

31.03.2022
SL No.2
Court No.8
(gc)

**FA 10 of 2020
With
CAN 3 of 2022**

**Smt. Tapati Ghosh
Vs.
Sri Tapan Kumar Mal & Ors.**

(Via Video Conference)

Mr. Ayan Banerjee,
Mr. Soumo Chaudhury,
...for the Appellant.
Ms. Shebatee Datta,
...for the respondents.

We have heard the learned Counsel for the parties.

The plaintiff is the decree holder. The plaintiff filed a suit for specific performance of agreement alleged to have been entered into between the predecessor-in-interest of the appellant and the respondents in respect of the suit property. In the alternative, the plaintiff also prayed for preemption on the basis of the said agreement. The appellant is the vendor who purchased the property from the original owner. The suit proceeded ex parte. It appears that attempt was made by the defendant No.1 to file written statement in the year 2014. The defendant No.1/appellant seems to have filed an application for acceptance of the written statement contemporaneously. However, the learned Trial Judge dismissed the said application for acceptance of the written statement on 14th July, 2016 by a reasoned order. The reason being that since the defendant No.1 appeared on 17th February, 2010 and

thereafter on several dates ending with 17th August, 2010 and the defendant No.1 was given ample opportunity to file written statement, the show cause petition for acceptance of the written statement cannot be accepted. It is not in dispute that the civil revisional application was filed against the said order. However, before the said matter could be taken up by the learned Single Judge, the Trial Court passed the decree thereby practically making the civil revisional application infructuous. It is not in dispute that the written statement was tendered in the year 2014 but due to non-acceptance of the written statement, the petition was filed. It appears to have been filed before the submission of the Commissioner's report. The Trial Court was required to find out if any prejudice would have been caused by acceptance of the written statement as it is the duty of the Trial Court to find out the truth and to decide the matter upon giving a reasonable opportunity to the parties. It is true that the appellant was late in filing written statement, but it would be compensated by costs. The defendant No.1 has made out an arguable case in the written statement which we feel ought to have been considered by the learned Trial Court.

In view thereof, we set aside the decree passed ex parte.

We direct the Trial Court to accept the written statement upon payment of cost of Rs.10,000/- to be

paid by the appellant/defendant No.1 to the respondent/plaintiff within one week from date. In the event the said cost is paid, the Trial Court upon proof of payment of the aforesaid sum shall accept the written statement.

We would request the learned Trial Court to recast the issues and decide the matter afresh. After recasting the issues, the Trial Court shall proceed from the stage of examination-in-chief of the defendants' witness and we request the learned Trial Court to conclude the examination of the defendants' witness within eight weeks after the evidence-in-chief by the defendant No.1/appellant is filed in the Trial Court.

The Trial Court shall give an opportunity to the defendant to adduce evidence and it would be open for the plaintiff to cross-examine the witness of the defendant.

It would be open for the plaintiff to pray for recall of its witness and the Trial Court may decide the said issue in accordance with law.

We make it clear that in the event the appellant/defendant No.1 fails to appear on the date fixed, the Trial Court shall be entitled to close the evidence of the defendants' witness and may pronounce the judgment after hearing the argument of the parties.

It is needless to mention that in the event the cost is not paid, the impugned decree shall revive.

With the aforesaid observation, the appeal being FA 10 of 2020 and the application being CAN 3 of 2022 stand disposed of.

However, there shall be no order as to costs.

L.C.R. of T.S. No.7 of 2020 if received should immediately be sent down to the learned Civil Judge (Senior Division), 2nd Court, Howrah along with a copy of this order through the learned Registrar Administration (L&OM).

A copy of this order shall immediately be communicated to the learned Registrar Administration (L&OM) for doing the needful.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)