

24. 08.05.2023

**C.O. 2166 of 2022**

**Sri Rasu Santra  
Vs.  
Sri Ashoke Santra & Ors.**

**Mr. Animesh Paul**

**.... For the petitioner**

**Mr. Tanmoy Mukherjee  
Mr. Souvik Das  
Mr. K.R. Ahmed  
Mr. Rudranil Das**

**...For the opposite party No. 1 to 7.**

Learned Advocates for the petitioner and learned Advocates for the opposite parties are present. Heard learned Advocates. The grievance of the petitioner against the judgement of the learned Appellate Court is that the petitioner did not get an opportunity to appear before the learned Appellate Court while the appeal was heard in terms of the order passed by this Court. By an order dated August 4, 2021 this Court in its revisional jurisdiction was passed an order disposing C.O 3431 of 2019 and CAN 11016 of 2019 by setting aside the order of the Appellate Court being order No.2 dated September 4, 2019 passed by learned District Judge at Howrah in Misc. Appeal No.154 of 2019. This Court by the said order also restrained the opposite parties/defendants by an order of injunction from demolishing the suit property during the pendency of the temporary injunction application filed in the Appellate Court.

S.G.

The petitioner pursuant to the order passed by this Court in C.O. 3431 of 2019 appeared before the Court of Appeal in Misc. Appeal No. 154 of 2019 by way of put up petition to advance the date of hearing. Pursuant to the

date fixed on 13.9.2021 the learned Appellate Court was pleased to dispose of Misc. Appeal No. 154 of 2019. Learned Advocate for the petitioner draws attention to the orders dated 10.8.2021, 13.9.2021 and 23.9.2021 of the Appellate Court. In terms of the order dated 10.8.2021, 16.12.2021 was fixed for hearing of the petition. On 13.9.2021 put up petition was filed by the petitioner/plaintiff for fixing the date of hearing in terms of the order passed by this Court. Although in the said order of Appellate Court liberty was granted to the appellants to send notice of the same along with a copy of order of this Court to the respondent in due course but the learned Appellate Court in order dated 23.9.2021 did not ensure as to whether the service of notice was effected upon the defendants. Learned Advocate for the opposite party Nos. 1 to 7 submits that it was not necessary for the plaintiff to cause service of the put up petition upon the defendant as the defendant was aware of the order passed by this Court in C.O. 3431 of 2019. Learned Advocate submits that as the petitioner defendant has not challenged the order of the Appellate Court on merits, it is open for him to make necessary application before the Appellate Court to recall the order dated 25<sup>th</sup> November, 2021 passed in Misc. Appeal No. 154 of 2019. It is admitted position that the notice of advancing the date of hearing was not communicated to the defendant/petitioner herein. Thus defendant/petitioner was not in a position to make submission on the date fixed. Although the impugned order is not challenged on merits but considering that there are certain procedural irregularity while disposing of the Misc. Appeal No. 154 of 2019, this Court is of the view that as under Article 227 of the Constitution of India necessary rectification can be made not only in case of error in law but also error of procedure, necessary orders should be passed. As it is admitted by opposite party Nos.

1 to 7 that notice of advancing date of hearing was not communicated, no fruitful purpose was served to send the matter back to the Appellate Court with liberty to the petitioner to make an application for recalling and the opposite party No. 1 to 7 to contest the same by filing objection along with relevant documents.

Thus this Court is of the view that the order passed by the learned Additional District Judge FTC –II, Howrah on 21<sup>st</sup> November, 2021 in Misc. Appeal No. 154 of 2019 should be set aside. Hence this revisional application stands disposed of. Order and judgement of Additional District Judge FTC-II, Howrah In Misc. Appeal No. 154 of 2019 dated 25<sup>th</sup> November, 2021 is set aside. The appeal is remitted back to the Learned Appellate Court to be considered and decided on merits upon hearing all the parties.

It is further made clear that as this Court while disposing of the revisional application being C.O. 3431 of 2019 restrained by order of injunction the opposite parties from demolishing the suit property during the pendency of the temporary injunction application filed in the Appellate Court, the said order shall continue till the appeal is disposed of by the learned Appellate Court.

Learned Appellate Court is requested to dispose of the appeal within three months from next date fixed. It is made clear that this Court has not gone into merits of the impugned order.

Affidavits may be filed in the mean time before Appellate Court. It is hereby clarified that put up petition to be moved to fix the date of hearing of the appeals and be served upon to the parties.

This revisional application stands disposed of.

**(Biswaroop Chowdhury, J.)**

