

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 244/2018**

% **12th March, 2018**

LUCKNOW MEDICAL AGENCIES Appellant

Through: Mr. V.K.Mishra, Advocate.

versus

ARJUN LAL & ORS. Respondents

Through: Ms. Shashi Gupta, Adv. for Mr.
Mukesh Gupta, standing
counsel for R-3.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 9329/2018 (delay of 98 days in re-filing)

For the reasons stated in the application, delay in re-filing is
condoned.

CM stands disposed of.

RFA 244/2018

1. This Regular First Appeal is filed under Section 96 of the
Code Of Civil Procedure, CPC by the plaintiff in the suit impugning

the judgment of the Trial Court dated 31.7.2017 by which the trial court has dismissed the suit for recovery of damages of Rs.30,44,433.00/- filed by the appellant/plaintiff against a total of three defendants. Defendant no.1/Mr. Arjun Lal was the main contesting defendant and in whose premises a fire had occurred. Defendant no.2 was the owner of the premises in which the defendant no.1 was the tenant. Defendant no.3 is the Municipal Corporation of Delhi. The three defendants are also the three respondents in this appeal.

2. Appellant/plaintiff filed the subject suit pleading that the appellant/plaintiff was a tenant in the first floor of the property bearing no.60A, Central Market, Lajpat Nagar, New Delhi belonging to the respondent no.2/defendant no.2. The respondent no.1/defendant no.1 was a tenant in the ground-floor and mezzanine floor of the same property. The respondent no.1/defendant no.1 in his tenanted premises was besides running his business of pastry/bakery shop. In the mezzanine floor the respondent no.1/defendant no.1 was running a factory for manufacturing of bakery products. In the night of 27.4.1995 a fire broke out in the tenanted premises of the respondent

no.1/defendant no.1. As a result of the fire, there took place destruction of the drugs worth lacs of rupees of the appellant/plaintiff stored in the tenanted premises. Appellant/plaintiff pleads that respondent no.1/defendant no.1 was illegally carrying on a factory for manufacturing of the bakery products without any license of respondent no.3/defendant no.3 who failed to perform its duty. The subject suit was therefore filed pleading that respondent nos.1 and 2/defendant nos. 1 and 2 are jointly and severely liable to pay the suit amount of Rs. 30,44,433.00/- under the different heads of loss of material, loss of fixtures, loss of profit, compensation for mental torture etc. appellant/plaintiff served a legal notice dated 10.4.1998 upon the respondent no.1/defendant no.1 but since respondent no.1/defendant no.1 did not pay the amount therefore the subject suit came to be filed.

3. The suit was contested by the respondent no.1/defendant no.1 and he pleaded that he was not running on any factory for manufacturing bakery products and that he was simply selling bakery products in the premises belonging to the respondent no.2/defendant no.2 and tenanted to the respondent no.1/defendant no. 1. Respondent

no.1/defendant no.1 also denied his negligence as alleged by the appellant/plaintiff and pleaded that the fire department had reported that the fire took place on account of electric short circuit and not because of any negligence on the part of the respondent no.1/defendant no.1. It was also pleaded by the respondent no.1/defendant no.1 that the appellant/plaintiff has filed the suit concealing the fact that he has already received the entire compensation from the insurance company. Suit was therefore prayed to be dismissed.

4. After pleadings were complete the following issues were framed by the trial court:-

“(1) Whether the Defendant no.1 is responsible for fire breaking in the suit premises situated at 60-A, Central Market, Lajpat Nagar, New Delhi? OPP

(2) Whether Defendant no.1 is running any factory from the mezzanine floor situated in the suit premises at the relevant time? OPP

(3) Whether the plaintiff has already been compensated by the Insurance Company for the loss occurred due to the fire and if so, whether the present claim?

(4) Whether Mr. Ramesh Kumar Gupta is competent and authorized to sign and verify the pleadings and institute the suit? OPP

(5) Relief”

5. Trial court has dismissed the suit by holding that respondent no.1/defendant no.1 could not be said to be guilty of any tort because fire had broken out at night at around 10 PM when there was no one in the building. None of the witnesses of the appellant/plaintiff were witnesses present in the property when the fire broke out. Trial court also notes that the probable cause of the fire as per the fire department is reported as an electric short circuit. An FIR 276/1995 under Section 436 Cr. P.C after investigation was filed as an untraced report. Trial court has also referred to the fact that the three witnesses of the appellant/plaintiff were the employees of the appellant/plaintiff and not independent witnesses and the appellant/plaintiff failed to lead evidence of any other occupant of the building, and which independent witnesses deposition could have weight that an illegal factory was being run by the respondent no.1/defendant no.1.

6. Trial court has also held the suit to be time barred by holding that the fire took place on 27.4.1995 but the suit was filed on 20.7.1998 ie after three years period of limitation under Article 113 of the Limitation Act, 1963.

7. Trial court has also dismissed the suit by observing that any loss suffered by the appellant/plaintiff has already been recovered by the appellant/plaintiff from the insurance company and with respect to which issue no.3 has been framed and this thus decided in favour of the respondent no.1/defendant no. 1.

8. So far as the trial court dismissing the suit as barred by limitation is concerned, I agree with the counsel for the appellant/plaintiff that this finding is wrong because the suit was filed, as per the endorsement made by the Registry on 27.4.1998 i.e. the suit was filed on the last date of limitation of three years period. Therefore, the finding of the trial court is set aside that the suit had to be dismissed as being barred by limitation. This, however, will not change the final conclusion of the judgment as discussed below.

9. In my opinion, so far as issue of appellant/plaintiff proving the running of a factory by the respondent no. 1/defendant no. 1 in the mezzanine floor is concerned, I completely agree with the discussion, reasoning and conclusion of the trial court because except self-serving statements of the employees of the appellant/plaintiff there was no independent evidence led, much less documentary

evidence, that the respondent no. 1/defendant no. 1 was carrying on a factory at the mezzanine floor of the subject premises. Learned counsel for the appellant/plaintiff sought to draw the attention of this Court to the statement of PW-4 Head Constable Ratan Giri from the office of DCP Licensing recorded on 20.9.2006 but this statement of PW-4 does not show that the license granted to the respondent no.1/defendant no.1 was for a factory and not for running of a bakery shop. Therefore, there is nothing on record either in the form of documentary evidence or of the evidence of the PW-4 that the respondent no.1/defendant no.1 was carrying on a factory for manufacturing of bakery products in the mezzanine floor of the subject property.

10. I may also note that the trial court has found issue no.3 against the appellant/plaintiff and it has held that there is no dispute that the appellant/plaintiff had taken an insurance policy covering the loss by fire, and that the appellant/plaintiff has admittedly recovered the amounts from the insurance company. This is stated in the first line of para 10 of the impugned judgment.

11. The relevant observations of the trial court holding that the appellant/plaintiff had failed to prove the tortious negligence of the respondent no.1/defendant no.1 are paras 8 and 9 of the impugned judgment and these paras read as under:-

“8. The plaintiff alleges that the defendant no.1 was using the premises as a factory for the manufacture of bakery products unauthorizedly and for the purpose had kept gas cylinders on the mezzanine floor alongwith other combustible material used in preparation of the products as in ghee and oil and that the fire broke out into the mezzanine floor where the gas cylinders were kept which got burst and the presence of the other inflammable material on the mezzanine floor aggravated the fire which spread to the first floor and rest of the building and could be overpowered after six hours of fire fighting. The plaintiff alleges that because of the bakery products being manufactured obnoxious odours and gases emanating from the premises used to disturb the neighborhood, including the plaintiffs employees managing the store on the first floor. The defendant is in occupation since 1982 and the fire broke in the intervening night of 24-25th April, 1995. If the defendant was a manufacturer of bakery products and to the knowledge of the plaintiff unauthorizedly it is a highly improbable circumstance that the plaintiff never agitated the grievance before any authority or sent any written communiqué/notice regarding the nuisance being suffered by the plaintiff as a co-occupant of the building due to illegal activity carried on by the Defendant no.1 for over a decades. The second floor is in the occupation of the owners of the building. There is no evidence of oral or written protest lodged with the landlord/owners of the building for stopping the unauthorized user. The knowledge of the fact that the defendant no.1 was running a factory, had kept gas cylinders on the mezzanine floor and was manufacturing bakery products from the mezzanine floor is based on the heat being generated and the obnoxious gases emanating. The partner of the plaintiff firm deposing as PW3 has admitted that he never saw the premises of the defendant from the inside with his own eyes. The relevant portion of the cross examination is reproduced hereunder:-

“I had never seen the premises of the defendant no.1 from inside personally but I have seen the premises from outside number of times as there is a common staircase for premises of defendant no.1 and mine.”

The witness does not depose to the effect that he had seen the gas cylinders or the oven or ghee and oil being kept/stored on the mezzanine floor. The plaintiff has examined there of its employees to prove the existence of gas cylinders and inflammable material and the manufacturing of the bakery products at the mezzanine floor of the property as is the contention of the plaintiff. The employees of the plaintiff have tendered their affidavits in evidence along similar lines as PW3. The employees of the plaintiff examined as PW4, PW5 and PW6 have in their deposition in chief for the first time introduced the new fact that the staircase leading to the first floor and an opening into the mezzanine floor also. I shall reproduced the deposition on oath verbatim hereunder:-

“I used to see about 10 to 12 persons working in the mezzanine floor for preparation of the eating materials.”

The partner of the plaintiff makes no such deposition to the effect that the stairs leading upto the first/second floor also opened into the mezzanine floor. The defendant as DW1 had deposed that there was a hold in the roof through which stair lead upto the mezzanine floor and the main staircase was not used by the defendant as the user was not permitted by the landlord and the only access to the mezzanine floor was through this opening which was got constructed by the defendant no.2 before letting out the same to the defendant no.1 and the defendant no.1 has constructed the stairs at his own cost and expense. There is no site plan filed to show that the stairs leading to the first floor plus second floor also opened into the mezzanine floor. Even from the opening what the witness depose to have seen are employees of the defendant no: 1 working for preparation of the eating material. In the course of cross examination the PW5 to PW7 have deposed as follows:-

“I never entered into the Mezzanine floor of 60-A, Central Market, Lajpat Nagar. (VOL. However I saw the said mezzanine floor from the door as I also used to use the same passage...”

What is peculiar about the deposition of PW5 to PW7 is that in their cross examination they make exactly the same volunteer statements in the course of their cross examination reiterating in a parrot like manner. Their depositions are rendered circumspect, as PW3 nowhere introduces the fact that the staircase to the First Floor had an opening at the mezzanine floor also and the employees of the plaintiff had seen the employees of the defendant no: 1 preparing eatables at the mezzanine floor. The building had several occupants, the plaintiff did not examine any independent witness who could have affirmed that such unauthorized and potentially hazardous activity was being carried out by the defendant no: 1 at the mezzanine floor. The defendant no: 1 denies that the mezzanine floor was a factory for preparing / manufacturing the eatables.

It is the case of the defendant no: 1 that the defendant no: 1 used to procure the eatables from his brother who runs a shop in Sarojini Nagar Market and was storing the eatables in the mezzanine floor till 1991 and after 1991 eatables were being prepared by the defendant no: 1 from the premises bearing no: 91-B, Amrit Puri, East of Kailash, Garhi, New Delhi, against license issued for the purpose and Mezzanine floor was used for storing of the eatables. In the course of cross examination no suggestion is put to DW1 that the stairs had an opening in the Mezzanine floor, or that the floor above used to be overheated and strong smells used to come from the mezzanine floor which was objected to by the plaintiff several times orally or that gas cylinder was kept at the mezzanine floor which had exploded or that ghee / oil and other inflammable material was kept alongwith the gas cylinder on the mezzanine floor.

9. It is also the case of the plaintiffs that the fire broke out from the mezzanine floor, as the gas cylinder on the mezzanine floor exploded and the fire spread to the first floor and other parts of the building. Admittedly the fire broke out at around 10.00 PM in the night when the market was closed for the day and there was no one in the building. DW2 or any of the employees of the plaintiff examined as PW5 to PW7, did not see the fire start. An anonymous telephone call was received at the police station-Lajpat Nagar reporting the fire in the market of Lajpat and when the police reached the spot the defendants shop was on fire. Telephonic information was also received at the fire station. The incident report of the fire station describes the places of incident as follows:

“Fire was in 5 number shops and in one medical store in building no: 60-A central market-Lajpat Nagar, New Delhi.”

The probable cause of the fire is recorded as “electric short circuit”. The FIR 276/95, u/s 436 Cr.P.C after investigation filed an “untraced report” as the fire as pert the Delhi Fire Service was caused by electric short circuit. There is no report of any gas cylinder bursting and causing widespread damage and distruction. There is absolutely no material to arrive at a conclusion that the first that broke out on the ground floor of property bearing no: 60, 60-A, Lajpat Nagar, New Delhi, was due to any act of negligence the defendant no. 1 may be held to be liable only for a breach of legal duty, or want of due care, and in the case at hand any negligent act which was the direct cause of the fire. In the absence of froof of any such breach or want of due care or any negligent act or omission which caused the fire, the defendant can be fastened with no liability. I find that the claim of the plaintiff has no legs to stand on. It is not established on the strength of oral and documentary evidence that defendant no: 1 was running any factory from the mezzanine floor situated in the suit premises as on 27.04.1995, the day when the fire broke out. Issue no: 2 is decided against the plaintiff and in favour of the defendant

no: 1. The plaintiff has failed to prove that it is defendant no.1 who is responsible by its acts and omissions for fire breaking out in the suit premises situated at 60-A, Central Market, Lajpat Nagar, New Delhi. Issue no.1 is, therefore, answered against the plaintiff and in favour of the defendant no.1.”

12. As regards the appellant/plaintiff receiving the amount from the insurance company, this is recorded in para 10 of the impugned judgment and this para 10 reads as under:-

“10. The plaintiff has admitted to have received compensation against two insurance policies in lieu of the loss of goods and property suffered due to the fire. In the event that the plaintiff was able to establish that it was due to the negligence of the defendant no.1 that the fire broke out and escaped from the premises of the defendant no.1 to the fire floor of the property in occupation of the plaintiff, the defendant no.1 would have been liable to compensate the plaintiff for the loss and injury occasioned due to negligence of the defendant no.1. A tort consists of some act done by a person which causes injury to another towards compensation of which damages may be claimed against the tortfeaser. Tortious liability arises from breach of duty and such duty is towards persons generally as it does not arise out of contract entered into between two or more parties. The fire that broke out on the night of 27.04.1995 at shop no.60-60A, Lajpat Nagar, New Delhi was an inevitable accident not capable of being avoided by the exercise of ordinary care and caution and certainly it was not caused intentionally by the defendant no.1. The cause as ascertained by the fire department and in the police report is electric short circuit, there is no evidence that the defendant no.1 was consuming electricity beyond the sanctioned load/capacity. The electric short circuit occurred when the premises were shut down for the day as the markets were closed before 10.00 PM in the night. The plaintiff is, therefore, not entitled to recover any compensation for the loss and injury suffered due to the fire break out in the premises bearing no.60-60A, Lajpat Nagar, New Delhi on 27.04.1995 due to electric short circuit from the defendant no.1. Issue no.3 is, therefore, answered in the manner that the plaintiff has received compensation for the loss of property suffered from the insurance companies, however, in itself this does not render the suit for damages not maintainable. The plaintiff is held not entitled to recover damages/compensation or loss/damage/injury to property suffered due to the fire that broke out on 27.04.1995 in the premises bearing no.60-60A,

Lajpat Nagar, New Delhi as the plaintiff has failed to establish that the defendant no.1 is responsible for the fire breaking in the suit premises situated at 60-60A, Lajpat Nagar, New Delhi. Issue no.4 was not pressed in the course of arguments. The suit for damages is instituted by the plaintiff partnership firm through its partner. Issue no.4 is, therefore, decided in favour of the plaintiff and against the defendants."

13. Section 41 of the Indian Contract Act, 1872 provides that if a person who is entitled to a particular amount from one person when this amount is received from a third person, then the liability of the promisor under the contract stands discharged. Section 41 of the Indian contract Act has also been relied upon by the Supreme Court in the judgment in the case of *Lala Kapur Chand Godha and Others vs. Mir Nawab Himayat Ali Khan Azamjah AIR 1963 SC 250* for holding that if a party to a contract receives the consideration under the contract, instead of from the promisor under a contract, from another third person, then even in such circumstances the liability of the promisor of the contract would stand discharged. In the present case, no doubt the case of the appellant/plaintiff is not based on contractual liability but on tortious negligence/liability of the respondent no.1/defendant no.1 however the principle of law is that a person will be compensated for loss only for once and not twice. Therefore, once the

appellant/plaintiff has been compensated for his loss by receiving the amount under the insurance policy, the principle contained in Section 41 of the Indian Contract Act if not the section itself, will come into play and therefore the trial court has committed no illegality in observing in para 10 of the impugned judgment that appellant/plaintiff has received the amount of loss suffered from insurance company and therefore he was not entitled to money decree in the subject suit.

14. Of course, all the loss as claimed by the appellant/plaintiff in the suit is not covered by the insurance policy because it is seen that appellant/plaintiff has also claimed loss of profit as also compensation for mental agony/torture. However so far as mental agony and torture claim of Rs.5 lacs is concerned, the same cannot be granted as it has already been held by the trial court and concurred by this Court that the appellant/plaintiff has failed to prove that the fire occurred on account of the negligence of the respondent no.1/defendant no.1 and fire had occurred on account of short circuit of wires at night. On the aspect of loss of gross profit is concerned, it is seen that the appellant/plaintiff has only filed his statement of account as Ex.PW3/6, but a reference to the statement of account

shows that it is not in any manner an audited statement of account which was filed with the income tax returns with respect to the profit earned from the value of the goods/drugs of the appellant/plaintiff lying in the subject premises. Once no income tax returns have been filed by the appellant/plaintiff to show the profit margin, therefore this Court cannot grant any damages for any loss of profit besides also as discussed above that negligence of respondent no.1/defendant no. 1 has not been proved. At this stage, I would like to state that the appellant/plaintiff had also claimed amounts which was not paid by the insurance company for value of goods burnt in the fire, however if the appellant/plaintiff could not prove before the insurance company the value of goods now claimed, and the insurance company paid a particular amount for loss of value of goods destroyed, obviously therefore in the absence of any additional/further evidence, as to how appellant/plaintiff should get amount in addition to the amount paid by the insurance company towards value of goods, cannot successfully prayed seeking a decree for the amount of Rs.8,81,547/- with respect to goods lost in fire.

14. There is no merit in the appeal. Dismissed.

MARCH 12, 2018

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VALMIKI J. MEHTA, J