

Item no. 3
22.04.2025
P.A.

RVW 303 of 2024
In
SA 351 of 1995
Sima Sengupta & Anr.
-Vs-
Avik Sengupta & Ors.

Mr. Chittapriya Ghosh
Mr. Sourav Kumar
Mr. Pawan kumar Gupta
Ms. Sohini Chakraborty
Ms. Sahana Pal

...For the Petitioners

Mr. Souvik Sarkar
...for the respondent no.1

Mr. Partha Pratim Roy
Mr. Pinaki Bhattacharya
Mr. Asoke Das
Ms. Priti Dutta
...for the respondent Nos. 2-4

Mr. Subhranil Ray
... for Ms. Sudipa Ray

Mr. Sandipan Pal

...for the proforma respondent Nos.
5(a) & 8(b)

Dr. Dudra Dhar
...for Ms. Ridita Sengupta, O.P. No.7 (b)

The instant review application has been preferred by the petitioners seeking reviewing and recalling the order of transposition and order of dismissal of Appeal on the ground of non-prosecution, alleging that opposite party no.1 namely Avik Sengupta one of the Appellants adopted a *malafide* strategy whereby he surreptitiously resorted to unfair means by misleading this court in transposing the rest of the appellants to proforma respondents to establish

himself as sole appellant and five days after such transposition, he prayed for dismissal of the second appeal without having any knowledge or consent or notice to the other appellants including the substituted appellants.

It is submitted that by an order dated 24.04.2024, this court was pleased to allow three substitution applications being CAN 7 of 2017, CAN 8 of 2020 and CAN 10 of 2024 in SA No. 351 of 1995 and thereby allowed the substitution of the legal heirs of deceased original appellant no. 1,3,4 and 7 and all the substitution applications were affirmed by said O.P. No. 1 Avik Sengupta. By the same order, this court also allowed CAN 9 of 2024 filed by said Avik Sengupta and thereby the other Appellants i.e. appellant no.8 and the heirs of appellant no.1 to 5 and 7 were transposed from the array of the appellants to the category of proforma respondents. It is further submitted that the said legal heirs had no notice and infact they were unrepresented at the hearing of said transposition application.

Thereafter on 29.04.2024 the said sole appellant namely Avik Sengupta submitted that he does not want to proceed with the second appeal and as such it was dismissed for want of prosecution.

Being aggrieved by the aforesaid orders, it is submitted by the petitioners that after the said substitution, no notice was given to the substituted

legal heirs about the prayer for transposition being CAN 9 of 2024 and it was heard on the same date of substitution and for which substituted legal heirs remain unrepresented. The transposed parties had never given consent about the transposition and the parties sought to be transposed did not get opportunity to contest and protect their interest.

It is further alleged that said opposite party no.1, Avik Sengupta has taken undue advantage of the faith reposed by his brothers and sisters who had given him the responsibility to supervise the case and protect their joint interest, being the youngest among the eight brothers and sisters and unfortunately he had betrayed with such trust and thereby deceived his brothers and sisters and their family members. Infact said Avik Sengupta suddenly appeared before the court and claimed that he has only interest in the suit premises and others do not have any interest which is not correct. It is further argued that said prayer for transposition being CAN 9 of 2024 was pre-mature and in law there is no scope for an appellant to be transposed to the array of respondents, going against the provision laid down in order I rule 10 and order XXIII rule 1 A of the Code of Civil Procedure. It is specifically alleged that said Avik Sengupta is hand in glove and in collusion with the land lords who are opposite party no. 2 to 4 herein and has played fraud upon the other appellants and has resorted an unjust

action under an arrangement with the land lords and for that by allowing CAN 9 of 2024, he himself became the sole appellant/tenant and thereafter has withdrawn the second appeal in a planned manner in conspiracy with the landlord. The transposed parties/other tenants did not have any notice or knowledge of the intended withdrawal of the second appeal and no consent was given by them to such withdrawal at any point of time.

It is further argued that in his affidavit in opposition, Avik sengupta failed to provide any explanation as to how the withdrawal has served the interest of the appellants/tenants . It is further argued that Avik Sengupta made the prayer for dismissal of the appeal acting *malafide* and for some unjust enrichment, otherwise he could not have any occasion to get the second appeal dismissed. If he was not interested, he could have got his name expunged by making appropriate prayer but he did not have any authority to surreptitiously prayed for dismissal of the appeal by transposing other appellants in the category of respondents, where the interest of other appellant are also involved.

It is also alleged that the said appellants never instructed the learned Advocate to place the aforesaid appellants in the category of proforma respondent in the appeal and it is also incorrect to say that the substituted heirs have no possession or interest over

the suit property. The application for transposition being CAN 9 of 2024 filed by Mr. Avik Sengupta is a misconceived application. Accordingly the said petitioners prayed for recalling the order passed in connection with CAN 9 of 2024 as well as the order of dismissal of the second appeal passed on 29.04.2024.

Learned Counsel appearing on behalf of the opposite party no.1 as well as ld. Counsel for respondent no. 2 to 4 submits that it is the specific averment in CAN 9 of 2024 that the appellant no. 6 is only residing in the suit premises and no other appellants have any interest in the suit premises and they have been residing at their respective addresses. He further submits that in CAN 1 of 2024 and CAN 11 of 2024 the detailed dates of leaving the premises by the said appellants, except appellant no.6 are given which has not been denied. They further argued that as the predecessor in interest of the petitioners was not residing with the original tenant at the time of his death at the rented premises, the petitioners have not acquired any legal right in the suit premises as tenant in view of the definition of section 2(h) of the West Bengal Premises Tenancy Act, and therefore, the petitioners cannot be the aggrieved persons by the order dated 24.04.2024 or by the order dated 29.04.2024. They further submit that a plaintiff may be transposed to the category of the defendant by striking out his name from the plaintiff and adding him

as a defendant by amending the cause title of plaint. In support of such contention they referred the decisions of ***Bhairabendra Narayan Dev Vs. Uday Narayan Dev and others*** reported in **AIR 1924 Cal 251**.

Further contention of the opposite parties herein is that if the judgment is found to be due to alleged erroneous transposition that cannot be subject matter of review because an erroneous order may be subjected to appeal before the higher forum. They further contended that Avik Sengupta all along acted as an agent of all the appellants and from the address of the said appellants given in CAN 9 of 2024, it is clear that save and except appellant no. 6, no other have any possession or interest over the property and for which the application for transposition was filed.

They further submitted that from the affidavit affirmed by Advocate Sudipta Ray, it is clear that Avik Sengupta instructed the said Advocate appearing on behalf of the appellants that save and except Avik Sengupta no one is residing in the said premises and also not contributing anything towards the cost of repairing of the premises in question and they will not claim any interest in respect of the suit premises and therefore application for transposition of the non-interested appellants to the category of proforma respondents were made.

They further pointed out that from application for stay, it would appear that there are 23 numbers of

family members in aggregate who are not residing and opted temporary alternative accommodation and it was specifically mentioned that Mr. Avik Sengupta will have the physical possession on behalf of the successors. In fact the predecessor of the petitioners of the Review Application left the suit property in 1979 and that too during the life time of original tenant Sailendra Sengupta, since deceased.

It is further argued on their behalf that save and except the present applicants, others have accepted the transposition and accordingly it can be presumed that the instruction as given by Mr. Avik Sengupta to Advocate Mrs. Ray is correct and they have no objection in that respect and relying a judgment reported in **2019 (3) CHN 640**, the opposite parties herein contended that if an overwhelming majority of the plaintiff decides to abandon a suit, only one descending plaintiff might not get the advantage in view of sub-rule (5) of Rule I of order XXIII, which is evident from the language of the provision itself and as such when majority of the respondents accepted the transposition and there is commonality of interest between the parties involved and in absence of any proof that Avik Sngupata acted contrary to the instruction of the petitioners, the order is good in the eye of law and is not required to be interfered by this court and as such they have prayed for dismissal of review application.

Decision

Taking clue from the arguments advanced by the opposite party herein and the respondents that if it is the specific case of Mr. Avik Sengupta as well as the land lord/respondents that under section 2(h) of West Bengal Premises Tenancy Act, the petitioners herein whose predecessor allegedly left the suit premises in the year 1979 during the life time of original tenant Sailendra Sengupta, and thereby their tenancy right in the suit property had come to an end then the name of those legal heirs ought to have been expunged from the memorandum of Appeal. But it is not understandable what prompted Mr. Avik Sengupta, the alleged sole possessor cum tenant of the suit property to make a prayer for substitution and transposition. It is one thing to say that petitioners right of tenancy came to an end long back, say in the year 1979 and it is completely different thing to suggest that all the petitioners have given their implied consent to their lawyer Mrs. Ray for transposition and/or dismissal of second appeal. Moreover, when the predecessor of the present petitioner allegedly left the suit premises in the year 1979 and when according to land lord and Mr. Avik Sengupta they seized to be a tenant under section 2(h) of WBPT Act 1956, then why the application for transposition was filed in the year 2024 and why it was moved only five days before making prayer of dismissal of the second appeal.

The petitioners herein specifically denied that they never gave any such instruction for transposition and it is also apparent that on the self same date of substitution of the legal heirs of deceased original appellant no. 1,3,4 and 7, the application for transposition was also moved and got it allowed on the self same day for transposition from the category of appellants to the category of proforma respondents, even when the name of substituted legal heirs of deceased Appellants were not corrected formally by the department and accordingly there is sufficient reason to believe that the prayer for transposition was not within the notice of said substituted legal heirs and as such they can very well be deemed to be unrepresented.

There is also nothing to show that prayer for transposition was ever made known the said substituted legal heirs, nor there is anything to show that such just substituted legal heirs have given any consent to such transposition. There can hardly be any scope to say that since Appellants had a common lawyer, to represent all the appellants, so it can be presumed that the substituted legal heirs have also given consent to such transposition. It is also not the case of the opposite parties that the transposition application was served upon the aforesaid deceased four original appellants, who admittedly died long back. Accordingly it is fallacious thinking that beside

Avik Sengupta, the substituted heirs or other appellants have no locus in the Appeal because if they had no locus in the Appeal, the question of substitution or transposition might not have arisen.

Aforesaid facts and circumstances clearly smacks of *malafides* on the part of Mr. Avik Sengupta to make the prayer for transposition of the petitioners in the category of proforma respondents and five days thereafter to make a prayer before the court for dismissal of the second appeal.

Under Order XLVII, Rule 1, review is permissible on discovery of new fact or when some mistake or error is apparent on the face of the record or on any analogous ground, In my view failure of counsel to urge all the arguments supposed to be made by all other Appellants, which created an erroneous impression in the mind of the Court, that other Appellants have no arguments to offer, would be analogous to an error apparent on the face of the record.

In such view of the matter **RVW No. 303 of 2024** is allowed.

The order dated 24.04.2024 by which Connected applications being CAN 9 of 2024 was allowed is hereby recalled and consequently the order dated 29.04.2024 by which the second appeal got dismissed is also recalled.

The second appeal being **SA 351 of 2024** be restored in its file with original number after setting aside the order of dismissal dated 29.04.2024. The matter be released from this Bench and be placed before the Hon'ble the Chief justice for passing the appropriate order. All Connected applications are also accordingly disposed of.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. Ajoy Kumar Mukherjee, J.)