

**(1982) 03 BOM CK 0069**

**Bombay High Court**

**Case No:** Chamber Summons No. 135 of 1982 in Suit No. 699 of 1981

Nevandram Javermal

APPELLANT

Vs

Devikabai Haridas Gandhi and  
Others and R. Sunderdas and  
Another

RESPONDENT

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**Date of Decision:** March 29, 1982

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10

**Citation:** AIR 1982 Bom 589

**Hon'ble Judges:** Kania, J

**Bench:** Single Bench

**Advocate:** TIN. Subramaniam, for the Appellant; N.V. Adhia, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

1 .This is a chamber summons mainly to bring on record the respondents as defendants Nos.1 (a) and 1 (b) , as the executrices of the last will and testament of the 1st defendant, in the will and testament of the 1st defendant, in the place and stead of the 1st defendant who, it appears was dead even at the time of the institution of the suit.

2. A few facts are necessary for the appreciation of the controversy raised before me. The defendant No.1 was the owner of a unit in an industrial estate, called A-Z Industrial Estate at Ferguson Road, Lower Parel in Bombay. Defendant No.2, firm, carried on business in the said unit on the basis of a leave and licence agreement. In Sept., 1976, by a written agreement, defendant No.2 agreed to sell to the plaintiff its running business and the benefit of the tenancy rights which, according to defendant No.2, it had In the said unit and further agreed that if it acquired the ownership of the said unit from defendant No.1 the same would also be transferred to the plaintiff. Thereafter, in suit No.1744 of 1974, filed in this court by defendant

No.1 herein against defendant No.2 herein, certain consent terms were arrived at whereby defendant No.1 agreed to sell the said unit to defendant No.2 on the payment of a certain amount. It is the case of the plaintiff that sometime shortly prior to march 1979, defendant, No.1, through defendant No.2, agreed to sell to the plaintiff the said unit along with 5 shares in the co-operative society and put the plaintiff in possession of the said unit pursuant to that agreement. It is further contended that on 28th March, 1979, a draft agreement regarding the said purchase was finalised but the same could not be signed for reasons which are not relevant here. The present suit, namely suit No.699 of 1981, was filed in march or April, 1981 by the plaintiff for specific performance of the said agreement and it is prayed therein that the defendants be ordered and decreed to specifically perform the said sale agreement which has been set out in para 5 of the plaint. The plaint was lodged on 30th March, 1981. It appears that, at that time, the defendant No. 1 was already dead, she having died on 14th July, 1979. It was on 16th Nov., 1979 that the plaintiff came to know that defendant No. 1 had died prior to the institution of the suit and left a registered will wherein the respondent were appointed as the executrices. It was only in Jan. 1982 that the plaintiff was able to find out the address of the respondent, on the same being furnished to the plaintiff by the learned advocate of defendant No. 2. The present summons has been taken out by the plaintiff on 25th Feb., 1982.

3. Practically the only contention raised by Mr. Adhia, learned counsel for defendant No.2, to show cause against the chamber summons, is that, as the defendant No. 1 was dead at the time of the institution of the suit, the suit against her is a nullity and no application can be made to bring her heir on record or to bring her legal representatives on record in her place and stead.

4. The only question is, whether the respondents could be brought on record under the provisions of o.O. 1, R. 10 of Civil P.C., 1908. The relevant clause of said Rule is clause 2, which runs as follows:-

"(2). The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the court effectual and completely to adjudicate upon and settle all the questions involved in the suit, be added". It appears to me that it is well settled proposition in law that where the suit is a complete nullity the provision of this clause will not come into play and no application can be entertained to join any party as a plaintiff or defendant. The main question will be whether the suit can be considered to be a nullity in the present case.

5. In considering this question, I might refer to some of the cases cited by the learned counsel. In AIR 1947 73 (Nagpur) which decision was relied upon by Mr.

Subramaniam, it has been held that O.I, R. 10 (1) re-supposes that the institution of the suit, that is, the presentation of the plaint, is proper. When the presentation of the plaint is proper the suit cannot be treated as void. In that case, the suit was for rectification of an instrument executed in favour of one Kashinath and one Sadashiv and it was instituted in the name of Kashinath and Sadashiv as plaintiffs, but it was subsequently discovered that Sadashiv had died only 3 days prior to the institution of the suit. The sons and window of Sadashiv thereafter applied for being substituted as his legal representatives. This was allowed by the trial Court. It was held, in a civil revision application, by Niyogi, J., that the suit was properly presented so far as Kashinath was concerned and he could prosecute the suit on his own account as if he was the sole plaintiff in the case. The suit vis-a-vis Sadashiv was certainly void and his legal representatives could not be brought on record under O. 22, R. 3, Civil P.C., 1908. But O.1, R. 10 (2) was applicable to the case and hence the order of substitution was not illegal. The fact that Kashinath wrongly included the name of a dead person in his plaint did not make any difference. In [Bai Pani Vankar Vs. Madhabhai Galabhai Patel](#), Chagla, C.J, held that an effective order under O. 1. R, 10 can only be made provided there is an appeal before the Court, but if the appeal is a nullity. The appeal thus being a nullity, an order for substitution of a legal representative in place of the deceased appellant cannot be made. It is true that, in that case, it was held that no substitution could be made, but the discussion in that judgment makes it clear that, the said view was taken only because the sole appellant was dead at the time when the appeal was filed. In fact, in distinguishing the case of filed. In fact, in distinguishing the case of Alabhai Vajsurbhai v. Bhaya, Bhaya AIR 1937 Bom 401, Chagla, C.J. has observed (in para 56 of the said report) as follows:-

""Now, the Bombay case is clearly distinguishable because that was not a case of an appeal being preferred against a sole respondent who was dead at the date when the appeal was preferred. That was a case where the appeal was preferred against several respondents and the appeal was properly instituted against some of the respondents who were alive at the date when the appeal was instituted. Therefore, it could not be said that the appeal was a nullity. There was a proper and effective appeal before the Court and really the question of bringing the legal representatives of the respondents who had died before the appeal was preferred was not so much a question of substitution as a question of adding the respondents who were already before the Court, and there can be no doubt that if a suit or an appeal is effectively before the Court, the question of addition of parties is regulated by O. 1, R. 10.""similar observation are also found in the decision of a Division Bench of the Mysore High Court in C.Muttu v. Bharath Match works AIR 1964 Mys 293 . It has been observed there as follows:-

"A careful review of the decisions of the several High Courts relating to substitution of a defendant in a suit in place of the original defendant makes it clear (a) that no such substitution can be permitted in a case where there was a sole defendant, (2)

where there are more defendants than one and one of them was dead when the suit was filed, the Courts have held that the legal representatives of the deceased defendant can be brought on record subject to any question of limitation that may be raised by the legal representatives of the deceased person who were brought on record as the suit had been validly presented in so far as the living defendants are concerned". With respect, I am in full agreement with these observations.

6. As against these decisions, reliance was sought to be placed by Mr. Adhia on the decision of Narula, C.J. of the Punjab and Haryana High Court, sitting as a single Judge, in [Jogindar Singh and Others Vs. Krishan Lal and Others](#), where it was held that the question of substituting the legal representatives of only such a person under O. 22, R. 4 of Civil P.C. can arise who was alive at the time when the suit was instituted and has died during the pendency of the suit. The case of a person who had died before the institution of the suit or the appeal, and who was erroneously impleaded as a party, does not fall within the purview of O. 22, R. 4 of the Code. In my view this decision is of no assistance to Mr. Adhia at all. In fact, a perusal of the judgment makes it quite clear that the decision, setting aside the order of the lower Court directing the legal representative of some of the defendants, who were dead prior to the institution of the suit, to be brought on record, was set aside on the footing that the only real defendant in the suit was dead at the time when the suit was instituted and the learned Chief Justice has nowhere said that, this rule would be applicable to a case where there are several defendants and it could not be said that only one of them was real defendant was dead at the time of the institution of the suit.

7. In the present case it is the admitted position that some of the defendants are alive and it is not as if defendant No. 1 was the only real defendant in the suit and in such a case, in my view, it is the settled position as shown by the decisions referred to earlier, that the mere fact that one of the defendants was dead at the time of the institution of the suit does not render the suit a total nullity so that the heirs of the deceased defendant cannot be brought on record at all. It is nobody's case that the application for bringing the heirs of the deceased defendant No. 1 on record is not made bona fide. It is true that there has been some delay in making the application but as, the facts set out earlier clearly show, it was only in January 1982 that the addresses of the respondents were furnished to the plaintiff by the learned advocate for defendant No. 2 and the chamber summons has been taken out as early as 24th Feb., 1982, hence, there is no such delay as would defeat the application of the plaintiff.

8. In the result the chamber summons is made absolute in terms of prayers (a) and (b), it being ordered that the respondents be brought on record in the suit as defendants Nos. 1 (a) and 1 (b) respectively as the executrices of the last will and testament of the deceased 1st defendant and in her place and stead. Cost of the chamber summons to be costs in cause.

9. Ordered accordingly.