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

+ CS(OS) 1104/2013

% ***Judgment dated 07.03.2014***

NATASHA GUPTA Plaintiff

Through : Mr.Kapil Gupta, Adv.

versus

THE KINGFISHER AIRLINES LTD Defendant

Through : Mr.Abhijeet Swaroop, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A. 15249/2013

1. Present application has been filed by defendant under Order XXXVII Rule 3(5) seeking leave to defend.
2. Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure seeking recovery of Rs.58,79,152 along with *pendente lite* and future interest at the rate of 12% per annum. As per the plaintiff, present suit is based on the written employment contract, which is in the form of a letter dated 1.7.2011, addressed by the defendant to the plaintiff.
3. Before the rival submissions of the parties can be considered, the brief facts of the case are being noticed. The plaintiff claims herself to be a certified pilot, who is having a requisite license issued by the Director General of Civil Aviation (DGCA). After obtaining the license, the plaintiff joined as a Co-pilot on ATR Aircraft with AIR DECCAN on 24.5.2007. Thereafter in the same year, AIR DECCAN merged with Kinfisher Airlines Limited, and the plaintiff was hired on the payroll of

the defendant as Co-pilot on ATR Aircraft. The plaintiff continued to render her services as a Captain in Operations Department till March, 2013. Apart from her promotion to the post of Captain, the salary of the plaintiff was also enhanced from time to time. Vide a renewed contract dated 1.7.2011 the salary of the plaintiff was enhanced to Rs.4,57,500/- per month.

4. Learned counsel for the plaintiff submits that besides the salary the plaintiff was also entitled to other statutory benefits being Provident Fund and gratuity as per Employees Provident Fund Act, 1952, and gratuity being 15 days' salary after having completed five years in service. Counsel further submits that it is the case of the plaintiff that on 27.10.2011 the plaintiff was further granted an enhancement of Rs.1.00 lakh, per month, being loyalty bonus, for being a pilot of the ATR fleet and, thus, her salary was increased to Rs.5,57,500/-, per month. Reliance is placed on the original letter dated 27.10.2011. Counsel contends that w.e.f. November, 2011, the defendant started paying the salary belatedly to the plaintiff, which was ultimately stopped in the month of July, 2012. Counsel further contends that despite various assurances given by the defendant, the plaintiff was not paid a single penny towards the outstanding salary, as a result of which, she mailed her resignation letter on 22.3.2013, which was accepted by the defendant on 25.3.2013.
5. According to the plaintiff, the defendant has illegally and unlawfully withheld the salary of the plaintiff for a period of nine months i.e. w.e.f. July, 2012, to March, 2013, besides, non-payment of statutory dues, being Provident Fund, Gratuity, Paid leaves, Bonus, etc.
6. The following amounts have been claimed by the plaintiff:

PARTICULARS	AMOUNT
Unpaid Salary for the period w.e.f. July, 2012 to March, 2013 @ Rs.5,57,500/- pm.	Rs.50,17,500
Interest @12% p.a. on the delayed and unpaid salary w.e.f. November, 2011 to March, 2013 and till the date of filing of the suit	Rs.5,14,047
Provident Fund from the date of joining i.e., 24.05.2007 till the date of relieving i.e., on 25.03.2013	Rs.1,12,330
Leave Encashment for 10 days.	Rs.20,660
Gratuity from the date of joining i.e., 24.05.2007 till the date of relieving i.e., on 25.03.2013.	Rs.2,14,615
GRAND TOTAL	Rs.58,79,152

7. Learned counsel for the defendant submits that the present suit is not maintainable under the provisions of Order XXXVII of the Code of Civil Procedure as the plaintiff has failed to place on record the original employment agreement dated 24.5.2007. Counsel further submits that in the absence of the original document, the present suit would not be maintainable. Reliance is placed by counsel for the defendant in the case of *Neebha Kapoor v. Jayantilal Khandwala and Ors.*, reported at 2008 (3) SCC 770, more particularly para 11, which reads as under:

11. For the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. Original documents are not available. Appellant,

therefore, is obligated to prove the loss of documents. Only because a suit has been entertained as a summary suit, the same by itself may not be a ground for passing of a judgment on mere asking. We have noticed the fact situation obtaining herein. The High Court was of the opinion that it is a case where unconditional leave should be granted. The question as to whether the defence of the respondents is “moonshine” or not was not a matter which required consideration of the High Court at that stage. A decree could not have been granted on the basis of even photostat copies of the documents. [See Food Corporation of India v. Dena Bank, Indore and another AIR 2004 MP 158] Presumption in regard to a negotiable instrument or a bill of exchange in terms of Section 118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as provided for under Clause (f) of Sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind.

8. Learned counsel for the defendant further submits that the plaintiff is guilty of suppression of material facts, as the plaintiff has failed to disclose the fact that all disputes and differences between the parties were to be resolved through arbitration. Another argument, which has been raised by counsel for the defendant, is that the plaintiff has approached this Court with unclean hands. It is also submitted that the defendant has raised triable issues, which cannot be decided in the summary proceedings and thus unconditional leave should be granted to the defendant. Counsel next submits that three months notice was to be served on the defendant, however, no notice was served prior to the termination of the said employment contract. Another argument of the counsel is that between October, 2012, and March, 2013, there were no flying operations and, thus, the plaintiff would not be entitled to the salary for this period. Reliance is placed on Clause 14 of the Employment Agreement in support of this contention. Counsel next contends that assuming the letter dated 1.7.2011 is relied upon by the plaintiff, still it did not contain any clause

with regard to gratuity and provident fund in the original contract, therefore, the plaintiff is not entitled to the said amounts.

9. Learned counsel for the defendant has relied upon *M/s Mechelec Engineers & Manufacturers v. M/s Basic Equipment Corporation*, reported at AIR 1977 SC 577, more particularly para 8 in support of his argument that since the defendant has raised triable issues, the defendant should be granted unconditional leave to defend.
10. I have heard counsel for the parties and have carefully perused the documents. Before dealing with the rival submissions of counsel for the parties, it would be useful to re-visit the law laid down by the Apex Court with regard to dealing with an application for leave to defend. The Apex Court in the case of *M/s.Mechelec Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation* AIR 1977 SC 577 has drawn up the parameters to be considered by the court while dealing with the application for leave to defend. Relevant paras of the judgment reads as under:

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246 , Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 37 C.P.C. in the form of the following propositions (at p. 253):

- (a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.
- (b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.
- (c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the

affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.”

11. It would also be useful to refer to the case of *V.K. Enterprises Vs. Shiva Steels* (2010) 9 SCC 256, wherein the Supreme Court had, in a matter with somewhat similar facts, upheld the order passed by the trial court where leave was rejected. Paragraphs 8 to 10 of the judgment read as under:

“8. Order XXXVII C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted. What is required to be examined for grant of

leave is whether the defence taken in the application under Order XXXVII Rule 3 C.P.C. makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.

9. Against such cogent evidence produced by the plaintiff/respondent, there is only an oral denial which is not supported by any corroborative evidence from the side of the Petitioner. On the other hand, the ledger book maintained by the Respondent and settled by the Petitioner had been produced on behalf of the Respondent in order to prove the transactions in respect of which the cheque in question had been issued by the Petitioner.

10. In our view, the defence raised by the Petitioner does not make out any triable issue and the High Court, has dealt with the matter correctly and has justifiably rejected the Petitioner's application under Order XXXVII Rule 3 C.P.C. and the same does not call for interference by this Court. The Special Leave Petition is, therefore, dismissed, but without any order as to costs.”

12. To appreciate the arguments of counsel for the parties, it would be useful to reproduce the letter dated 1.7.2011 along with Annexure A, which forms part of the aforesaid letter and which is the basis of filing the present suit under Order 37:

“July 1, 2011

Capt. Natasha Gupta
Captain
E-Code: 15724
New Delhi.

Dear Capt. Gupta,

We are pleased to inform you that effective July 1, 2011 your salary has been revised in appreciation of the continued service rendered by you.

The detailed compensation structure effective July, 2011 is attached herewith as Annexure – A.

We look forward to your continued support and contribution in fulfilling the Company’s objectives.

Well done and keep up the good work !!

With best wishes,

Yours truly,

For **Kingfisher Airlines Limited**

Rubi Arya
Vice President – Human Resources

Encl: Annexure –A.”

“ANNEXURE A – PAY, ALLOWANCES AND BENEFITS

Name :	Capt. Natasha Gupta
Designation :	Captain
Department :	Operations

The following will be the monthly pay and allowances applicable to you as a **Captain**:

Salary Element	Amount
Basic Salary	Rs.62000/- p.m.
House Rent Allowance (HRA)	Rs.31000/- p.m.
License Allowance	Rs.22000/- p.m.
R/T Allowance	Rs.15000/- p.m.
Special Allowance	Rs.69750/- p.m.
Flying Allowance	Rs.226000/- p.m.
Medical Allowance	Rs.1250/- p.m.
Telephone & Mobile Allowance	Rs.5000/- p.m.
Uniform Allowance	Rs.5000/- p.m.
Car Allowance	Rs.3000/- p.m.
Driver Salary	Rs.5000/- p.m.
Service Pay	Rs.12500/- p.m.
Total	Rs.457500/- p.m.
Companies Contribution to Provident Fund	As per the Provisions of EPF Act, 1952
Gratuity (vesting after 5 years of continuous service)	15 days salary for every completed year of service

13. The original letter has been placed on record, which has been signed by the Vice-President of the defendant. The letter has not been denied by the defendant. Thus, the first submission of counsel for the applicant/defendant that unconditional leave be granted as the original document has not been placed on record is without any force. The covering letter would show that the plaintiff was informed that her salary had been revised in appreciation of the continued services rendered by her. The detailed compensation structure, effective from 1.7.2011 was attached, which has been extracted hereinabove. The communication dated 1.7.2011 has rightly been made as the basis of filing the present suit under the provisions of Order XXXVII, as this communication can be treated as a written contract. Moreover, the plaintiff was paid salary based on this communication and as detailed in the annexure thereto. The annexure also refers to the contribution to the provident fund as per the

provisions of EPF and Gratuity payable to the plaintiff. It would also be useful to reproduce communication dated 27.10.2011, which reads as under:

“October 27, 2011

Capt. Natasha Gupta
E-Code: 15724
Captain
Operations Department
New Delhi.

Dear Capt. Gupta,

We are pleased to introduce the ATR Loyalty Bonus in your salary effective October 27, 2011. An amount of Rs.1,00,000/- (subject to applicable taxes) will be payable as ATR Loyalty Bonus.

Please note that the above ATR Loyalty Bonus will be discontinued the day you stop operating the ATR fleet.

All other terms and conditions of your employment remain unaltered.

With best wishes,

Yours truly,

For **Kingfisher Airlines Limited**

Hitesh Patel
Executive Vice President”

14. There is also no room for doubt that the plaintiff was to be paid Rs.1.00 lakh, per month, as ATR Loyalty Bonus. In my view the aforesaid two communications make the claim of the plaintiff undisputed as the letters

extracted above clearly establish the extent of salary and bonus, which were payable by the defendant to the plaintiff.

15. The submission made by learned counsel for the defendant that the original employment agreement was not placed on record, in my view, is not a triable issue, as the original agreement, sought to be referred to by the defendant, pertains to the year 2007 and has not been relied upon by the plaintiff whereas the present suit relates to the period, which is covered by the communication dated 1.7.2011, which clearly and explicitly gives every detail of break up of salary, to be paid to the plaintiff by the defendant. Thus, the judgment, sought to be relied upon, by counsel for the defendant, would not be applicable in the facts of the present case. To say that the parties had agreed to resolve the disputes through arbitration is a weak argument raised by counsel for the defendant, as, in my view, the defendant has not cared to move an application under Section 8 of the Arbitration and Conciliation Act. Moreover, the defendant has not even filed the agreement, which contains an arbitration clause.

16. Section 8(2) of the Arbitration and Conciliation Act reads as under:

“8. Power to refer parties to arbitration where there is an arbitration agreement. – (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.”

17. A reading of Section 8(2) of Arbitration and Conciliation Act would show that an application under Section 8 cannot be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. In this case, neither the original agreement nor its certified copy has been filed, nor an application under Section 8 of the Arbitration and Conciliation Act has been filed by the defendant. Thus, this argument of

learned counsel for the defendant that in view of the arbitration clause the present suit is not maintainable and hence leave be granted, is liable to be rejected. Another argument raised by learned counsel for the defendant is that the defendant is not liable to pay gratuity and bonus. This argument is also unacceptable as, firstly, the annexure to the letter dated 1.7.2011 refers to the gratuity and provident fund and moreover both are statutory dues and the liability is thus undisputed, to be paid by the defendant to the plaintiff and no benefit can accrue to the defendant on this account.

18. As far as the argument raised by the counsel for the defendant that the plaintiff has not completed the flying hours, is concerned, a photocopy of the appointment letter dated 24.5.2007 has been handed over in Court during the course of arguments. Relevant clause, which has been referred to, reads as under:

“14. The company will make best endeavors to ensure you have every opportunity to fly at least 900 hours in any 12 consecutive months at the same time you are required to fly 75 per month or 225 hrs in every quarter unless compelled by unforeseen or circumstances beyond control.”

19. No explanation is forthcoming from the defendant as to what would be the effect if the flying hours are not completed. Moreover, the plaintiff has never denied or refused to carry out flying for the defendant. It is only the defendant, who was unable to give enough flying hours, if any, to the plaintiff.
20. In my view, the defendant has failed to satisfy this Court that he has a good defence to the claim on merits. The defendant has also failed to raise any triable issue or a fair, bonafide or a reasonable defence. The defence, which has been raised, is illusory, sham and practically moonshine. Thus,

for the reasons aforestated the application, seeking leave to defend, being without any merit, is dismissed.

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21. Consequent to the dismissal of the leave to defend application, the prayers made in the present suit is allowed. Suit is decreed in favour of the plaintiff and against defendant in the sum of Rs.58,79,152/- together with interest *pendent lite* and future interest at the rate of 10%, per annum, till its realization.
22. Decree sheet be drawn up accordingly.

G.S.SISTANI, J

MARCH 07, 2014

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