29.07.2022
SL No.15
Court No.8
(gc)

FA 275 of 2010
With
CAN 3 of 2011
(Old No: CAN 993 of 2011)

Arabinda Mridha & Anr.
Vs.
Madan Mohan Sarkar & Ors.

The appellants are not represented, nor any accommodation is prayed for on their behalf.

By reason of our earlier order, the L.C.R. has arrived. However, the report of the department shows that no steps have been taken by the learned Advocate for the appellants for effecting service of notice of appeal upon the respondent No.3, nor any attempt has been made to substitute the legal heirs of the respondent No.1. However, notice was served upon the respondent No.2 as recorded in our earlier order dated 29th June, 2022.

The appeal along with the connected application appeared in the Warning List of cases on 15th June, 2022 and continued to appear in the said list until it was transferred to the daily cause list of 29th June, 2022 when upon going through the record, we directed the department to call for L.C.R. and the appellants were directed to take appropriate steps for substitution.

The appellants have failed to take out any steps in this regard. We could have dismissed the appeal for non-compliance of our order dated 29th June, 2022 but having regard to the fact that the appeal is pending since 2010 and L.C.R. has arrived, we propose to dispose of the matter on the basis of the L.C.R.

The respondents are the plaintiffs in a suit for attachment and realization of a sum of Rs.1,56,500/- and mesne profits. The claim is arising out of purchase of a power tiller (Hand-tractor) from G.N.B. Credit Pvt. Ltd. on 27/10/1994. The said tractor was purchased for cultivation in the name of plaintiff No.2. The plaintiff No.2 is the son of the plaintiff No.1. Subsequently, on the basis of the representation of the defendant Nos.1 and 2, the plaintiffs agreed to buy a tractor valued at Rs.4,75,000/- on a hire purchase basis from the defendants. It was agreed that the plaintiffs would pay Rs.1.50 lacs to the defendants initially, thereafter the balance amount should be paid in instalments. The defendant Nos.1 and 2 made a representation that although Laxicon Auto Pvt. Ltd. is the manufacturer and they would arrange for the said vehicle as the defendant No.2 is the General Manager of the said Company and having regard to the fact that the plaintiffs were not in a position to immediately deposit Rs.1.50 lacs, the said amount may be paid in instalments in the account of the defendant Nos.1 and

2. It is alleged that the plaintiff No.1 deposited Rs.14,500/- on 21/09/1994 to the defendants and got receipt to that effect from Mridha Agency. From time to time, the plaintiffs paid a sum of Rs.1,56,500/- in aggregate in expectation of getting delivery of the power tiller to use for its agricultural purpose. The plaintiff No.2 subsequently wrote a letter to Laxicon Auto Pvt. Ltd., in reply to which, the said Company informed to have received only Rs.2,000/- and the rest of the amount was never paid by the said Agency to the Laxicon Auto Pvt. Ltd. In spite of demand, the defendants failed and neglected to refund the said amount or to arrange for the tractor. The defendants in the written statement alleged that the suit is bad for non-joinder and mis-joinder of necessary parties. The defendants denied all the material allegations of the plaint case. Mridha Agency works as a broker of distributor of vehicles and financers and for that gets commission and is not responsible for non-supply of tractor to the plaintiffs.

The learned Trial Judge framed several issues. All the issues were decided in favour of the plaintiffs. The plaintiffs were able to prove that the plaintiffs had paid a sum of Rs.1,56,500/- in aggregate. The learned Trial Judge was correct in holding that there is a failure of consideration of the Agency and is bound to refund the said amount.

We have gone through the L.C.R. and the evidence adduced by the parties in this regard. It was admitted during evidence that a sum of Rs.83,000/- was paid to Mridha Agency for purchasing a vehicle. The defence witnesses could not prove the refund of a sum of Rs.83,000/- and Rs.50,000/- to the plaintiffs. There are discrepancies with regard to the refund of amount to the plaintiffs. Exhibits A and B showing refund of the said amount was disbelieved by the learned Trial Judge and we think on cogent ground. The relevant portion of the reasoning is stated below:-

> *"It appears from the Ext. A, Angikarpatra dated 26.11.95, that the stamp paper was collected on 14.6.95 in the name of Mridha Agency. It is curious to note why the said Angikarpatra has been executed about six months later of purchasing the stamp paper? Why the stamp paper was purchased in the name of Mridha Agency and not in the name of Madan Mohan Sarkar, as Madan Mohan Sarkar gives the Angikarpatra to Mridha Agency? Why the signature of Madan Mohan Sarkar does not appear just underneath the completion of the writings? I find herein that the best witness is the Defendant No.3 Rani Mridha who has not been tendered before this Court to say the clear picture about the incident. D.W.3 is the chance witness of the Ext. B. D.W.s 2 & 3 do not know the contents of the exhibits. I find herein that the contents of the Exts. A & B have not been proved by the defendants."*

The defendant No.3 who could have been the best witness to prove the contents of Exhibits A and B, never appeared to prove the contents of the said documents.

On such consideration, we are in agreement that defendants/respondents failed to refund the money.

Consequently, the appeal fails.

Hence, the appeal and the connected application stand disposed of.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Siddhartha Roy Chowdhury, J.) **(Soumen Sen, J.)**