

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

Judgment reserved on: 25.09.2014

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Judgment delivered on: 28.10.2014

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ARB. P. 431/2012

SHISHIR GUPTA

..... Petitioner

Versus

AIR INDIA LIMITED

..... Respondent

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ARB. P. 434/2012

SUDHANSHU BHARADWAJ

..... Petitioner

Versus

AIR INDIA LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Kaustabh Sinha and Mr. Virender Negi,
Advocates in Arb. P. 431/2012
Mr. Jitin Sahai and Mr. Naveen Gaur, Advocates
in Arb. 434/2012
For the Respondents: Mr. Mudit Sharma and Mr. Tanmaya Nirmal,
Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. These are the petitions filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act) against a common respondent i.e., Air India Ltd.
2. The respondent is resisting the appointment of arbitrator in the matter

broadly on two grounds : First, that there is no dispute obtaining between the parties which, requires adjudication. Second, the arbitration agreement on which reliance is placed by the petitioners before this court is restricted to the 'interpretation' of that particular agreement, that is, the service agreement obtaining between the parties and thus, does not encompass within its ambit, disputes adverted to in these petitions.

3. Before I proceed further, it may be relevant to broadly sketch out the necessary facts relevant for adjudicating the captioned petitions :-

FACTS PERTAINING TO ARB. P. 431/2012

3.1 The petitioner, in this case, hereinafter referred to as Mr. Gupta, was appointed as a Trainee Pilot on 13.02.2007. On his appointment, Mr. Gupta executed five (5) agreements with the respondent of even date i.e., 27.02.2007. These agreements are titled as follows :-

(i). Service Agreement; (ii). Agreement for joint fixed deposit; (iii). Surety bond for Service Agreement; (iv). Loan agreement; and (v). Surety bond for loan agreement (hereinafter collectively referred to as the agreements).

3.2 Upon completion of training, Mr. Gupta was appointed as a Second Officer vide appointment letter dated 28.04.2009 with effect from 02.04.2008. Thereafter, Mr. Gupta was appointed as a First Officer vide appointment letter dated 11.05.2009, this time with effect from 15.04.2008. Mr. Gupta's appointment was confirmed as First Officer vide a communication dated 09.10.2009 issued by the respondent.

3.3 It is not in dispute that in terms of the agreement for joint fixed deposit, a fixed deposit in the sum of Rs.7.50 Lakh was created by Mr. Gupta.

3.4 According to Mr. Gupta, his grievances vis-a-vis the respondent

came to fore when from May, 2010, there was a continuous delay encountered in receipt of monthly emoluments, that is, his salary and flying allowance. Mr. Gupta's grievance in a sense multiplied when, he was not promoted to the Captain's Grade despite him having apparently achieved the necessary qualifications in terms of respondent's internal office letter dated 23.01.2004. The aforesaid, coupled with reduction in flying hours which, necessarily impacted, Mr. Gupta's emoluments, led him to ultimately tender his resignation as, his grievances were not addressed. In so far as the promotion aspect was concerned, Mr. Gupta had brought this, to the notice of the respondent vide communication dated 30.06.2011.

3.5 Having regard to these circumstances and also the fact that Mr. Gupta had spent huge amount, that is, USD 35000 in obtaining necessary training with an entity, known as, M/s. Cloud Dancers Aviation Inc., Florida, USA, he decided to tender his resignation. Accordingly, a letter dated 19.07.2011 was submitted by Mr. Gupta indicating therein his desire to resign from the services of the respondent with effect from 20.08.2011. In this letter, Mr. Gupta made reference to his aforementioned grievances. Mr. Gupta therefore, by this letter, not only asked for acceptance of his resignation but also sought issuance of a 'No Objection Certificate' and waiver of the notice period of six (6) months by the competent authority. Release of the fixed deposit of Rs.7.5 Lakh was also sought.

3.6 The respondent in reply, issued two communication dated 28.07.2011 and 10.08.2011 whereby, it was broadly indicated to Mr. Gupta that his resignation was under consideration and that, till such time he should continue with his services.

3.7 The aforementioned letters of the respondent were followed by yet another letter dated 11.08.2011. By this letter, the respondent essentially

informed Mr. Gupta about the fact that he had executed various agreements and surety bonds (to which I have already made a reference above), which required him to continue in service for a period of 10 years failing which, he would have to pay damages equal to Rs.10 Lakhs. Mr. Gupta was further made cognizant of the fact that the fixed deposit of Rs.7.5 Lakh was also liable to be forfeited on account of the condition attached to it, which was that he had to continue in service with the respondent for a period of 5 years from the date of commencement of training.

3.8 This apart, reference was made to the fact that he had also executed a loan agreement towards training cost which, though adjusted proportionately till 2008 against salary, was refunded to Mr. Gupta in anticipation of the fact that he would serve the respondent for a period of 10 years from the date of his appointment as a First Officer. In sum, by this letter, respondent advised Mr. Gupta to deposit a sum of Rs.41.60 Lakhs towards cost of training alongwith interest, apart from an additional sum of Rs.10 Lakhs towards non-fulfilment of the terms of Service Agreement, before his request for resignation could be processed. De hors this, the letter indicated that the joint fixed deposit furnished by Mr. Gupta would be encashed / forfeited, in the meanwhile.

3.9 Mr. Gupta shot off his rejoinder vide two successive letters dated 23.08.2011 and 07.09.2011. At this stage, Mr. Gupta sought to not only rebut what was stated by the respondent in its letter dated 11.08.2011 but also sought acceptance of his resignation. Since that did not happen, Mr. Gupta vide letter dated 14.09.2011 informed the respondent that he would not be available for being rostered with effect from 19.09.2011 and consequently, on being advised, he would vacate the official accommodation provided to him by the respondent, on or before the aforementioned date.

4. The respondent of course, did not relent, which propelled Mr. Gupta to write to the Director General, Civil Aviation (DGCA) vide letter dated 16.09.2011. By this letter, Mr. Gupta, broadly, requested DGCA to intercede in the matter.

4.1 The correspondence which was exchanged thereafter between the parties herein would show that both sides stuck to their respective stands, while the respondent vide letters dated 11.11.2011 and 11.12.2011, indicated that Mr. Gupta's resignation could not be processed for various reasons including failure to give six (6) months' notice as per service regulations, and that, the fixed deposit alongwith accrued interest would be forfeited; Mr. Gupta contended to the contrary. In this behalf, Mr. Gupta issued letters dated 31.01.2012 and 06.02.2012.

4.2 A grievance with regard to non-payment of flying allowance during notice period and purported failure to deposit withholding tax was articulated by Mr. Gupta, in his letter dated 28.02.2012.

4.3 It appears that it is when the bank with which, the fixed deposit was created (i.e., the Indian Overseas Bank, Parliament Street, New Delhi Branch), intimated to Mr. Gupta vide its letter dated 26.03.2012 that it could not renew the fixed deposit any further without the original fixed deposit receipt being presented, (which is admittedly in the custody of the respondent); furthermore, it stated that, and that, they would release the money unless an order injuncting encashment was produced from a court, that Mr. Gupta instituted a petition under Section 9 of the Act.

4.4 The said petition was numbered as : OMP 596/2012. Notice in the said petition was issued on 06.07.2012. The court on that date also granted an ad interim ex parte order, whereby the respondent herein i.e., Air India Ltd. was restrained from encashment of the bank guarantee issued by the

aforementioned bank. Directions were also issued to the bank to renew the same for a period of one year from the date of its expiry. This interim order has continued to operate to date.

4.5 On 14.07.2012, Mr. Gupta caused a legal notice to be served on the respondent whereby, the arbitration agreement was sought to be triggered in terms of clause 5 of the Service Agreement.

4.6 It may be relevant to note that since arguments were heard in the captioned petitions, the Section 9 petition has been stood over and is now listed for hearing on 31.10.2014.

FACTS PERTAINING TO ARB. P. 434/2012

5. The petitioner in this case, hereinafter referred to as Mr. Bharadwaj, was appointed as a Trainee Pilot on 10.07.2007. On his appointment, Mr. Bharadwaj executed five (5) agreements with the respondent of even date i.e., 22.07.2007. These agreements are titled as follows :-

(i). Service Agreement; (ii). Agreement for joint fixed deposit; (iii). Surety bond for Service Agreement; (iv). Loan agreement; and (v). Surety bond for loan agreement (hereinafter collectively referred to as the agreements).

5.1 Upon completion of training, Mr. Bharadwaj was appointed as a Second Officer vide appointment letter dated 16.04.2009 with effect from 04.06.2009. Thereafter, Mr. Bharadwaj was appointed as a First Officer vide appointment letter dated 08.07.2010, this time with effect from 12.06.2010. Mr. Bharadwaj's appointment as First Officer was confirmed vide a communication dated 08.07.2010 issued by the respondent, with effect from 12.06.2010.

5.2 It is not in dispute that in terms of the agreement for joint fixed deposit, a fixed deposit in the sum of Rs.7.50 Lakh was created by Mr.

Bharadwaj.

5.3 According to Mr. Bharadwaj, his grievances vis-a-vis the respondent came to fore when from May, 2010, there was a continuous delay encountered in receipt of monthly emoluments, that is, his salary and flying allowance. Mr. Bharadwaj's grievance in a sense multiplied with reduction in flying hours which, necessarily impacted, Mr. Bhardwaj's emoluments. However none of these grievances were addressed by the respondent.

5.4 Having regard to these circumstances and also the fact that Mr. Bharadwaj had spent huge amount, that is, USD 35000 in obtaining necessary training with an entity known as M/s Flight Dynamics School of Aeronautics, Cebu, Philippines, he decided to tender his resignation. Accordingly, a letter dated 30.12.2011 was submitted by Mr. Bharadwaj indicating therein his desire to resign from the services of the respondent with effect from 30.01.2012. In this letter, Mr. Bharadwaj made reference to his aforementioned grievances. Mr. Bharadwaj therefore, by this letter, not only asked for acceptance of his resignation but also sought issuance of a 'No Objection Certificate' and waiver of the notice period of six (6) months by the competent authority. Release of the fixed deposit of Rs.7.5 Lakh was also sought.

5.5 The respondent in reply, issued communication dated 11.01.2012 whereby, it was broadly indicated to Mr. Bharadwaj that he would be required to comply with the conditions of service requiring six (6) months notice period prior to resignation. This communication, was in turn replied to by Mr. Bharadwaj, vide letter dated 30.01.2012, stating that the respondent itself was in breach of service conditions and, therefore, restated his reasons for tendering his resignation, which was to take effect from 30.01.2012.

5.6 The respondent replied to the aforementioned letter by issuing communications dated 28.03.2012 and 04.05.2012. By these letters, the respondent essentially communicated that Mr. Bharadwaj had been treated as having abandoned his services with effect from 01.02.2012. Further, referring to the fact that he had executed various agreements and surety bonds (to which I have already made a reference above) which required him to continue in service for a period of ten (10) years failing which, he would have to pay damages equal to Rs.10 Lakhs. Mr. Bharadwaj was further made cognizant of the fact that the fixed deposit of Rs.7.5 Lakhs was also liable to be forfeited on account of the condition attached to it, which was that he had to continue in service with the respondent for a period of five (5) years from the date of commencement of training.

5.7 This apart, reference was made to the fact that he had also executed a loan agreement towards training cost which, though adjusted proportionately till 2008 against salary, was refunded to Mr. Gupta in anticipation of the fact that he would serve the respondent for a period of ten (10) years from the date of his appointment as a First Officer. In sum, by this letter, respondent advised Mr. Bharadwaj to deposit a sum of Rs.39.26 Lakhs towards cost of training alongwith interest apart from an additional sum of Rs.10 Lakhs towards non-fulfilment of the terms of Service Agreement before his request for resignation could be processed. De hors this, the letter indicated that the joint fixed deposit furnished by Mr. Bharadwaj would be encashed / forfeited in the meanwhile.

5.8 It appears that it is when, the bank with which, the fixed deposit was created, (i.e., the Indian Overseas Bank, Parliament Street, New Delhi Branch), intimated to Mr. Bharadwaj vide its letter dated 26.03.2012 that it could not renew the fixed deposit any further without the original fixed

deposit receipt being presented which is admittedly in the custody of the respondent; furthermore, it stated that, they would, release the money unless an order injunction encashment was produced from a court, that Mr. Bharadwaj instituted a petition under Section 9 of the Act.

5.9 The said petition was numbered as : OMP 595/2012. Notice in the said petition was issued on 06.07.2012. The court on that date also granted an ad interim ex parte order whereby the respondent herein i.e., Air India Ltd. was restrained from encashment of the bank guarantee issued by the aforementioned bank. Directions were also issued to the bank to renew the same for a period of one (1) year from the date of its expiry. This interim order has continued to operate to date.

5.10 On 14.07.2012 Mr. Bharadwaj caused a legal notice to be served on the respondent whereby, the arbitration agreement was sought to be triggered in terms of clause 5 of the Service Agreement.

5.11 It may be relevant to note that since arguments were heard in the captioned petitions, the Section 9 petition has been stood over and is now listed for hearing on 31.10.2014.

SUBMISSIONS OF COUNSELS

6. On behalf of the petitioners, Mr. Kaustabh Sinha and Mr. Jitin Sahai have advanced submissions. While on behalf on the respondent, submissions have been advanced by Mr. Mudit Sharma.

7. Counsel for the petitioners have submitted that all five (5) agreements referred to above were interlinked. It was contended that both Mr. Gupta and Mr. Bhardwaj had to resign from the services of the respondent in view of the peculiar circumstances which arose post their engagement which was that, they were not being paid their salary and allowances regularly. In case of Mr Gupta, he was additionally aggrieved by the fact that he had been

denied promotion to the grade of Captain.

7.1 Learned counsels submitted that therefore, the dispute veered around not only the possible claims that Mr. Gupta and Mr. Bhardwaj may have qua the respondent but also with regard to the legitimacy of the demand raised by the respondent qua cost of training, damages and the purported illegal attempt at encashing the fixed deposit created by them in favour of the respondent.

7.2 It was submitted by the learned counsels, Messrs. Kaustabh Sinha and Mr. Jitin Sahai that the expression 'interpretation' found in clause 5 of the Service Agreement was all encompassing and would include disputes such as the ones, indicated hereinabove.

8. Mr. Mudit Sharma, on the other hand, refuted the aforementioned submissions. He submitted that the facts obtaining in this case would clearly show that both Mr. Gupta and Mr. Bhardwaj had abandoned service prior to the defined period adverted to in the agreements referred to hereinabove, which automatically led to the consequences incorporated therein. It was Mr. Sharma's contention that, therefore, there was no dispute which, required adjudication by an arbitrator.

8.1 This apart, Mr. Sharma contended that the arbitration agreement between parties was incorporated in the form of clause 5 only in the Service Agreement, and that, too, restricted to interpretation of the said agreement and, therefore, disputes to which reference has been made in the petitions or, in the notices invoking arbitration, could not be referred to an arbitrator for adjudication.

REASONS

9. I have heard the learned counsel for the parties and perused the record.

10. In my view, what is not in dispute is that, both Mr. Gupta and Mr. Bhardwaj, who were initially employed as Trainee Pilots and, thereafter, went on to being appointed as First Officers, had executed five (5) agreements bearing the same date with the respondent. In so far as Mr. Gupta was concerned, the said five (5) agreements were executed on 22.02.2007 whereas, in case of, Mr. Bhardwaj, they were executed on 22.07.2007. Apart from the dates, these agreements are identical. Admittedly, the arbitration clause finds mention in clause 5 of the Service Agreements.

11. The manner, in which, these agreements have been executed with both Mr. Gupta and Mr. Bhardwaj would show that the respondent was desirous of ensuring that they continue in service for atleast ten (10) years. The loan agreements are indicative of the fact that the respondent had foreseen that the cost of training would be recovered over a period of ten (10) years. Therefore, while essentially, no loan transaction took place, the respondent projected in the agreement the cost of training, which was pegged at Rs.26 Lakhs, as the amount loaned to its employees i.e., Mr. Gupta and Mr. Bhardwaj.

11.1 Undisputedly, recoveries were made from the salaries of its employees till about January 2008 which, were refunded thereafter to its employees including Mr. Gupta and Mr. Bhardwaj.

11.2 The fact, however, remains that both Mr. Gupta and Mr. Bhardwaj have left the services of the respondent before the periods prescribed in the aforementioned agreements; albeit for the reasons articulated in the notices issued invoking the arbitration. The respondent having taken the stand that it would not process the resignations tendered by Mr. Gupta and Mr. Bhardwaj, has laid claims qua them in the sum of Rs.41.60 Lakhs and

Rs.39.26 Lakhs respectively. This is in addition to the sum of Rs.10 Lakhs each sought from both Mr. Gupta and Mr. Bhardwaj towards damages and forfeiture of the fixed deposit in the sum of Rs.7.5 Lakhs each, furnished by them.

11.3 Therefore, two questions arise for consideration. First, are there disputes obtaining between the parties? Second, can these disputes be referred to arbitration?

11.4 In so far as first question is concerned, in my opinion, the answer is relatively simple. This is for the reason that though Mr. Gupta and Mr. Bhardwaj have left the services of the respondent prior to the period prescribed in the aforementioned agreements, what would have to be seen is, whether their actions had genesis in the respondent's failure to fulfil its obligations of making timely payment of salary and allowances which, apart from anything else would be implicit in the respondent's right to demand services from its employees i.e., Mr. Gupta and Mr. Bhardwaj, under the Service Agreements. The respondent's claim for cost of training, damages and the right to forfeit the joint fixed deposit would have to be tried and adjudicated upon, for whatever it is worth in light of, the stand of Mr. Gupta and Mr. Bhardwaj, that they were forced into such a situation. The arbitrator would necessarily have to ascertain whether the respondent's claim was justified and if so, to what extent. Therefore, in my view, there is a dispute, which has arisen, between the parties, which requires adjudication.

11.5 In so far as the second question is concerned, one would have to examine the relevant clauses obtaining in the Service Agreement.

11.6 Clause 2 of the Service Agreement postulates that cost of training shall be met by the employee, and that, after he is appointed as a First

Officer, the respondent will incur towards further training / endorsement (over a period of 10 years) an estimated cost of Rs.10 Lakhs. In lieu thereof, the employee would be required to serve the respondent for a period of ten (10) years, failing which, he would pay damages to the tune of Rs.10 Lakhs.

11.7 Clause 3 of the service agreement, provides that while the employee undergoes training as a Trainee Pilot, he will be paid a stipend of Rs.20,000/- p.m.

11.8 Clause 3(a) speaks about creation of a joint fixed deposit for a period of five (5) years from the date of commencement of training. What is notable is, the same clause also articulates that in the event, the “borrower” violates any term and condition of the appointment letter or loan agreement or this agreement (which is the Service Agreement), the amount deposited in the aforesaid account (which I would assume the fixed deposit), shall become the property of the respondent.

11.9 Clause 4 of the Service Agreement adverts to the fact that on completion of training, and on obtaining necessary endorsement and instrument rating from the DGCA, the employee concerned would be appointed as a Second Officer, with fixed pay of Rs.770/- plus variable dearness allowance, as applicable. The clause goes on to say that on completion of “release checks”, the employee concerned would be appointed as a First Officer in the pay scale of Rs. 6200-175-6550-200-7550-225-7775-250-8025 and, would be entitled to the benefit of contributory provident fund, gratuity, medical facilities and free / concessional air passages.

12. The most crucial clause, for the purposes of the captioned petition is clause 5 (which is similarly worded in Service Agreement pertaining to both Mr. Gupta and Mr. Bhardwaj), and, is therefore, for the sake of convenience

extracted hereinbelow:-

“5. That, in the event of any dispute arising between the Company and Shri Shishir Gupta / Mr. Bhardwaj with regard to the interpretation of this Agreement, the same shall be referred to the sole arbitration of the Managing Director of the Company or the person nominated by him in this behalf. The decision of the arbitrator described above shall be final and binding between both the parties..”

13. Mr. Sharma's submission that the expression, any dispute referred to in clause 5 of the Service Agreement is qualified with the expression, “with regard to interpretation of this agreement” and hence, claims of the kind adverted to in the notices invoking arbitration cannot be referred to adjudication by the arbitrator is untenable for the following reasons :-

13.1 First, there are linkages, intrinsically embedded in the Service Agreement which, allude clearly, inter alia, to the loan agreement and the agreement for joint fixed deposit.

13.2 Second, the expression, interpretation of this agreement, at first blush, may appear to convey that it only encompasses disputes pertaining to the meaning of words and sentences used in the Service Agreement – the fact is, that the word interpretation by itself has very wide connotation. Interpretation is the process of discovering and ascertaining, in the context of a contract, the true meaning of the document. The interpretation may take various forms. For example, doctrinal interpretation may turn on the meaning of words and sentences whereupon it is referred to a grammatical interpretation. When one attempts to give a logical interpretation, which is beyond the obvious meaning of the words, the interpretation may be called extensive or expansive. Similarly, when one avoids giving full meaning to the words, in order to avoid going beyond what is intended by the maker of

the document, the interpretation may be adverted to as restrictive. These variations can apply both to a statute or, a contract or, document, whose meaning is sought to be ascertained. (See Black's Law Dictionary 6th Edition Pages 817-818).

13.3 Therefore, whether or not the claims adverted to by Mr. Gupta and Mr. Bhardwaj, fall within clause 5 of the Service Agreement, is an exercise, which requires adjudication by the arbitrator. Mr. Sharma's argument really boils down to this: that the text of clause 5 is plain and, therefore, its meaning can only be to deal with aspects regarding the text of the Service Agreement. In my opinion, this is the simplistic approach. What appears to be a plain text may also require interpretation and, only after interpretation, can the interpreter conclude that the meaning is plain. It is not to say that there are no texts which have a plain meaning. But as indicated above, that is, the job of an interpreter; in this case the arbitrator. As Friedmann has stated "no contract is clear, contracts are distinguishable only by their varying levels of clarity." [See Purposive Interpretation in Law by Aharon Barak (page 14 First Indian Reprint 2007, Universal Law Publishing Pvt. Ltd.)].

14. Thus, in my opinion, this is an aspect which, falls in the domain of the arbitrator, who would have to determine the scope and ambit of clause 5 keeping in view the facts and circumstances obtaining in the cases. In line with the dicta of the Supreme Court in the case of *National Insurance Company Ltd. Vs. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267*; in my view, these are issues which fall in the third category and, therefore, would fall exclusively within the ken of the arbitral tribunal. (see paragraph 22.3 at page 283 of the said judgment).

15. Having regard to the aforementioned circumstances, I find merit in

the contentions raised in the captioned petitions. Since, the respondent failed to appoint an arbitrator, despite notices having been served in that behalf, upon it, the right to appoint an arbitrator has been lost by. Accordingly, I appoint Ms. Maninder Kaur Acharya, Senior Advocate (Mobile Nos.9810163078 & 9810236189), as an arbitrator in the captioned matters. The arbitrator will be paid a consolidated fee of Rs.1,50,000/- in the captioned matters, in addition to expenses, if any, incurred by her on actual basis, which will be borne equally by the parties hereto.

16. The petitions, are disposed of accordingly. There shall, however, be no orders as to costs. Needless to say the observations made above are only for the purposes of adjudication of the captioned matters.

RAJIV SHAKDHER, J

OCTOBER 28, 2014

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