

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

%

Date of decision: 22nd November, 2013

+

RFA 169/2005

M/S INDIAN AIRLINES LTD.

.... Appellant

Through: Mr. Sanjay Gupta & Mr. Tanmaya
Nirmal, Advs.

Versus

CAPT. A.V. ARORA

....Respondent

Through: Mr. Y.P. Rao & Mr. Anil Kumar,
Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 17th November, 2004 of the Court of the Addl. District Judge of dismissal of Suit No.295/2003 filed by the appellant for recovery of Rs.12,55,668/- with interest from the respondent/defendant.
2. The appeal was admitted for hearing and the Trial Court record requisitioned. The counsel for the parties have been heard.
3. The appellant/plaintiff on 8th August, 2001 instituted the suit from which this appeal arises, pleading:-

- (a). that the respondent/defendant retired from employment of the appellant/plaintiff on 29th February, 2000 as Manager (Flight Safety);
- (b). that while the respondent/defendant was working with the appellant/plaintiff as a Commander, he was, in a routine medical examination on 10th June, 1994, found temporarily medically unfit and was grounded with effect from the same day;
- (c). that the respondent/defendant being a grounded pilot, could not undertake flying duties and as such he was assigned simulator instructional work at Central Training Establishment, Hyderabad and was imparting the said training till 20th February, 1997;
- (d). that as a grounded pilot, the respondent/defendant in addition to his salary, was entitled to be paid simulator allowance as per the appellant/plaintiff's Memo dated 23rd December, 1994 for the number of hours he imparted simulator training between January, 1996 to 20th February, 1997 and for the instructional work undertaken by him between 10th June, 1994 and 31st

December, 1995 he was to be paid instructor's allowance in terms of Memo dated 16th July, 1993;

- (e). that though the respondent/defendant was paid instructor's allowance for the period 10th June, 1994 till 31st December, 1995 but the simulator allowance could not be paid to the respondent/defendant for the period w.e.f. January, 1996 till 20th February, 1997 for want of his fitness slab on the basis whereof the simulator allowance was to be paid.
- (f). that on 10th August, 1998 the respondent/defendant was paid a sum of Rs.14,43,733/- towards simulator allowance for the period January, 1996 to February, 1997;
- (g). that though the simulator allowance was payable as per Memo dated 23rd December, 1994, the same was erroneously determined and paid on the basis of rates provided in the Indian Commercial Pilot's Association (ICPA) Settlement effective from January, 1996 which were applicable only to flying pilots and not to grounded pilots;
- (h). that under the ICPA Settlement of 1996 any pilot undertaking training duties as trainer on a simulator was to be paid 25%

more than his applicable hourly flying allowance as laid down in the said Settlement;

- (i). that flying allowance is to be paid only to flying pilots and not to grounded pilots;
- (j). thus the rates contained in the ICPA Settlement which were not applicable to the respondent/defendant, being a grounded pilot, were erroneously applied to him;
- (k). resultantly the respondent/defendant, instead of being paid Rs.1,41,000/-, was paid Rs.14,43,733/- i.e. Rs.13,02,733/- were paid in excess to him;
- (l). that the respondent/defendant was declared permanently medically unfit on 27th January, 1997 and thus ceased to be on the rolls of the appellant/plaintiff;
- (m). that on 3rd December, 1997 the respondent/defendant applied for a ground job and was appointed w.e.f. 18th January, 1999;
- (n). that the respondent/defendant had failed to refund the excess amount so received by him inspite of demand and thus the payment of his salary w.e.f. December, 1999 to February, 2000 when the respondent/defendant retired, was stopped;

- (o). that the respondent/defendant was paid retiral benefits in the sum of Rs.18,01,111.68p;
- (p). that the respondent/defendant filed Civil Writ Petition No.449/2000 in this Court challenging the withholding of his salary and in compliance with the orders in the said writ petition, a sum of Rs.15,690/- was released to the respondent/defendant while adjusting the balance salary of Rs.47,065/- towards excess payment of Rs.13,02,733/-, leaving a sum of Rs.12,55,668/- recoverable from the respondent/defendant; and,
- (q). that inclusive of interest at 18% per annum for the period prior to institution of the suit, the suit from which this appeal arises, for recovery of Rs.18,89,608.26p was filed.

4. The respondent/defendant contested the suit, by filing a written statement, *inter alia* on the grounds:-

- (i). that the respondent/defendant was a check pilot/instructor even before being declared temporarily medically unfit on 10th June, 1994 and he continued performing the duties as a check pilot/instructor till 20th February, 1997;

- (ii). that pilots are one single category of workmen and it makes no difference whether they are entrusted with the flying duties or ground duties, assignment whereof depends upon the requirement of the appellant/plaintiff;
- (iii). it is not as if only the grounded pilots are assigned the job of giving training to the new pilots;
- (iv). that there is thus no reason why a different allowance is payable to flying pilots;
- (v). flying allowance is only a nomenclature given to emoluments which were being given earlier under different heads such as meal allowance, special traveling allowance, light refreshment allowance/ entertainment allowance, layover / stay allowance etc. under Memo dated 23rd December, 1994 and subsequently the ICPA settlement was signed on 26th January, 1996 in which it was decided that such allowances will be stopped and a flying allowance will be paid at the rates mentioned therein;
- (vi). denying that any excess payment had been made;
- (vii). that the appellant/plaintiff had admittedly not paid the simulator allowance to the respondent/defendant for the period between

January, 1996 to 20th February, 1997 till August, 1998 because the appellant/plaintiff wanted to consider and decide the rate at which the simulator allowance was payable; it was now not open to the appellant/plaintiff to re-open the issue;

(viii). for giving training on a simulator also, vast flying experience is required and it is for this reason only that under the Settlement aforesaid the rate of flying allowance was made dependent upon the numbers of years of experience of a pilot;

(ix). that as far as simulator training is concerned, there is no difference between flying pilot or a grounded pilot;

(x). that the appellant/plaintiff had made payment on the same rates to one Flight Engineer Mr. A.K. Sethi also when he was temporarily grounded; and,

(xi). that the said suit was a counterblast to the writ petition filed by the respondent/defendant which was then still pending.

5. The appellant/plaintiff filed a replication denying the contents of the written statement and reiterating its case. No specific reply was given to the plea in the written statement, of payment on the same rates to Flight Engineer Mr. A.K. Sethi who was also temporarily grounded.

6. On the pleadings aforesaid, the following issues were framed in the suit on 19th January, 2004:-

- “i). Whether the plaintiff is entitled to recover a sum of Rs.14,43,733/- as excess payment made to the defendant during his service period? OPP*
- ii). Whether the suit of the plaintiff is barred by limitation? OPD*
- iii). Whether the plaintiff is entitled to claim interest on the above amount if so, at what rate and for what period? OPP*
- iv). Relief.”*

7. Both parties examined one witness each.

8. The learned Addl. District Judge has vide impugned judgment dismissed the suit of the appellant/plaintiff, finding/observing/holding:-

- (a). that the plea of the appellant/plaintiff that flying allowance is payable only to flying pilots and not to grounded pilots who impart simulator training was devoid of any merit because Clause 8 (vii) of the Memorandum of Settlement dated 11th November, 1993 as under:-

“Flying Allowance, Special Allowance and Experience Allowance will be payable for all domestic fights – scheduled, non-scheduled, charter ferry, test flights. It will also be payable to Training Captains (Check Pilot/Instructor/Examiner) for carrying out instructional flights and check flights on

aircraft or simulator subject to such maximum payment as may be specified”,

provided for payment of flying allowance to check pilot/instructor/examiner for carrying on instructional flights on aircrafts or even ‘on simulator’;

- (b). that the aforesaid Settlement dated 11th November, 1993 was only partly modified by Memorandum of Settlement dated 26th January, 1996, Clause 21 (vi) whereof specifically provided that existing benefits/obligations/agreements/settlements shall continue unaffected except to the extent modified; thus the Settlement dated 11th November, 1993 continued to hold force and since Clause 8 supra thereof had not been modified, it continued to hold force;
- (c). that payment had been made to the respondent/defendant after about 2½ years, after examination and approval at various levels and it did not lie in the mouth of the appellant/plaintiff to allege that payment was erroneously made; thus even equity did not demand such directions to be given to the respondent/defendant to return the amount; and,

(d). the suit itself was filed when nearly three years from 10th August, 1998 were about to lapse.

Resultantly the suit was dismissed.

9. On enquiry as to the fate of the Civil Writ Petition No.449/2000 supra, the counsels inform that the same was listed on 18th November, 2013 and has been disposed of giving liberty to the respondent/defendant, who is the petitioner therein, to apply for revival thereof depending upon the outcome of the present appeal. It is stated that some claims of the respondent/defendant therein may still require adjudication, if the present appeal is dismissed.

10. Though in my view the writ petition as well as this appeal ought to have been considered by the same Bench but the writ petition having been disposed of, that is now not possible.

11. The counsel for the appellant/plaintiff has invited attention to the printed receipt dated 10th August, 1998 signed by the respondent/defendant of full and final settlement of his final settlement dues from the appellant/plaintiff wherein also the respondent/defendant had agreed that in case there was an excess payment of final settlement dues to him due to any reason revealed at a later stage, he would refund the same and also

authorizing the appellant/plaintiff to adjust the same from his provident fund dues. The counsel is however unable to tell when the provident fund of the respondent/defendant was released and as to why, if the excess payment had been detected by then, the same was not recovered from the provident fund, except for stating that it was paid as per the directions in the writ petition.

12. The counsel for the appellant/plaintiff has invited attention to Clause 12 of the 26th January, 1996 Settlement providing for payment of hourly flying allowance to pilots and Clause 14 thereof providing for payment of 25% more than applicable hourly flying allowance to a pilot undertaking training duties as trainer on a simulator/aircraft, instead of simulator allowance. He has also invited attention to the Memo dated 23rd December, 1994 providing for payment of a simulator allowance of Rs.400/- each day to flying or medically grounded pilots for imparting simulator instructional works and further providing that if the pilot instructor has on the same date done flying as well as imparted training on simulator, he will be paid simulator allowance of Rs.400/- in addition to the applicable flying allowance. He has thus contended that flying allowance is not applicable to imparting training on simulator.

13. Per contra, the counsel for the respondent/defendant has contended that as long as an employee is a pilot, he is entitled to a flying allowance, whether actually flying or not and the rate of such flying allowance is dependent upon the number of years of experience of the pilot. However upon it being enquired from him as to for how many hours of flying such flying allowance is to be paid to a pilot who has not actually flown, no answer is forthcoming.

14. The counsel for the respondent/defendant has otherwise reiterated the same argument which was accepted by the learned Addl. District Judge i.e. of, under the 11th November, 1993 Settlement the flying allowance being payable for carrying out instructional flights and check flights on aircraft or simulator and the said part being not modified under 26th January, 1996 Settlement. The counsel for the respondent/defendant has also referred to the Memo dated 27th February, 1996 issued in pursuance to the Settlement dated 26th January, 1996 to show that with the introduction of payment of flying allowance/productivity allowance w.e.f. 1st January, 1996, the earlier prevalent meal allowance, special traveling allowance, entertainment allowance, layover allowance were did away with.

15. I am unable to accept that flying allowance is payable to all pilots employed by the appellant/plaintiff, irrespective of whether they fly or not. If that were to be so, there was no need for the 11th November, 1993 as well as the 26th January, 1996 Settlements to provide for the hourly rate of flying allowance. In that event, the rate prescribed would have been monthly. Moreover, if the quantum of flying allowance was not dependent upon the number of hours of flying, there would have been no need or occasion for providing an hourly rate. It is for this reason only that no answer has been forthcoming from the counsel for the respondent/defendant, of the basis on which flying allowance is to be paid to a pilot who has not flown.

16. As far as the reliance placed by the counsel for the respondent/defendant on Clause 8 (vii) supra of the 11th November, 1993 Settlement, and which argument was accepted by the learned Addl. District Judge, is concerned, I find merit in the contention of the counsel for the appellant/plaintiff that the same cannot be read as providing for payment of flying allowance to non-flying pilots as well. The counsel for the appellant/plaintiff has explained that the reason behind providing for payment for carrying out instructional flights and check flights on aircraft or simulator at the same rates as flying allowance was to prevent the pilots

from choosing flying over simulator training, to the detriment of new pilots in need of training. The purport thereof cannot be to make payable to a pilot, not fit or capable of flying, the flying allowance.

17. I do not find in the 11th November, 1993 Settlement, any provision for payment of simulator allowance to a pilot otherwise unfit to fly. It is perhaps for the reasons only that the Memo dated 23rd December, 1994 brought in the concept of the simulator allowance and which was not on hourly basis but on per diem basis; to take care of the possibility, of a pilot on the same day flying as well as imparting simulator training, it was provided that the simulator allowance would be in addition to the flying allowance.

18. Had the contention of the counsel for the respondent/defendant been correct, the respondent/defendant would have been entitled to flying allowance also for the period 10th June, 1994 to 31st December, 1995 when the respondent/defendant was not even imparting simulator training and was merely a non-flying instructor and which is not the case of the respondent/defendant. The appellant/plaintiff in the plaint expressly pleaded that the respondent/defendant for the said period was paid only the instructor's allowance and this is not disputed/controverted in the written statement.

19. Though I have enquired from the counsel for the appellant/plaintiff as to what is there to show that the excess payment, for refund whereof the suit from which this appeal arises was filed, was towards the flying allowance and the counsel for the appellant/plaintiff stated that there is no document to show the same but further contended that it is not so disputed. The counsel for the respondent/defendant also confirms that the payment made to the respondent/defendant in 1998 has been computed applying the rate of flying allowance to the number of hours of training imparted by the respondent/defendant on simulator.

20. The question however still arises, as to what is to be the rate at which a pilot found to be medically unfit to fly but medically fit to impart simulator training, is to be paid. The 26th January, 1996 Settlement, though did away with the meal allowance, special traveling allowance, entertainment allowance, layover allowance etc. and retained only, a type allowance, productivity allowance and a flying allowance, does not provide for any simulator training allowance. The only inference is that the simulator training allowance as provided for in the Memo dated 23rd December, 1994 i.e. of Rs.400 per diem, continued.

21. Thus I disagree with the reasoning given by the learned Addl. District Judge, that a pilot medically unfit to fly is entitled to simulator allowance at the same rate as flying allowance as provided in the Settlement dated 26th January, 1996.

22. The argument of the counsel for the respondent/defendant of there being no distinction between a flying and a grounded pilot and there being no reason to discriminate between the two in the matter of payment of allowances for the same work of imparting simulator training, is meritless, in as much as the respondent/defendant has not laid any challenge to the said Rule/Policy/Settlement and the adjudication of this *lis* has to be on the basis thereof only. However notwithstanding the same, I tend to agree with the other reason given by the learned Addl. District Judge, of the appellant/plaintiff being in equity not entitled to the relief.

23. For the appellant/plaintiff to have succeeded in its claim, the appellant/plaintiff ought to have pleaded and proved the reasons and circumstances in which the so called excess payment was made to the respondent/defendant. No such pleadings have been made. No documents showing the decision making at the time of making of the excess payment in 1998 or of detection of mistake thereof have been proved. The

respondent/defendant is now informed to be over 70 years of age and it is not found just to now direct him to refund the amount received by him in excess. It has also not been disclosed, owing to whose mistake the excess payment was made.

24. However while dismissing the appeal it is deemed appropriate to make the same subject to a rider. If the respondent/defendant seeks revival of the writ petition aforesaid or otherwise makes a claim against the appellant/plaintiff for any other dues and if such dues are found due to him, the appellant/plaintiff shall be entitled to deduct therefrom the excess payment which has been found to have been made, together with interest at such rate as may be fixed by the Court/Fora which finds any amount to be due from the appellant/plaintiff to the respondent/defendant.

25. The appeal is disposed of on the aforesaid terms, leaving the parties to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

NOVEMBER 22, 2013

pp