

6 SCOB [2016] AD 61

APPELLATE DIVISION

Present:

Ms. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque

CIVIL PETITION FOR LEAVE TO APPEAL NO.1827 of 2009
(From the judgment and order dated 24.05.2009 passed by the High Court Division in Civil Revision No.3987 of 2008.)

Mrs. Ruksana Huq and others :Petitioners

=Versus=

A. K. Fayazul Huq (Raju) and others :Respondents

For the Petitioners : Mr. Fida M. Kamal, Senior Advocate instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For Respondent No.3 : Mr. Probir Niogi, Advocate instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

Respondent Nos.1 and 2 : Not represented.

Date of hearing : 25.02.2014.

Code of Civil Procedure, 1908

Order I rule 10(2):

Though there is no clear provision mentioning the word ‘transposition’ but order I rule 10(2) of the Code of Civil Procedure enables the courts to make such transposition, Order I rule 10(2) has empowered the courts to strike out name of any party, either plaintiff or defendant, improperly joined and also to add any persons-either as plaintiff or defendant-who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary for effectual and complete adjudication of the matter. Exercising this very power the courts can make transposition also of either of the parties of a suit or other proceeding to the other category of the parties and the courts also are doing so, and it has become a long practice now. Of course, generally, the courts will not allow transposition of defendants as plaintiffs after striking the names of the original plaintiffs or after transposing them as defendants. But in appropriate facts and circumstances-as these are in the present case-the courts should not be reluctant to make such transposition of the parties for the ends of justice or to prevent abuse of the process of the court.

...(Para 8)

J U D G M E N T

Nazmun Ara Sultana, J:

1. This Civil Petition for Leave to Appeal is directed against the judgment and order dated 24.05.2009 passed by the High Court Division in Civil Revision No.3987 of 2008 discharging the rule.

2. The necessary facts for disposal of this Civil Petition for Leave to Appeal, in short, are as follows:-

The present petitioners, as heirs and successors of late Mr. A. K. Faizul Huq filed Succession Case being No.888 of 2007 in the Court of Joint District Judge, 3rd Court, Dhaka for a certificate of succession under the Succession Act, 1925. During pendency of that proceeding the present respondent Nos.1 to 3, claiming themselves as the second wife, son and daughter of late A. K. Faizul Huq, filed an application on 26.08.2007 praying for being added as parties in that succession case. The court allowed that application vide order dated 12.11.2007 and fixed 02.03.2008 for recording evidence of both the parties. Thereafter, the court recorded the evidence of the opposite party No.1, Mariam Begum since the petitioners side was absent. However, subsequently the court allowed the prayer of the petitioners to cross-examine the opposite party's witness No.1, but without cross-examining the opposite party's witness No.1, the petitioners, on 19.06.2008, filed an application under order XXIII rule 1 of the Code of Civil Procedure praying for withdrawal of the case. At the same time the added opposite parties also filed an application for transposing them as petitioners. The court, after hearing both the parties and considering the facts and circumstances, passed the impugned order dated 11-08-2008 allowing the prayer of the opposite parties to be transposed as petitioners and rejecting the petitioners' prayer for withdrawal of the case and also transposing the petitioners as opposite parties.

3. Being aggrieved by and dissatisfied with that order of the court below the petitioners filed the above mentioned civil revision before the High Court Division and obtained rule. A Single Bench of the High Court Division ultimately, after hearing both the parties and considering the facts and circumstances, discharged that rule holding that the court below committed no illegality in rejecting the petitioners application for withdrawal of the succession case and allowing the opposite parties' prayer for being transposed as petitioners and also transposing original petitioners as opposite parties in that succession case by the impugned judgment and order. Being aggrieved, the petitioners have filed this present Civil Petition for Leave to Appeal.

4. Mr. Fida M. Kamal, the learned Senior Advocate for the leave-petitioners has made submissions to the effect that order XXIII rule 1 of the Code of Civil Procedure has provided the right to these leave-petitioners to withdraw their succession case and that the petitioners filed an application to withdraw their succession case and in that circumstances the court ought to have allowed that application for withdrawal of the succession case. The learned Advocate has argued that by rejecting the prayer of these petitioners for withdrawal of their succession case the court below committed illegality. The learned Advocate has made submissions to the effect also that the added opposite parties-who claimed themselves to be the heirs of late Mr. A. K. Faizul Huq had scope to file a fresh succession case and in the circumstances the court below had no reason to transpose the added opposite parties as petitioners in the succession case filed by the present leave-petitioners. Mr. Fida M. Kamal has advanced argument to the effect also that there is no provision in any law for transposing the opposite parties as petitioners in any case and as such the transposition of the opposite parties as petitioners in the succession case of these leave-petitioners has been illegal. The

learned Advocate has argued to the effect also that the succession case under Succession Act of 1925 being not a suit or even a miscellaneous proceeding the provisions of the Code of Civil Procedure are not applicable in this succession case and as such the impleading of the opposite parties in the succession case as per order I rule 10 of the Code of Civil Procedure also has been illegal.

5. Mr. Probir Niogi, the learned Advocate for the respondents has made submissions to the effect that there has been no violation of any provisions of any law at all in impleading the other heirs of late Mr. A. K. Faizul Huq as opposite parties in this succession case and subsequently in transposing them as petitioners in that succession case. The learned Advocate has argued that the trial court, on consideration of the facts and circumstances, rightly added the other heirs of late Mr. A. K. Faizul Huq as opposite parties in the succession case and subsequently transposed them as petitioners while the original petitioners wanted to withdraw from the said succession case and that the High Court Division, considering all these facts and circumstances, upheld the impugned order of the trial court rightly.

6. We have considered the submissions of the learned Advocates of both the sides and gone through the impugned judgment and order of the High Court Division and also that of the trial court.

7. It appears that these leave-petitioners filed the succession case without disclosing the fact that their predecessor late Mr. A. K. Faizul Huq died leaving second wife and one son and one daughter by that second wife. But when the second wife and her children came to be added as parties in that succession case these leave-petitioners did not raise any objection and consequently they were added as opposite parties. Subsequently when the court fixed the case for hearing these leave-petitioners remained absent and consequently the court took evidence of one of the added opposite parties who also, as heirs of late Mr. Faizul Hoque were claiming succession certificate. These leave-petitioners then appeared before the court and prayed for cross-examining that OPW.1 and the court allowed that prayer but ultimately the leave-petitioners did not cross-examine the OPW.1, rather they filed the application for withdrawal of the succession case. In that circumstances the court rejected the application of these leave-petitioners for withdrawal of the succession case and allowed the application of the added opposite parties to be transposed as petitioners and also transposed these leave-petitioners as opposite parties in that succession case by the order dated 11.08.2008. It appears that the High Court Division, on consideration of all these above facts and circumstances, upheld this order of the trial court holding that there has been no illegality in this order. We also find no illegality in the order dated 11.08.2008 passed by the trial court and also in the impugned judgment and order of the High Court Division upholding this order of the trial court.

8. Considering the facts and circumstances narrated above we do not accept the argument advanced from the side of the leave-petitioners that the trial court committed wrong and illegality by not allowing the leave-petitioners' prayer for withdrawal of the succession case. By the impugned order the trial court transposed these leave-petitioners as opposite parties in that succession and also transposed added opposite parties as petitioners in that succession case which, in effect, resulted in withdrawal of their succession case for these leave-petitioners. The argument of the learned Counsel for the leave-petitioners that there is no provision in law for transposing petitioner as opposite party and opposite party as petitioner in any proceeding-also is not correct. Though there is no clear provision mentioning the word 'transposition' but order I rule 10(2) of the Code of Civil Procedure enables the courts to

make such transposition, Order I rule 10(2) has empowered the courts to strike out name of any party, either plaintiff or defendant, improperly joined and also to add any persons-either as plaintiff or defendant-who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary for effectual and complete adjudication of the matter. Exercising this very power the courts can make transposition also of either of the parties of a suit or other proceeding to the other category of the parties and the courts also are doing so, and it has become a long practice now. Of course, generally, the courts will not allow transposition of defendants as plaintiffs after striking the names of the original plaintiffs or after transposing them as defendants. But in appropriate facts and circumstances-as these are in the present case-the courts should not be reluctant to make such transposition of the parties for the ends of justice or to prevent abuse of the process of the court.

9. Mr. Fida M. Kamal has advanced argument to the effect also that Order I rule 10 of the Code of Civil Procedure is not applicable in a succession case which is neither a suit nor a proceeding as mentioned in section 141 of the Code of Civil Procedure and as such the impleading of the added opposite parties in this succession case was illegal. But we do not accept this argument also of the learned Counsel. Section 141 of the Code of Civil Procedure has provided that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. A succession case, in all consideration, is a proceeding in a court of civil jurisdiction. It needs to be mentioned here that these leave-petitioners themselves also filed the application for withdrawal of the succession case as per provision of the Code of Civil Procedure.

10. However, in the circumstances narrated above the court below did not commit any wrong or injustice at all in transposing the added opposite parties as petitioners and the petitioners as opposite parties in the succession case after rejecting the petitioners application for withdrawal of that succession case. The withdrawal of the succession case, if had been allowed, these leave-petitioners would not have been benefited in any way, rather the withdrawal of this succession case would require the added opposite parties to file a fresh succession case causing abuse of the process of court.

11. However, we find no merit in this Civil Petition for Leave to Appeal and hence it is dismissed.