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CO No. 2381 of 2018

**Mr. Ekbal Ahmed & Ors.
versus
Sarwari Begum & Ors.**

Mr. Sandip Das,
Mr. Md. Fida Rosul,
Mr. Diptyendu Kr. Pal For the petitioners.

Affidavit of service filed by the petitioners is taken on record.

Order No.5 dated 20th January, 2018 along with Order No. 10 dated 5th July, 2018 passed by the learned Additional District Judge, 13th Court, Alipore in Ejectment Appeal No. 4 of 2017 has been assailed in the present application, filed under Article 227 of the Constitution of India.

Petitioners contended that petitioners had filed an Ejectment Suit being No. 184 of 2011 against the opposite parties/appellants and after contested hearing, the said suit was decreed on 30th May, 2017. Being aggrieved by that judgment and decree the tenant/defendant/appellant preferred the present appeal. In the said appeal, November 18, 2017 was fixed for appearance and bringing the lower court record. Owing to wrong entry in the diary, none appeared on behalf of petitioner when the matter was called on that day and as such the petitioners/respondents were directed to file

show cause on 20th January, 2018. Petitioners filed show cause on 20th January, 2018, but unfortunately at the time when the appeal was called for hearing, learned advocate was engaged in another court and for which the petitioners remain unrepresented and for which, cause shown by the respondents/plaintiffs /landlords was rejected and by the impugned order dated 20th January, 2018, the appeal is posted for *ex parte* hearing. After passing the order, the respondents/petitioners filed an application under Section 151 of the Code, explaining their cause for non-appearance, when the matter was called on for hearing but the said petition under section 151 had also been rejected by the Court below by the other order impugned dated 5.7.2018.

Mr. Sandip Das, learned advocate appearing on behalf of the petitioners submits that the Court below has failed to exercise its jurisdiction and the Court below erred in not considering the difficulties of the petitioners owing to which the petitioners remained absent when the matter was called for hearing. Moreover, by rejecting the second application under Section 151 of the Code, the Court below was erred in assuming that the petitioners' remedy is to assail the order before the higher Court and the learned court below has become *functus officio* after passing the order impugned. Learned court below was erred in holding that he has no power to recall an order under Section 151 of the Code and accordingly the

petitioners have prayed for setting aside the order impugned.

Having considered the facts and circumstances of the case, it appears that in the second application under Section 151 of the Code dated 14.03.2018, petitioners have explained on oath that their learned advocate was absent till 11.30 a.m. on that date and thereafter at about 12 noon when the matter was called on for hearing, at that relevant point of time the petitioners' advocate was busy in another court with another matter and for non-appearance to explain the cause, the show cause application was rejected and the matter is posted for *ex parte* hearing.

The aforesaid statement made on oath by the Petitioners/Respondents is worthy to be trusted as it has not been rebutted by cogent document or evidence by the opposite party herein. If that be so, before posting the appeal for *ex parte* hearing, the court below ought to have address itself to the question, whether the Respondent was in a position to engage another advocate in time to represent the respondent, when he found that his counsel was engaged in another court. If it satisfied that it was not possible for the party to engage an advocate to proceed with the appeal on that day itself, the court should have granted adjournment in favour of plaintiff/respondent, instead of refusing adjournment mechanically.

The settled principle of law is that the client should not suffer for the laches on the part of his learned advocate conducting the case. Moreover, if the order for hearing the appeal *ex parte* is set aside and the Respondent is allowed to contest the appeal the highest prejudice that may cause to the opposite party/appellant, would be that the appeal will be disposed of on merit after contested hearing and nothing more.

Considering all these, both the orders impugned i.e Order No.5 dated 20th January, 2018 and Order No. 10 dated 5th July, 2018 are hereby set aside.

The court below is directed to accept the cause shown by the petitioners and to fix a date for hearing the appeal.

As the appeal is pending since 2017, the court below is further directed to expedite the hearing of the appeal and to conclude the hearing of the appeal and pronounce judgment preferably within a period of 12 weeks from the date of communication of this order.

With these observations and direction the application being CO 2381 of 2018 stands disposed of.

Urgent photostat certified copy of the order, if applied for, be given to the parties on usual undertakings.

(Ajoy Kumar Mukherjee, J.)