of the Ordinance, nor will it apply to any person to whom a license has been granted as defined in the Indian Easements Act

9. Explanation II provides that if the person who acquires by succession the right to continue in possession after the termination of the tenancy was not financially dependent on the deceased person, such successor shall acquire the right only for a limited period of one year or till his death whichever occurs earlier and thereafter the right of such successor would be extinguished,

10. Explanatory Iii has been inserted to remove all doubts which may arise on a construction of the aforesaid provisions. It provides that where by reason of Explanation Ii, the right of any successor of a statutory tenant becomes extinguished, such extinguishment shall not affect the right of any other successor of the same category to continue in possession after the termination of the tenancy, but if there is no other successor of the same category the right to continue in possession after the termination of the tenancy shall not, on such Extinguishment, pass on to any other successor specified in any lower category or categories, as the case may be.

11. This clause of the Explanation makes it clear that the right of a successor to the statutory tenant is confined only to the persons in the same category to the exclusion of the persons in the lower categories and where the successor who succeeds under Explanation I dies or his right is otherwise extinguished, the right cannot pass on to the successors of the deceased tenant in any lower category. In my opinion, if some statutory tenant, dies leaving behind him his widow and son and the parents, under the amended law, his widow is to inherit the rights of the statutory tenant subject to the condition of her ordinarily living with the deceased and being financially dependant on him, but the sons and parents of the deceased will not inherit any right of a statutory tenant and on the extinction of the right of the widow, the right will not revive and cannot be inherited either by the son or by the parents of the deceased, who are in lower categories and the right will be extinguished.

12. A plausible argument, which could be advanced was that the legal representatives in the other categories may claim their right not from the deceased statutory tenant, but from his permitted successor, i.e., the widow. But, even this contention has been put at rest by the insertion of clause (b) to Explanation III. This provides that the right of every successor referred to in Explanation I to continue in possession after the termination of the tenancy shall be personal to him and shall not, on the death of such successor, devolve on any of his heirs. Hence, the result is that the son or daughter coming wit-bin the second category cannot claim any right upon the death of the successor to the statutory tenant in the first category, In my opinion, where the son and daughter of the second category do not have any right in the premises aftei7 the death of the statutory tenant and opening of his succession they cannot acquire any rights on the death of the successor widow claiming either under the deceased statutory tenant or the successor. Surely, in a case where the person in the lower category did not possess any right on the death of the deceased statutory tenant, he cannot improve his right by the intervention of one or more deaths in the family.

13. It has been contended that the daughter-in-law who is the widow of a pre-deceased son, who has been put in the fourth category needs greater protection of having to reside in the tenanted premises and her case would be more deserving than that of the widow and the son or daughter and so she could well

have been placed in the first category along with the widow. But this is a matter for the consideration of the legislature and the courts cannot question the wisdom of the Parliament in enacting the law.

14. The fact, however, remains that the rights of possession which have been conferred upon the legal representatives of the deceased statutory tenant are statutory rights conferred by Section 3 of the ordinance by amendment of S. 2(1) of the Rent Control Act and these rights have to be claimed or exercised only in accordance with the provisions of law and subject to the conditions and restrictions contained therein. There is no scope for enlarging them by any equity or justice.

15. Applying the provisions of law to the facts of the case, it is clear that the deceased statutory tenant died on 8th August, 1969, after his contractual tenancy had been terminated with effect from 30th June, 1968. He was a statutory tenant entitled to personal protection against eviction. Under the rule of law laid down in the Supreme Court decision cited above, his legal representatives are not entitled to inherit his rights since the right of a statutory tenant was not transferable or heritable. On his death, in view of the amendment of the Act by the Ordinance, his widow (who falls in the first category) was entitled to the protection for a period of one year if she was financially independent or for her life if she was financially dependent on the deceased. For the purposes of this case, I am, on the request of the counsel, assuming in favor of the appellants that the widow as well as the son, Prem Parkash Kapoor, appellant No. 1, were financially dependent on and residing with the deceased, although this fact is being disputed by the respondent. But, even after making the said assumption in favor of the appellants, it appears that the protection granted by the amendment is confined personally to the widow who is in the first category and excludes the rights and claims of the son, the parents and other persons who fall in the lower categories. Nor can appellant No. 1, the son, or any of the appellants claim to succeed to the rights of a deceased statutory tenant claiming through the said widow of the deceased, which is expressly barred by clause (b) of Explanation III.

16. Mr. Ahmed has seriously contended that appellant No. 1, the son of the deceased, had become a tenant merely by inclusion in the definition of tenant by sub-section (1) of Section 3 of the Ordinance. It is no doubt true that the list of the heirs now added to the definition of tenant includes the spouse, the son and daughter, the parents and that widow of a pre-deceased son, but the right to succession has been provided by Explanation I as being conferred on the persons in various categories in preferential order. The son does not come within the first category, which is confined to the surviving wife or husband and as such in the presence of the widow, the son is not entitled to any right whatsoever. Had the heirs been in the same category, then there is no doubt that the death of one of the heirs in the same category will not prejudicially affect the right of the successor in the same category to share the tenancy rights. Clause (iii) of sub

section (1) of Section 3 of the Ordinance " which includes the aforesaid legal representatives in the definition of tenant" Takes it expressly and unequivocally subject to the order of succession and the conditions specified in Explanations I and II. Conditions and restrictions in such a case cannot be divorced from the right. The right must be earned and enjoyed either subject to the prescribed conditions and restrictions or not at all, There is no justification for the contention of Mr. Ahmed that appellant No. 1 should be given the benefit of newly conferred statutory right while ignoring the conditions and restrictions circumscribing it. The appellants, Therefore, cannot claim any right of the statutory tenant in the premises in view of the amendment of law made by the Ordinance. As such I find that the change in the law does not help the appellants. The contention of the appellants fails,

17. As a result, I find that there is no merit in the appeal and the same is dismissed with cost.

18. Appeal dismissed.