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**(2001) 02 AHC CK 0040**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 8368 of 1982

Chandrama Prasad Singh and Anr.

APPELLANT

Vs

First Addl. District Judge, Varanasi & Ors.

RESPONDENT

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**Date of Decision :** 16-02-2001

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 21 Rule 4, Order 22 Rule 9

**Citation :** (2001) 02 AHC CK 0040

**Hon'ble Judges :** V.M.Sahai, J

**Final Decision :** Allowed

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## **Judgement**

V.M. Sahai, J.—This writ petition has been filed by defendant/petitioner challenging the order passed by Courts below allowing application under Order 1 Rule 10 C.P.C. and impleading the heirs of deceased defendant No. 1 Baij Nath Singh in the suit.

2. The brief facts are that plaintiffs Raghunath, Jagannath and Baij Nath Singh sons of Sukkhu filed original suit No. 30 of 1973 before Munsif, Varanasi against defendants Baij Nath Singh, Chandrama Prasad Singh and Kamla Singh sons of Mahabir Singh for demolition and possession. During the pendency of the suit defendant No. 1, Baij Nath Singh died on 10111976. The plaintiff on 1841978 filed two applications, one for substitution of Jagdish Singh son of Baij Nath Singh after setting aside that abatement under Order 22 Rule 9 C.P.C. and the other application was filed under Section 5 of the Limitation Act for condoning the delay in filing the abatement and substitution application. To explain the delay it was stated that Baij Nath Singh died at Obra, District Mirzapur and the death was not known to the plaintiff prior to 1641978. The defendant in his objection filed on 1351978 disputed this fact and stated that Baij Nath Singh always lived in his village Dindaspur, Pargana, Kaswar Raja, District Varanasi where he died on 10111976. The trial Court held on 2371979 that the plaintiff had knowledge of death of deceased and the claim of plaintiff that he came to know about the death on 1641978 could not accepted. But in view of the law laid

down by a Division Bench of this Court in Khalil Ahmad and others v. Additional District Judge, Gorakhpur and another, AIR 1974 Allahabad 422, directed impleadment of legal representative of deceased defendant, in the interest of justice.

3. The defendant challenged the order passed on 23/7/1979 by civil revision No. 148 of 1979 which was allowed by District Judge on 25/4/1980 and the matter was remanded to the trial Court to pass orders in accordance with law after hearing the parties and after coming to the conclusion consider whether necessary conditions for exercise of power under Order 1 Rule 10 C.P.C. existed. The plaintiff filed another application 78C, before the trial Court that earlier substitution application filed by him maybe treated as application under Order 1 Rule 10 (2). The trial Court rejected this application on the ground that his earlier application stood rejected on 23/7/1979 and the Court in exercise of its inherent powers had directed impleadment of heirs of deceased. Since the earlier application was not pending before the trial Court, therefore, the application 78C was rejected on 23/8/1980. This order passed by trial Court became final and it was not challenged by plaintiff. Another application 85C under Order 1 Rule 10 was moved for impleading the heirs of deceased Baij Nath Singh in the suit. This application was allowed by the trial Court on 14/1/1981. The defendant challenged the order by way of civil revision No. 238 of 1981, which has been dismissed on 30/3/1982 by 1st Additional District Judge, Varanasi. The defendant/petitioner has challenged the orders passed by both the Courts below by means of this writ petition.

4. Learned Counsel for the petitioner Shri Vijay Kumar Rai holding brief of Shri Sankhata Rai has urged that the suit of the plaintiff abated due to nonsubstitution of heirs of defendant No. 1, Baij Nath Singh. The application for setting aside the abatement and substitution having been rejected by the trial Court, the Courts below could not bring the heirs of legal representative of the deceased on record by taking recourse to Order 1 Rule 10 (2) C.P.C. He placed reliance on a Full Bench decision of this Court in Smt Mahendra Kaur v. Haft z Khalil and others, 1983 ALJ1305.

5. Shri Namvar Singh learned Counsel appearing for respondent Nos. 3 to 5 has urged that the substitution application was allowed by the Courts below in view of the Division Bench decision of this Court in Khalil Ahmad's case. Subsequently, the law has been settled by the Full Bench of this Court in Smt. Mahendra Kaur (supra) and decision in Khalil Ahmad's case has been overruled. But before the decision was overruled the Courts below rightly followed the decision in Khalil Ahmad's case. He lastly urged that since the order passed by trial Court and the Revisional Court were in his favour, therefore, he could not get any opportunity to challenge the order before the Court, therefore, he submitted that the matter be left open for a fresh decision by the trial Court and for reconsideration of the substitution application and application for setting aside the abatement or he be granted permission by this Court to move a

substitution application and application for setting aside the abatement along with the application for Section 5 of the Limitation Act before the Court below otherwise his entire suit will abate and he would be left with no remedy for no fault of his.

6. The trial Court had disposed of the substitution application and application for setting aside the abatement and application under Section 5 of the Limitation Act. It did not accept the claim of the plaintiff. The order abating the suit became final. But it permitted the plaintiff to bring heirs of deceased Baij Nath Singh on

record under its inherent powers in view of the decision in Khalil Ahmad's case. The matter was remanded to the trial Court for deciding afresh about existence of conditions for exercise of power under Order 1 Rule 10. After the case was remanded by the Revisional Court the plaintiff moved an application 78C that his application for setting aside the abatement and substitution be treated as an application under Order 1 Rule 10. This application was rejected by trial Court on 23/8/1980. This order became final and the plaintiff did not challenge it by way of revision and filed another application 85 C before the trial Court for impleading Jagdish Singh son of Baij Nath Singh as heir of the deceased. This application was allowed by the trial Court on 14/1/1981 and revision was rejected by order dated 30/3/1982. The Courts below have impleaded the heir of legal representative of the deceased in the suit, under Order 1 Rule 10 (2), relying on Khalil Ahmad's case. The decision of the Division Bench in Khalil Ahmad's case has been overruled by the Full Bench of this Court in Smt. Mahendra Kaur's case. The Full Bench has held that the provisions of Order 1 Rule 10 C.P.C. enables the Court to implead necessary parties to the suit but it was not applied to a case of substitution of one party for bringing his heirs on record where due to nonsubstitution of heirs of the deceased abatement had taken place. It was held, the Court have no power under Order 1 Rule 10 (2) C.P.C. to substitute the heirs and legal representative of the deceased defendant. If such course is permitted the affect would be nullifying the consequences of abatement in cases in which the heirs were not brought on record and no explanation had been offered for not bringing the heirs on record. It further held that since there were specific provisions in the Civil Procedure Code dealing with substitution, abatement and setting aside the abatement in Order 22 Rule 4 C.P.C., therefore, the general provision of addition of party made in under Order 1 Rule 10 (2) C.P.C. would stand excluded. In view of the law laid down by the Full Bench in Smt. Mahendra Kaur's case the orders passed by Courts below bringing Jagdish Singh son of Baij Nath Singh, the defendant No. 1 on record of suit under Order 1 Rule 10 (2) C.P.C. cannot be upheld.

7. The argument of Shri Namvar Singh learned Counsel for the respondent that he did not had any opportunity to challenge the order of the Courts below cannot be accepted. The plaintiff had the first opportunity to challenge the order of trial Court dated 23/8/1979 when their applications for setting aside the abatement and substitution and the application under Section 5 of the Limitation Act stood

disposed of. And their claim that they came to know about the death of the deceased on 16/4/1978 was not accepted by the trial Court. The trial Court held that the plaintiff had knowledge of death of deceased Baij Nath Singh who died on 10/11/1976. The other occasion when the plaintiff could have challenged the order of the trial Court was when the application 78C for treating the earlier applications for setting aside the abatement and substitution to be under 3rd Order 1 Rule 10 (2) C.P.C. was rejected on 23/8/1980. This order became final and it was not challenged by the plaintiff, therefore, it cannot be accepted that plaintiff did not have any opportunity to challenge the order of the trial Court. This Court cannot disturb the finality of abatement.

8. In the result, this writ petition succeeds and is allowed. The order dated 30/3/1982 passed by 1st Additional District Judge, Varanasi Annexure 9 to the writ petition and order dated 14/1/1981 passed by VIIIth Additional Munsif, Varanasi Annexure 7 to the writ petition are quashed.

9. The parties shall bear their own costs.