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

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Date of Decision: 22.12.2015

+ CS(OS) 1128/2003

ANJUM NATH

..... Plaintiff

Through

Mr.Kirti Uppal, Sr. Advocate with
Ms.Arundhati Katju and Mr.Ali
Choudhary, Advocates.

Versus

BRITISH AIRWAYS

..... Defendant

Through

Mr.Sandeep Prabhakar, Mr.Amit
Kumar, Mr.Vikram Deswal and
Mr.Vikas Mehta, Advocates.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present suit is filed by the plaintiff seeking a decree of declaration in favour of the plaintiff and against the defendant declaring that the plaintiff is entitled to be paid as per the Early Retirement Scheme as applicable in India on 08.07.2002. A decree is also sought for Rs.55 lacs in favour of the plaintiff and against the defendant.

2. It is contended by the plaintiff in the plaint that she was the H.R. Manager of the defendant. She was employed for more than 28 years with the defendant having joined the company on 20.05.1974 as Secretary to Assistant to Manager, Northern India in Delhi. After several promotions, on 1.7.2001 she was appointed HR Manager, South Asia in the Management Grade IMG2. It is stated that after 28 years of diligent

service, the services of the plaintiff were wrongfully and illegally terminated on 8.7.2002.

3. It is further contended that on the said date, namely, 8.7.2002 she was called by the Department Head Ms.Amanda Ball. There she was informed that her job has been merged with another newly created role of Corporate Affairs, which she was not qualified to handle and therefore she was required to leave. It is contended that the said Ms.Amanda Ball while informing the plaintiff of the above decision gave the plaintiff two options, namely, (i) to resign from defendant No.1 with immediate effect or (ii) to have the Contract of Employment terminated with three months' pay. The said Ms.Amanda Ball had drafts of both letters ready with her. No time was given to the plaintiff inasmuch as she had to take a decision there and then as to which of the two letters she would choose. She was also told that in case she resigns she will receive a compensation under the U.K. Severance Policy i.e. one and half week's salary for every year of service upto a maximum of 30 weeks. If her services were terminated, she would not be entitled to this amount. Plaintiff sought to advise the said Ms. Amanda Ball that there was a Local ERS Scheme for staff in India which entitled her to 56 months' salary for her 28 years of service i.e. 2 months salary for each year of service. But Ms. Amanda Ball did not listen to the view of the plaintiff. Under duress, it is submitted that the plaintiff finally wrote a letter stating that she would like to apply for "Corporate Business Response Scheme". Promptly, she was handed over a letter of acceptance acknowledging her application under the "Corporate Business Response Scheme" stating that plaintiff had tendered her resignation which had been accepted by the defendant.

4. Plaintiff on 25.7.2002 is said to have written an appeal to Mr. Andy Stern, General Manager where she gave complete facts about the manner in which she was forced to submit her letter dated 8.7.2002 opting for the Corporate Business Response Scheme whereas she was entitled to receive compensation under a local ERS Scheme. It is stated that Mr. Stern assured the plaintiff that she would be treated fairly, but stopped responding after an official meeting with the plaintiff at the British Airways Office in Gurgaon on 12.08.2002. On 02.09.2002, Mr. Stern wrote to the plaintiff that Mr.Cyril Daniels, the plaintiff's successor would handle all correspondence. In despair, it is stated that the plaintiff on 8.10.2002 sent an appeal to Mr. Neil Robertson. Mr.Robertson on 09.10.2002 took time to look into the matter and finally replied on 28.10.2002 justifying the action of the defendant.

5. Subsequent correspondence from the defendant emanated whereby Mr.Cyril Daniels on behalf of the defendant offered to the plaintiff Severance Settlement which was four week's pay for every year of service subject to a maximum of 54 weeks. It is the contention of the plaintiff that this formula offered by the defendant is as per Voluntary Severance Scheme launched by the defendant in October 2003 whereas the plaintiff had ceased to be an employee of the defendant company in July 2002. Hence, the said formula could not apply to the plaintiff. It was the further stand of the plaintiff that she is entitled to benefits under the Early Retirement Scheme in India (hereinafter referred to ERS Scheme) which was the applicable scheme on the date of her severance from the company which was two months' salary for every complete year of service subject to a maximum of 60 months. Plaintiff further states that

she had served 28 years and one month and is hence entitled to 56 months of salary. Hence, a total of Rs.62,96,361/- is claimed on this account. It is the contention of the plaintiff that the aforesaid formula was consistently applied in each and every case similar to the plaintiff. The Early Retirement Scheme was launched in India some years ago. Specific examples are given of Shri Jaspal Singh Kohli, Shri Jaspal Singh Khokhar and Ms.Kishin Jhuremalani who on leaving the service of the defendant were given payments under the said scheme.

6. Defendant sent payment of Rs.14,52,335/- on 12.12.2002 (after income tax deduction) on account of severance compensation. The plaintiff accepted the same without prejudice to her contentions and wrote a letter to the defendant to the said effect on 20.12.2002. Hence, by the present suit the plaintiff claims the balance amount of Rs.49,24,440/-. In addition, she also seeks damages for mental agony, deliberate default and delay on the part of the defendant in settling plaintiff's account as per early retirement scheme of Rs.5 lacs plus interest. Hence, a total claim of Rs.55 lacs is sought.

7. Defendant has filed its written statement. In the written statement it is stated that reliance of the plaintiff on the Early Retirement Scheme is misplaced as the same was not applicable in July 2002 when the plaintiff submitted her resignation. It is further stated that as per the resignation letter of the plaintiff she had sought compensation under the Corporate Business Response Scheme. It is urged that this scheme was also not applicable inasmuch as at the relevant time in 2002 no severance scheme whatsoever was available in terms of her contract. The plaintiff was only entitled to three months' notice in writing or three months' pay in lieu of

notice. Notwithstanding this position, it is stated the defendant has paid sums under the inapplicable Corporate Business Response Scheme as a special consideration with a view to avoid any legal liability inasmuch as the plaintiff had sought the payment under the said Corporate Business Response Scheme.

8. Based on these pleadings, issues were framed on 10.09.2008 as follows:-

- “(i) Whether the plaintiff's services were wrongly and illegally terminated on 08.07.2002 in violation of the applicable rules and the earlier practice of the defendant Company? OPP
- (ii) Whether the plaintiff was coerced and made to sign the letter dated 08.07.2002 under duress as stated in the plaint upon his requesting for UK Business Response Scheme? OPP
- (iii) If issue No.2 is answered in the affirmative, what is the effect of the letter dated 08.07.2002 in view of the payments received in full by the plaintiff? OPD
- (iv) Whether the voluntary scheme for retirement was not applicable to the plaintiff as averred in the plaint? OPP
- (v) Whether the plaintiff was entitled to the benefit of the early retirement scheme in India? OPP
- (vi) Whether the suit is bad for misjoinder of parties? OPD
- (vii) Whether the plaintiff is entitled to the amounts claimed in the plaint? OPP
- (viii) Whether the plaintiff is entitled to any other relief?”

9. Parties have led their evidence. The plaintiff has filed her own evidence as PW 1. Plaintiff has exhibited 21 documents Ex.PW-1/1 to Ex.PW-1/21 in her evidence. Defendant filed affidavit by way of evidence of DW-1 Ms.Avani Prabhakar and DW-2 Praneet Bindra. Defendant DW-2 in her evidence has exhibited one document as Ex.DW-

2/1.

10. I have heard learned counsel for the parties and gone through the record. Learned senior counsel for the plaintiff has submitted that the ERS Scheme was the applicable scheme on the basis of which payment had to be made to the plaintiff. The said scheme entitles the plaintiff to 56 months salary for 28 years of service @ two months salary for each year of service. He submits that the letter that the plaintiff had submitted on 08.07.2002 was under coercion and pressure in the circumstances explained in the plaint and in the evidence and that neither the plaintiff had resigned voluntarily nor had she opted for the Corporate Severance Policy voluntarily. It is stressed that the said Corporate Severance Policy was not applicable in India or to the Indian employees of the plaintiff and cannot be applied to the plaintiff simply because she mentioned it in letter dated 08.07.2002. Reliance is also placed on *Ambika Construction vs. Union of India, 2006 13 SCC 475* and *National Insurance Company Limited vs. Boghara Polyfab Private Limited, AIR 2009 SC 170* to contend that any document/resignation signed by the plaintiff under duress or coercion would not be binding on the plaintiff if a protest has been lodged promptly. It is urged that the plaintiff has immediately after the resignation lodged several protests to the defendants including several personal meeting including one on 12.08.2002 and communications sent to officers of the defendants on 25.07.2002, 25.08.2002, 08.10.2002. Hence, it is urged terms of the said communication dated 08.07.2002 cannot bind the plaintiff.

It is further urged that three employees, namely, Shri Jaspal Singh Kohli, Shri Jaspal Singh Khokhar and Ms.Kishin Jhuremalani who left in

1998, 2000 and 2001 respectively were given settlement under ERS Scheme. He submits that there is no denial of this fact by the defendant. Reliance is placed on paragraph 20 of the plaint and the reply in paragraph 20 of the written statement. It is further urged that the defendant has not been able to produce any record to the contrary. Hence, an adverse inference has to be drawn against the defendant for non production of relevant documents under section 114(g) of the Evidence Act to hold that the said scheme was applicable to employees in India.

It is also urged that the conduct of the defendant in granting the retirement benefits to three employees under the said scheme is a clear proof of the fact that, the ERS Scheme was the applicable scheme to the plaintiff. Reliance is placed on judgment of the Supreme Court in the case of *Godhara Electricity Company Limited vs, State of Gujarat, (1975) 1 SCC 199 (MANU/SC/0282/1974)* to contend that subsequent conduct can be used to infer the terms of contract between the parties.

It is also urged that the plaintiff has been harassed and is entitled to damages accordingly for the stress and agony.

11. Learned counsel appearing for the defendant has strongly refuted the contentions of the plaintiff and submitted that the ERS Scheme which is sought to be relied upon by the plaintiff is a voluntary retirement scheme which was announced in 1995. The Scheme had expired in 1995 itself. Even otherwise, it is an Early Retirement Scheme which was voluntary and which is at best an “Invitation to offer” and does not confer a legal right. Reliance is placed on the judgment of the Supreme Court in *Bank of India vs O.P.Swaranakar (2003) 2 SCC 721*

(*MANU/SC/1179/2002*) to support the contention that the scheme was not a matter of right but an “Invitation to offer”. The plaintiff, it is urged, cannot claim a vested right based on the said scheme. It was the sole discretion of the defendant to accept a request of an employee for compensation under the ERS Scheme. It is further urged that none of the essential ingredients of a Contract are made out in the present case. To be a binding contract, there has to be an offer and an acceptance. There has to be a meeting of minds. None of these essential ingredients of a binding contract exist between the parties in the present case.

12. It is further urged regarding the ERS Scheme having being paid to the three employees that despite best efforts, the defendant company has not been able to trace out the records. Possibly they were given higher amounts as claimed by the plaintiff as the plaintiff was working in the HR Department and she may have committed an error either by mistake or deliberately. However, merely because three persons have allegedly received payment under the ERS scheme cannot mean that all employees have to be treated in the same manner.

Further it is stated that after the shocking incident in America on 11.09.2001 there had to be a downsize in the Department and none of the staff members have received any payment thereafter as is being sought by the plaintiff. It is urged that though as per the resignation letter of the plaintiff she had opted for the Corporate Business Response Scheme the defendant has given her more than she was entitled to. The plaintiff has been paid four weeks per year of service as a goodwill gesture under the Corporate Business Response Scheme.

13. I may now come to the issues. I will first come to issues No.(ii)

and (iii) which read as follows:-

“(ii) Whether the plaintiff was coerced and made to sign the letter dated 08.07.2002 under duress as stated in the plaint upon his requesting for UK Business Response Scheme? OPP

(iii) If issue No.2 is answered in the affirmative, what is the effect of the letter dated 08.07.2002 in view of the payments received in full by the plaintiff? OPD”

14. PW-1 has in her evidence by way of affidavit has given a detailed description of what transpired on 08.07.2002. As per her evidence she was suddenly on the said date called by Ms. Amanda Ball, the Head of the Department, for a purported routine meeting but was informed in the meeting that her job had been merged with a newly created role of corporate affairs and that she had to leave the services of the company. The meeting is stated to have taken place in a conference room where she was confined for 2½ hours till she agreed to take a decision to leave the organisation. She has also explained that she was given only two options (i) either to resign (ii) or to have the contract of employment terminated with payment of three months’ pay in lieu of notice. Ms. Amanda Ball was carrying two drafts of both the letters ready with her. Though time was sought from Ms. Amanda Ball by the plaintiff to consider the options available to her but no time was given to the plaintiff as it was stated that it was not desirable to allow her to spend any further time on her desk. Hence, it is stated in the affidavit that the plaintiff was pressurised to sign the document Ex.P-14. The document reads as follows:-

“Dear Andy

For personal reasons, I would like to apply for the Corporate Business Response Scheme. I would request

you to release me from close of work on 8th July, 2002.
Please would you process the settlement of my dues accordingly.”

15. As per her affidavit by way of evidence, there and then she was handed over an acceptance of her resignation letter, though she had nowhere used the word resignation in her communication. The communication from the defendant reads as follows:-

“Dear Anjum,
I acknowledge your letter of 8th July 2002 applying for the Corporate Business Response Scheme and tendering your resignation with effect from close of work on 8th July, 2002. I am pleased to accept the above and would ask you to contact your Finance Manager, South Asia for settlement of your dues.”

16. The plaintiff was subjected to repeated cross-examination on various dates i.e. 15.03.2010, 15.07.2010, 12.08.2010, 30.11.2010, 18.04.2011, 06.09.2011 & 03.01.2011. The relevant portion regarding the cross-examination on 06.09.2011 reads as follows:-

“Q. I put it to you that no termination letter was ever issued to you and further that your services were never terminated by the defendant. What do you say?

Ans: No letter was issued. (Vol. As the company had accepted my request to leave the company. Again said, under corporate business response scheme. Again said, in fact under the early voluntarily retirement scheme, which Ms.Amanda Ball insisted to be the corporate business response scheme).

I had submitted a letter on 08.07.02 itself. (Vol. The same was under duress and force)

(Witness is put to Ex.P14)

Ex.P14 is the same letter, as has been referred above.

Q. What threat was given or force applied against you for submitting such letter?

Ans: It was the threat of termination of my services.

It is correct that Ex.P14 was not lying prepared with Ms.Amanda Ball. (Vol. I had prepared the letter. Again said, the letter of termination was lying prepared with her)

It is incorrect to suggest that no letter of termination was kept ready by Ms.Amanda Ball or that it is for this reason that no such letter was ever served upon me. It is incorrect to suggest that no such threat of termination was ever given to me.

It is correct that Ex.PW1/X was issued to me by the department on the same day, after submission of Ex.P14.

After acceptance of my letter, I was asked to leave the office. I did not submit any complaint in writing to the management or to police, complaining about any threat or use of force against me, either the same day or within reasonable time thereafter. (Vol. I had spoken to the General Manager (South Asia), subsequently). I do not remember when did this conversation take place.”

17. DW-1 Avani Prabhakar in her affidavit by way of evidence has confirmed that the post of HR Manager held by the plaintiff was merged with another post and hence the services of the plaintiff were no longer required. DW-2 Preneet Bindra had also confirmed that after 9/11 incident due to deterioration in global economic scenario the defendant company was forced to take austerity measures.

18. Both the DW-1 and DW-2 admit that the services of the plaintiff were no more required. Hence, the defendant had to remove or move out the plaintiff from the defendant organisation.

19. The next disputed fact is as to what transpired in the meeting on 8.7.2002 that took place between the plaintiff and Ms.Amanda Ball. The details have been narrated by the plaintiff in her evidence by way of

affidavit which has already been stated above. She was threatened that if she did not accept the package as suggested by Mr.Amanda Ball her services will be terminated and she will receive only three months' salary. The affidavit states that under pressure and coercion she signed the communication Ex.P-14 dated 8.7.2002. On the same date, the defendant has accepted her communication treating it to be a resignation. There and then she was asked to leave the office. Pursuant to the incident of 8.7.2002 the plaintiff has written to Mr.Ande Stern, General Manager, South Asia on 25.07.2002. In her admission/denial the defendant has admitted receipts of the said communication which is Ex.P-15. The version of the plaintiff as elaborated in the plaint and in the affidavit by way of evidence is the same as narrated in the said letter sent immediately after the incident. The communication also acknowledges that Mr.Ande Stern has spoken to her earlier. There is another communication to the said effect written by the plaintiff to Mr.Neil Robertson on 8.10.2002 Ex.PW1/9 though the defendant has denied this communication. There is a subsequent email from Mr.Neil Robertson dated 28.10.2002 Ex.PW1/11 where he has acknowledged the receipt of the communication from the plaintiff. The two communications written contemporaneously narrate the sequence of events and facts as narrated by the plaintiff in her evidence by way of affidavit. Ex.P15 and PW1/9 also show that the plaintiff had immediately protested and lodged a strong complaint pointing out the manner in which she was forced and pressurized to sign the communication dated 08.07.2002.

20. Hence, it is clear from the evidence on record that the plaintiff was forced and pressurised into signing communication dated 08.07.2002. A

clear case of coercion and undue influence is made out by the manner in which the plaintiff was threatened by Ms.Amanda Ball, her superior officer. The plaintiff had no option. Unjust terms were being imposed upon the plaintiff by a stronger party. The plaintiff in the circumstances had no choice or rather no meaningful choice but to give her assent to the suggestions being forced on her by Ms.Amanda Ball and to sign on the dotted line as threatened by Ms.Amanda Ball.

21. Reference may be had to the judgment of the Supreme Court relied upon by the plaintiff in the case of *National Insurance Company Limited vs. M/s. Boghara Polyfab Pvt. Ltd. (supra)*. In paragraph 25 the Court held as follows:-

“25. In several insurance claim cases arising under Consumer Protection Act, 1986, this Court has held that if a complainant/claimant satisfies the consumer forum that discharge vouchers were obtained by fraud, coercion, undue influence etc., they should be ignored, but if they were found to be voluntary, the claimant will be bound by it resulting in rejection of complaint. In *United India Insurance Co. Ltd. vs. Ajmer Singh Cotton & General Mills* AIR1999SC3027, this Court held:

The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by

circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief.

In the instant cases the discharge vouchers were admittedly executed voluntarily and the complainants had not alleged their execution under fraud, undue influence, misrepresentation or the like. In the absence of pleadings and evidence the State Commission was justified in dismissing their complaints.

The above principle was followed and reiterated in *National Insurance Co. Ltd. vs. Nipha Exports (P) Ltd.* (2006)8SCC156 and *National Insurance Co. Ltd., vs. Sehtia Shoes* (2008)5SCC400 . It will also not be out of place to refer to what this Court had said in *Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly* (1986)IILLJ171SC in a different context (not intended to apply to commercial transactions):

(This) principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This

principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra- structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.”

[emphasis supplied]

22. To the same effect is the judgment of the Supreme Court in the case of *Ambika Construction vs. Union of India (supra)*.

23. The plaintiff hence was coerced and pressurised to sign letter dated 8.7.2002. As far as issue No.(ii) is concerned, it is clear that the plaintiff was coerced and made to sign the letter dated 8.7.2002 under duress. Issue No.(ii) is answered accordingly.

24. On issue No. (iii), it may be noted that on 13.12.2002 the defendant remitted a payment of Rs.14,52,335/- after tax deduction on account of severance compensation. The plaintiff accepted the same without prejudice to her contentions and wrote a letter to the defendant to the said effect on 20.12.2002 Ex.PW1/20. Given the protest lodged before receipt of the payment and also after receipt of payment it cannot be said that the acceptance of the said amount by the plaintiff was in full and final settlement of her claim. Issue No.(iii) is answered accordingly.

25. I will now deal with issues No. (i), (iv), (v) and (vii) which read as follows:-

“(i) Whether the plaintiff's services were wrongly and

illegally terminated on 08.07.2002 in violation of the applicable rules and the earlier practice of the defendant Company? OPP

(ii)

(iii)

(iv) Whether the voluntary scheme for retirement was not applicable to the plaintiff as averred in the plaint? OPP

(v) Whether the plaintiff was entitled to the benefit of the early retirement scheme in India? OPP”

(vi).....

(vii) Whether the plaintiff is entitled to the amounts claimed in the plaint? OPP”

26. We may first look at the appointment letter of the plaintiff which is exhibited as PW-1/D-14. The plaintiff has accepted the contract of employment and affixed her signatures on 27.7.2001 on this document.

Relevant clauses of the letter read as follows:-

“2.1.1 Your appointment will be for a period of 3 (three) years from 5 July 2001 subject to the completion of a satisfactory period of six months’ probation from the date of your engagement. At the end of the 3 year period, your contract will stand terminated unless extended in writing for a further specific period on mutually agreed terms.

.....

2.1.3 Your employment will be governed at all times by applicable staff regulations for British Airways now in force (or as modified from time to time in Station Orders) and applicable to your particular employment. These regulations may be seen on request and will be deemed to be incorporated in this Contract.

.....

2.1.5 Without prejudice to any other rights of termination of the parties under this contract, either party may terminate this Agreement at any time by giving to the other three months’ notice in writing or three months’ pay in lieu of

notice.

In this event British Airways Plc will buy out the actuarial discount applicable to your pension. Your eligibility to pension will be as per BA Plc Staff Pension Fund India.”

27. Hence, three things follow from the above contract of employment. Firstly, the appointment to the post of Human Resources Manager, South Asia is for a period of three years w.e.f. 05.7.2001. Secondly, the employment is governed by applicable staff regulations of the defendant which are in force or as modified from time to time. Thirdly, the contract is terminable by either party by giving three months’ notice in writing or three months’ pay in lieu of notice.

28. In the present case, admittedly the defendant has not terminated the services but, as already stated above, has procured a communication dated 08.07.2002 from the defendant under coercion and pressure. The termination clause would not apply as admittedly the defendant has not terminated the services. The defendant has in fact treated the communication dated 08.07.2002 as a resignation on the alleged request of the plaintiff to be compensated under the Corporate Business Response Scheme. Hence, the question arises that in case of such a severance what would be the applicable staff regulations relating to compensation which are applicable to the plaintiff. As per Clause 2.1.3 of the appointment letter the applicable staff regulations will apply to the plaintiff.

29. The plaintiff submits that she is entitled to benefits under the ERS Scheme which means that she was entitled to two months’ salary for every year of service i.e. in her case 56 months as she had served for 28 years.

30. We may look at the evidence led by the plaintiff to prove that the ERS Scheme is the one on the basis of which she would be entitled to be given her dues for severance of service. Plaintiff has placed on record a copy of the ERS Scheme Ex.P-13 relevant clauses of which reads as follows :-

1. "This Scheme is available to staff in India and the staff wishing to opt for this Scheme may submit their applications to Finance Human Resources & Administration Manager South Asia Through their Section Head.
2. British Airways reserve the right to accept or reject any application made under this Scheme and the decision of General Manager South Asia will be final and conclusive. Unless the Management's acceptance is conveyed to the staff concerned in writing, the request shall not be deemed to have been accepted.
3. Staff requiring any clarification or assistance concerning this Scheme, may approach their Section Head.
4. The last date for receipt of applications is 31 January 1996."

31. The scheme on a bare reading per se is not applicable to the plaintiff as it expired in 1996. However, the plaintiff contends that by their conduct, the defendants have extended the Scheme to employees leaving service of the defendant even after 1996.

32. PW-1 in her affidavit by way of evidence has stated that the said Scheme has consistently been applied in the past several years for all severance payments made to employees taking early retirement under the same formula, even in the absence of a formal communication extending

the tenure of the Scheme. She in her affidavit by way of evidence gives following examples of persons who have been given remuneration on leaving service under the said Scheme.

- a. Mr. Jaspal Singh Kohli – Area Cargo Manager – India, Bangladesh & Sri Lanka (Grade IMG1) – effective from 31.12.1998.
- b. Mr. Jaspal Singh Khokhar, Area Cargo Sales Manager IBS (Grade IMG1) – effective from 31.3.2000.
- c. Mr. Kishin Jhuremalani, Operations Coordinator, Mumbai (Grade S2) effective from 28.2.2001.

33. That in sum and substance is the evidence led by the plaintiff to show that the ERS Scheme is applicable to her and that she is entitled to remuneration based on the said Scheme. These averments are reiterated by the plaintiff in her cross-examination.

34. Defendant has stoutly denied existence of any such Scheme. DW-1 in her affidavit by way of evidence has clearly stated the ERS Scheme (Ex.P-13) was not in force in British Airways in India when the plaintiff submitted her letter dated 8.7.2002. Same is repeated by DW-2 in her evidence by way of affidavit. She has said that the ERS Scheme was valid only from 5.1.1996 to 31.1.1996. It is stated that after 11.09.2001 due to deterioration of global economic conditions there was no question of any automatic extension of the ERS Scheme. She reiterates that there was no Scheme in existence in 2002 and a Scheme, namely, the Voluntary Severance Scheme, 2002 was launched in 2002. It is stated that the plaintiff has been given benefits under the Corporate Business Response Scheme which is equivalent to the benefits payable under the Voluntary Severance Scheme. It is reiterated that on 08.07.2002 no

severance scheme was followed.

35. To test the validity of the submission of the plaintiff that the EVR Scheme was extended beyond 1996, we may first look at Section 9 of the Indian Contract Act, 1872. Same reads as follows:-

“9. Promises, express and implied.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

36. The legal position in this regard is settled. A Contract is implied in fact only when there is a meeting of minds. Normally, the Court would refuse to reach and imply a term in a contract which is silent on a point.

37. Reference may be had to the judgment of the Division Bench of Bombay High Court in *State of Maharashtra & Ors. v. Saifuddin Mujjaffarali Saifi*, AIR 1994 Bombay 48 (MANU/MH/0008/1994). The court had noted as follows:

“17.....A term which is not actually included in a written contract cannot be implied unless the Court comes to a clear conclusion that both the parties must have intended that the term should be implied. However, it must be emphasized that a very important question arises as to whether and in what circumstances a contract between the parties can be implied. The contract can be implied and it is clear from Section 9 of the Indian Contract Act, but it is the fundamental principle of law that the Court should not make a contract for the parties. It follows that a clear case must be made out before doing so. A contract implied in fact requires meeting of minds. The Court should refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of term.....”

38. From the evidence of the plaintiff it can be concluded that the three employees, namely, Shri Jaspal Singh Kohli, Shri Jaspal Singh Khokhar and Ms.Kishin Jhuremalani have been paid as per the EVR Scheme. Based on this fact, in my opinion, there cannot be said to be any meeting of minds of the parties. The evidence led by the plaintiff is sketchy. This evidence can not lead to the conclusion that the tenure or terms or conditions of the ERS Scheme were changed. There is nothing in the conduct of the defendant to show that the ERS Scheme was made applicable to all employees in India in 2002. Clause 2 of the Scheme clearly states that the defendant has a right to accept or reject any application under the Scheme and the decision of the defendant shall be final and conclusive in this regard. Merely because the defendant consented to compensate the three employees based on the ERS Scheme would not mean that they were obliged to do the same in the case of the plaintiff. It cannot be held that defendant by their conduct gave a go-bye to this clause, making the Scheme binding on the defendant.

39. Reference may be had to the judgment of the Supreme Court in the case of ***Bank of India & Ors. vs. O.P. Swaranakar etc. (supra)***. That was a case where the Supreme Court was dealing with a Voluntary Retirement Scheme of a Nationalized Banks. The Court held as follows:

“63. A proposal is made when one person signifies to another his willingness to do or obtain from doing anything with a view to obtaining the assent of the other to such act or abstinence (See Section 2(a)). Herein the banks by reason of the scheme or otherwise have not expressed their willingness to do or abstain from doing anything with a view to obtaining assent of the employees to such act. It

will bear repetition to state that not only the power of the bank to accept or reject such application is absolutely discretionary, it, as noticed therein before, could also amend or rescind the scheme. The Scheme, therefore, cannot be said to be an offer which, on the acceptance by the employee, would fructify in a concluded contract.

64. The proposal of the employee when accepted by the Bank would constitute a promise within the meaning of Section 2(b) of the Act. Only then the promise become an enforceable contract. In the instant case the banks when floating the scheme did not signify that on the employees assenting thereto a concluded contract would come into being in terms whereof they would be permitted to retire voluntarily and get the benefits thereunder.”

40. Hence, merely because the defendant granted relief to three of its employees under the EVR Scheme does not imply defendant was obligated to compensate the plaintiff also under the Scheme. The evidence does not show that ERS Scheme can be made applicable to the plaintiff as claimed.

41. The reliance of the plaintiff on the judgment of the Supreme Court in *Godhara Electricity Company Limited vs, State of Gujarat (supra)* is misplaced. In para 11 the Supreme Court held as follows:-

“11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by

the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actions as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation (see Corbin on contracts, Vol. 3, pp. 249 and 254-56).”

42. This judgment does not assist the plaintiff.

43. In my opinion, it was for the plaintiff to prove her case. Under section 101 of the Indian Evidence Act the burden of proof is on the plaintiff to prove the facts which would entitle her to a legal right. Reference in the above context may be had to the judgment of the Supreme Court in *Anil Rishi vs. Gurbaksh Singh*, (2006) 5 SCC 558 paragraphs 8 to 10 of which read as follows:-

8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:-

Section 101. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.”

44. The burden of proof was on the plaintiff. The plaintiff has failed to discharge the burden.

45. Coming to the issues, as far as issue No. (i) is concerned, there is no termination of the services by the defendant. The plaintiff has opted for a certain scheme under circumstances explained and the defendant has accepted the same as her resignation. Even otherwise, as per the appointment letter of the plaintiff dated 27.07.2001, her services could be terminated after giving three months’ notice/three months’ salary. More than the said amount has been paid. Hence, issue No.(i) is answered

accordingly.

46. Regarding issues No. (iv) and (v), the Early Retirement Scheme on the basis of which the compensation is sought for by the plaintiff was not applicable to the plaintiff and she is not entitled to benefit of the same. Issues No. (iv) and (v) are answered accordingly.

47. I may now come to the last issue, namely, issue No.(viii) i.e. “whether the plaintiff is entitled to any other relief?”. As per the plaint the plaintiff on account of the conduct of the defendant suffered damages, due to mental agony and humiliation and has claimed Rs.5 lacs as a token damages on this account. These damages it stated arose on account of mental agony, deliberate default and delay on the part of defendant in settling plaintiff’s account as per EVR Scheme which damage cannot be computed in terms of money.

48. PW-1 in her affidavit by way of evidence has reiterated the above contentions. The plaintiff has not been cross-examined on this aspect at all.

49. The sequence of events may be relooked. The plaintiff had an unblemished career for more than 28 years. She joined services with the defendant on 20.05.1974 as Secretary to Assistant to Manager, Northern India in Delhi. She has gone through several promotions i.e. HR Co-ordinator; South Asia; HR Manager, Bangladesh; Sri Lanka and finally HR Manager, South Asia. There is no averment in the written statement of the services of the plaintiff not being in order. Suddenly, out of the blue on 08.07.2002, ignoring her 28 years of service she has been told to leave her service there and then. She has been harassed, coerced and pressured into giving her communication dated 08.07.2002 Ex. P- 14.

50. Thereafter the defendant has remained silent. The first communication that came from the defendant was on 04.10.2002 three months after having accepted the resignation of the plaintiff giving details of the severance settlement of the plaintiff. Some correspondence followed whereby the plaintiff sought the break-up on 12.10.2002. The defendant sent a reply on 07.11.2002 not accepting the contentions of the plaintiff. Finally, the defendant on 12.12.2002 sent remittance of Rs.14,52,335/-(after income tax deduction) on account of severance compensation.

51. In my view, the defendant has acted in complete disregard of the emotions of an employee who has loyally served them for 28 years. A person who has served for 28 years would deserve some compassionate handling before being told to leave. That is the minimum respect an employer is expected to show to an employee who has served the company for so long. Simply telling her one fine day that she has to leave forthwith for no fault of the employee and coerce her to sign a communication showing that she was voluntarily leaving is bound to cause immense emotional trauma and humiliation. Thereafter, the defendant has been dilly dallying and has taken more than five months to send the severance package of their choice. The delay has no explanation.

52. Reference may be had to the judgment of the Supreme Court in ***Mehmood Nayyar Azam vs. State of Chhattisgarh and Others, (2012) 8 SCC 1*** where the Supreme Court held as follows:-

22. At this juncture, it becomes absolutely necessary to appreciate what is meant by the term "harassment". In P. Ramanatha Aiyar's Law Lexicon, 2nd Edn., the term "harass" has been defined, thus: -

“**Harass.** "injure" and "injury" are words having numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word "harass" excluding the latter from being comprehended within the word "injure" or "injury". The synonyms of "harass" are: To weary, tire, perplex, distress tease, vex, molest, trouble, disturb. They all have relation to mental annoyance, and a troubling of the spirit.”

The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. The accused in custody can be put under tremendous psychological pressure by cruel, inhuman and degrading treatment.”

53. A clear case of harassment of plaintiff is made out in the facts of this case.

54. It may be relevant to mention here the observations of the Supreme Court in *Indian Railway Constructions Co. Ltd. v. Ajay Kumar*, AIR 2003 SC 1843 (MANU/SC/0166/2003). While dealing with duties of an employer and an employee, the court observed as follows:

“26. We find substance in the plea of learned counsel for the appellant that an employee even if he claims to be a member of the employee's union has to act with sense of discipline and decorum. Presentation of demands relating to employees cannot be exhibited by muscle power. It must be borne in mind that every employee is a part of a functioning system, which may collapse if its functioning is affected improperly. For smooth functioning, every employer depends upon a disciplined employees' force. In the name of presenting demands they cannot hold the employer to ransom. At the same time the employer has a duty to take into and as far as

practicable, obviate the genuine grievances of the employees. The working atmosphere should be cordial, as that would be in the best interest of the establishment. Unless an atmosphere of cordiality exists there is likelihood of inefficient working and that would not be in the interest of the establishment and would be rather destructive of common interest of both employer and employees.”

In my opinion, the defendant has failed to deal with the genuine grievance of the plaintiff and to establish a cordial atmosphere in the place of work.

55. Normally, in view of a breach of contract compensation for humiliation and harassment would not be awarded. However, in my opinion, this would be an exceptional case. A reference in this regard may be had to a judgment of this High Court in the case of ***Akhilesh Kumar Vermavs. Maruti Udyog Ltd. & Ors., 2011 IX AD (Delhi) 90 (MANU/DE/3812/2011)***. That suit was filed by a plaintiff who was employed as an Executive. He sought apart from other reliefs, amounts towards harassment, mental agony and defamation. This court held as follows:-

“18..... The proposition of law, which emerges from these judgments, is that even if the dismissal of an employee from service is illegal, he is not entitled to whole of the back-wages as a matter of right, and the Court needs to award a suitable compensation after considering all the facts and circumstances of the case before it.

19. Taking into consideration all the facts and circumstances of the case including the fact that the Plaintiff has been practicing as an Advocate of this Court seems to be doing well as is evident from the income

disclosed in his affidavit, I am of the view that the ends of justice would be met if the Plaintiff is awarded an all inclusive compensation amounting to Rs. 15,00,000/- on account of his wrongful dismissal from service. He will not be entitled to any pendent lite and future interest on this amount.”

In that background this court awarded an overall compensation of Rs. 15 lacs.

56. The plaintiff has claimed Rs.5.00 lacs on account of mental agony, humiliation, deliberate default and delay on the part of the defendant in settling the plaintiff's account as per EVR Scheme.

57. Delay in settling the account of the plaintiff as per calculations of the defendant is apparent as stated above. I award a sum of Rs.1.00 lac to the plaintiff on account of the said delay in settling the account of the plaintiff as per calculations of the defendant.

Further, I award a token sum of Rs.1.00 lac on account of mental agony, coercion and harassment that the plaintiff was subjected to by the defendant.

58. A decree is passed in favour of the plaintiff and against the defendant for a sum of Rs.2.00 lacs (Two Lacs only). The plaintiff will also be entitled to simple interest @ 12% p.a. on the said amount from the date of filing of the suit till recovery. The plaintiff shall also be entitled to costs.

**(JAYANT NATH)
JUDGE**

DECEMBER 22, 2015/n