

Bench:  
Mr. Justice Md. Ruhul Quddus  
and  
Mr. Justice Kazi Ebadoth Hossain

Civil Rule No. 690 (F) of 2018  
(arising out of FA No.114 of 2013)

Saleha Khanam and two others  
...Petitioners

-Versus-

Shamsul Haque and others  
... Opposite parties

Mr. Dewan Abdun Naser, Advocate  
... for the petitioners

Mr. Shah Monjurul Hoque with Ms. Syeda  
Nasrin, Advocates  
...for the appellants No.1 (a)-(d)

No one appears for the respondent-opposite  
party

Judgment on 08.11.2020

*Md. Ruhul Quddus, J:*

This Rule is issued on an application filed by the petitioners for substitution of the deceased appellant Tamizul Haque, where petitioner No.1 claims herself to be the second wife of the appellant, while petitioners No. 2 and 3 his daughters with the second wife. Deceased appellant's three daughters and one son have already been substituted as appellants No. 1(a)-(d). Being the remaining successors, the present petitioners have filed this application for substitution.

The application is accompanied by two supplementary affidavits one dated 5.10.2020 and another dated 19.10.2020. Series of documents have been annexed with the application and supplementary affidavits.

The substituted appellants No. 1(a)-(d) contest the Rule by filing a counter-affidavit and supplementary counter-affidavit denying the petitioners' successorship to the deceased appellant, and challenging authenticity of the marriage registration certificate (annex-3 to the supplementary affidavit dated 05.10.2020).

Mr. Dewan Abdun Naser, learned Advocate for the petitioners submits that being the remaining legal heirs and successors of the deceased appellant Tamizul Haque, they need to be substituted as appellants No.1 (e)-(g) for protection of the estate of the deceased and also to prosecute the appeal properly. Referring to the documents annexed with the application and supplementary affidavits, Mr. Naser submits that these documents are sufficient to prove the petitioners' successorship to the deceased appellant. His son and daughters from the first wife are hatching up a conspiracy to deprive the petitioners of their lawful property, which they have inherited from the deceased appellant, which has necessitated them to move for substitution despite their four co-sharers have already been made parties.

Mr. Naser further submits that the substituted appellants have raised objection to this Rule only for the purpose of dragging the

connected appeal, whereas the petitioners' heirship/successorship is not the material issue in the connected first appeal.

Mr. Shah Monjurul Hoque, learned Advocate for the substituted appellants No. 1 (a)-(d) submits that the petitioners are not the legal heirs and successors of the deceased appellant. Mr. Hoque also challenges the authenticity of the marriage registration certificate (Annex-3) and further submits that the Marriage Registrar who issued the certificate was not the Marriage Registrar at the material time and the volume is not under his custody. The Rule obtained on false statement is liable to be discharged.

We have heard the learned Advocate and gone through the record. The original suit, out of which the connected first appeal has arisen, was for partition among the heirs and successors of late Md. Safiullah, where the deceased appellant Tamizul Haque was a defendant and his full brother Shamsul Haque (respondent No.1 herein) plaintiff. The suit was decreed, challenging which the defendant Tamizul Haque, since deceased preferred this first appeal. During pendency of the appeal, the appellant Tamizul Haque died on 24.06.2017. Thereafter, his three daughters were substituted as appellants No. 1(a)-(c) by order dated 21.01.2018. Subsequently, his son Adam Tamiji Haque was substituted as appellant No. 1(d) by order dated 15.07.2018. Lastly, his second wife and two daughters from the second wife (petitioners herein) approached this Court with the present application, whereon this Rule was issued.

Substitution of legal representative in a suit/appeal is governed by Order XXII, rule 3 of the Code of Civil Procedure which, amongst others, provides that where the sole plaintiff dies, the Court on an application made in that behalf shall cause the legal representative of the deceased to be made a party and proceed with the suit. Rule 5 of the said Order speaks of determination of the question as to legal representative and the phrase 'legal representative' is defined in section 2 (11) of the Code of Civil Procedure. The definition is quite wide and it includes any person who intermeddles with the estate of the deceased. So, an order of substitution of legal representative in a suit or appeal or in any other legal proceedings is made for limited purpose i.e only to carry on the suit/appeal/legal proceedings and it cannot have the effect of conferring any right to heirship or property of the deceased. It also does not operate as res judicata, where the question needs to be decided later on in order to resolve the controversy on merit. Therefore, where two sets of rival claimants in an appeal as in the present case are proposed to be substituted, both should get the opportunity keeping their claim of heirship open to be decided later on merit. These views lend support from number of decisions including *Daulat Ram vs Mt. Meero*, AIR 1941 Lah 142; *Suraj Mani and another vs Kishori Lal*, AIR 1976 Himachal 74; *S Charanjit Singh vs Bhartindar Singh*, AIR 1988, P&H 123.

Let us go through the application and examine the documents annexed in support of the petitioners' claim. In paragraph No. 2 of the application for substitution, the petitioners have stated on oath that

alongside the substituted appellants, they are the successors of the deceased appellant. Annex-2 series of the said application includes a *warisan sanad* issued by Munshi Kamruzzaman, Councilor of Ward No.19, Dhaka South City Corporation, which shows the appellants No. 1(a)-(d) along with the present petitioners to be the successors of the deceased appellant; a copy of the petitioner No.1's passport showing her husband *Tamizul Haque*; another copy of petitioner No.2's passport showing her parents as *Saleha Khanam* and *Tamizul Haque*. Annex-4 to the supplementary affidavit dated 05.10.2020 is a Birth Certificate, which also shows petitioner No.2's parents as *Saleha Khanam* and *Tamizul Haque*; Annex-5 thereto is her HSC certificate showing her father's name as *Tamizul Haque* while Annex-6 is the Birth Certificate of petitioner No.3 issued by the Bangladesh High Commission in London and Annex-7 is her passport, which show her parents' names as *Saleha Khanam* and *Tamizul Haque*. Annex-8 to the supplementary affidavit dated 19.10.2020 is the National ID card of petitioner No.1 which shows her husband's name as *Tamizul Haque*.

It further appears from Annexures 9-11 of the supplementary affidavit dated 19.10.2020 that appellant No.1 (d) Adam Tamiji Haque initiated a criminal case being Ramna Police Station Case No.4 dated 19.11.2018 under sections 419, 420, 467, 468, 471, 109 and 34 of the Penal Code against the present petitioners and two Councilors of Ward No.19, Dhaka South City Corporation bringing allegations of creating and forging a *warisan sanad* (Annex-2 to the application for

substitution). Ultimately an Inspector of Police investigated the case and submitted a final report with the findings that petitioner No.1 was the second wife of Tamizul Haque while petitioners No.2-3 were/are his daughters from second marriage. The concerned Metropolitan Magistrate, Dhaka by order dated 04.03.2020 accepted the final report and exonerated all the accused including the petitioners.

It does not appear that the informant has challenged the aforesaid order dated 04.03.2020 (Annex-11) in higher forum. Authenticity of the documents as referred to above except the marriage registration certificate is not challenged by the substituted appellants No. 1(a)-(d) in their counter affidavit and supplementary counter-affidavit. Despite service of notice, the respondent-opposite party does also not appear to oppose the prayer for substitution of the present petitioners.

Under the circumstances, the documents as discussed above are sufficient to establish that the petitioners alongside the substituted appellants No.1 (a)-(d) are the 'legal representatives' of the deceased appellant. It is, therefore, very much possible to decide the present application on the basis of the said documents without any further inquiry into the authenticity of the marriage registration certificate (annex-3).

Moreover, determination of heirship/successorship of the present petitioners is not the issue in the connected first appeal, but entitlement and allotment of share of the deceased appellant Tamizul

Haque and that of the plaintiff-respondent Shamsul Haque and other co-sharers. After adjudication of this appeal, if any question of partition of the property left out by the deceased appellant Tamizul Haque arises, only then the question of the petitioners' heirship will arise. At this stage the substituted appellants No. 1(a)-(d) have no reason to be aggrieved if the petitioners are substituted.

In view of the above, we find substance in the application for substitution. Accordingly, the Rule is made absolute. The application for substitution is allowed and the present petitioners (1) Saleha Khanam, (2) Farhana Haque and (3) Sonya Haque Zaman are made appellants No. 1(e), 1(f) and 1 (g) respectively in First Appeal No.114 of 2013.

The office is directed to make necessary amendment in the cause title of the memo of appeal.

*Kazi Ebadoth Hossain, J.*

I agree

*Shebo/Bo*