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

+ **CS(OS) 1117/2013**

% ***Judgment dated 9th September, 2014***

NEERAJ BIALA Plaintiff
Through: Mr.Saurabh Tiwari, Advocate

versus

THE KINGFISHER AIRLINES LTD Defendant
Through: Mr.Abhijeet Swaroop, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A. 16773/2013 (Leave to defend) & I.A. 16227/2014 (u/S.8 of the Arbitration & Conciliation Act)

1. Defendant has filed the IA.No.16227/2014 under Order 8 of the Arbitration & Conciliation Act for referring the dispute between the parties, subject matter of the present suit, to arbitration in view of the arbitration clause contained in the letter of appointment dated 21.10.2008.
2. IA.No.16773/2013 has been filed by the defendant seeking leave to defend. Both the applications [IA.No.16227/2014 & IA.No.16773/ 2013] are being disposed of by a common order.
3. Plaintiff has filed the present suit under the provisions of Order 37 Code of Civil Procedure. The suit is based on a written agreement being the appointment letter. As per the plaint, the plaintiff was appointed as a "Transition Captain" for A320 w.e.f. 14.10.2008 vide appointment letter dated 21.10.2008 with a consolidated salary of Rs.4.30 lacs per month, which was subsequently increased to Rs.4.55 lacs per month from July,

2011 onwards. On account of financial mess, the defendant was unable to pay salary to most of its pilots, including the plaintiff. The defendant was in arrears of paying salary to the plaintiff for the months of December, 2011 and January to March, 2012. With no option the plaintiff resigned vide e-mail dated 12.8.2011. The resignation was withdraw vide e-mail dated 3.2.2012, which was accepted by the defendant by their e-mail dated 8.2.2012. The resignation was withdrawn by the plaintiff in view of assurances rendered by the defendant that they would soon resume the operations and would clear all the dues.

4. Despite plaintiff having resumed his job, the situation did not change. Plaintiff again vide e-mail dated 13.3.2012 submitted his resignation which was accepted. Plaintiff has not received salary for the months of December, 2011 and January to March, 2012. The details of due, as claimed by the plaintiff are as under:

“Gross Salary	:	Rs.4,55,000/-	X 3	
(December, 2011 and January to February, 2012)				= Rs.13,65,000/-
12 days salary of March, 2012				= Rs.1,90,000/-
Over time of December (5 hrs.)				= Rs. 15,000/-
Over time of February (3 hrs.)				= Rs. 9,000/-
48 days leave encashment @ Rs.2066/-				= Rs. 99,168/-
Interest @ 18% per month				= <u>Rs.3,77,678/-</u>
				Rs.20,55,846/-”

5. Plaintiff claims to have made various requests to the defendant to clear the dues, but no payments were made, resultantly the present suit has been filed. As per the plaint, plaintiff was appointed at Delhi, he was posted at Delhi, salary was paid at Delhi, hence, this court has the territorial jurisdiction to entertain the present suit.
6. The defendant has filed IA.No.16773/2013 for unconditional leave to defend on the ground that there is an arbitration clause between the

parties, and this Court has no territorial jurisdiction to try and entertain this matter. Counsel for the defendant also submits that in view of clause 17 of the letter of appointment, jurisdiction has been conferred on the courts at Mumbai.

7. Unconditional leave is also sought on the ground that the plaintiff was obliged to serve defendant company for a minimum period of five years from the date of joining which period would have expired on 20.10.2013, however, the plaintiff resigned from the services of the defendant without serving the commitment period, which is a clear breach of the agreed term of the letter of appointment. Besides, in case the plaintiff resigned prior to the completion of the commitment period, the plaintiff was liable to pay liquidated damages. Six months' notice period was also required prior to the acceptance of the resignation.
8. It is further the case of the defendant that in the absence of the original documents having been filed, the present suit is not maintainable under Order 37 Code of Civil Procedure.
9. Counsel for the plaintiff submits that all the defences sought to be raised by the defendant have been subject matter of at least three earlier suits decided by this Court i.e. CS(OS)No.1151/2013 titled *Captain Amar Bhatia Vs. The Kingfisher Airlines Limited* and two other suits one of them is CS(OS)No.1063/2013 titled *Dinesh Kant Sharma Vs. The Kingfisher Airlines Ltd.*’.
10. Counsel for the plaintiff submits that all the above said suits were identical. They all pertain to pilots, based on appointment letter, all the suits are related to non-payment of salary, objections with regard to the jurisdiction and arbitration was raised. It is also submitted that in those suits the applications for leave to defend were decided against the defendants.

11. Counsel for the defendant submits that this case is no different from the abovesaid cases. Counsel for the defendant submits that in those cases no application under Section 8 of the Arbitration & Conciliation Act was filed and thus there was no opportunity for the Court to decide this objection.
12. I have heard counsel for the parties and considered their rival submissions. Leave to defend is sought by the defendant firstly on the ground that this Court has no territorial jurisdiction in view of the fact that parties had agreed to confer jurisdiction over the Courts at Mumbai. This ground was raised in the similar matters as well and rightly rejected.
13. The objection with regard to the territorial jurisdiction is also without any force, for the reason that jurisdiction cannot be conferred on a Court where no part of cause of action has arisen. The plaintiff was appointed as a pilot for Delhi, which is evident from reading the letter of appointment. This aspect was also considered in para 10 in the case of *Captain Amar Bhatia (Supra)*, which reads as under:

“10. As far as the aspect of territorial jurisdiction is concerned, though the Appointment Letter of the plaintiff does provides for exclusive jurisdiction of the Courts of Mumbai but as per the law laid down in *Inter Globe Aviation Ltd. Vs. N. Satchidanand* (2011) 7 SCC 463, the question of the parties restricting the jurisdiction to one of the several Courts having jurisdiction arises only when several Courts have jurisdiction. It is the averment of the plaintiff in the plaint that the plaintiff was appointed at Delhi, was based at Delhi and was being paid his salary at Delhi. The defendant, in the application for leave to defend, has not controverted any of the said facts and has also not stated as to how the Courts at Mumbai have jurisdiction. Without any averment to the said effect, the said clause of exclusive jurisdiction cannot be held to have vested the Courts at Mumbai, which otherwise have no jurisdiction, jurisdiction over the matter. The reliance by the counsel for the defendant on *Swastik Gases Private Limited Vs.*

Indian Oil Corporation Limited (2013) 9 SCC 32 in this regard is thus of no avail.”

14. The second ground raised is with regard to the existence of an arbitration clause and for which I.A.16227/2014 has been filed under Section 8 of Arbitration and Conciliation Act, 1996. The argument also stands rejected by another Single Judge of this Court in an identical matter.
15. In the case of *Captain Amar Bhatia Vs. The Kingfisher Airlines Limited* [CS(OS)No.1151/2013], the defendant did raise the question of an arbitration clause. The Judge dealt with this objection in the following manner:

“13. It cannot be lost sight of that there is really no denial or dispute raised by the defendant to the claim of the plaintiff for recovery of arrears of his salary. There is thus really no dispute for adjudication by arbitration. I see no reason to deny to the plaintiff in this suit the relief of recovery of money which admittedly is due to the plaintiff and the chances of recovery whereof, even if a decree were to be passed in favour of the plaintiff, are remote and to compel the plaintiff to spend more monies in invoking the arbitration clause when there is really nothing for arbitration. Without thus intending this to be precedent, in the facts and circumstances of the present case, I reject said argument also of the defendant. I may also notice that today CS(OS) No.1603/2013 & CS(OS) No.1152/2013 also filed by two other pilots of defendant, for similar claims are also listed and in the appointment letter subject matter of CS(OS) No.1152/2013, there is no arbitration clause or the clause for the exclusive jurisdiction of the Courts at Mumbai.”

16. I am in respectful agreement with the finding for the reason that the plaintiff has claimed salary for 3 months. The quantum of salary is not in dispute. Since the quantum of salary is not in dispute, I am of the view that there can be no dispute which can be referred to arbitration. I, however, add that the plaintiff had agreed that if the matter is referred to

an arbitrator in Delhi and the fee is to be paid by the defendant he was agreeable to the same. But this offer was declined by the defendant on the ground that proceedings are to be held in Mumbai.

17. Given the present financial condition of the defendant of which this Court can take judicial notice, no purpose is going to be achieved by referring this matter to arbitrator when in fact nothing remains to be adjudicated upon.
18. The defendant seeks unconditional leave also on the ground that the original appointment letter has not been filed. As far as non-filing of the letter of appointment is concerned, counsel for the plaintiff on instructions submits that the said letter has been mis-placed.
19. No doubt it is settled law that in a suit under Order 37 CPC original documents are to be placed on record. Even otherwise, as per Order 7 Rule 14 CPC original documents on which the suit is based, is to be filed along with the plaint, this by itself will not be a ground to disentitle the plaintiff to a decree. However, taking into consideration the peculiar facts and more particularly that the appointment letter is not in dispute, I am of the view that the defence raised in this leave to defend is neither bona fide nor plausible and reasonable. The defence is sham and moonshine and is only to be rejected in the light of the parameters laid down by the Apex Court in the case of **M/s.Mechalee Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation** AIR 1977 SC 577. Relevant praras 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.”

20. Resultantly both the applications [I.A. 16773/2013 & I.A. 16227/2014] are dismissed.

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21. In view of the order passed in the applications [I.A. 16773/2013 & I.A. 16227/2014] plaintiff is entitled to a decree. Counsel for the plaintiff

restricts his prayer for the salary of three months and 12 days with *pendente lite* and future interest @10%. Decree-sheet be drawn up accordingly.

G.S.SISTANI, J

SEPTEMBER 09, 2014
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