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

+ O.M.P. (COMM) 39/2016, IAs 1973-1974/2016

PINNACLE AIR PVT. LTD.

..... Petitioner

Through: Mr. Tanmay Mehta, Mr. Kunal
Godhwari and Mr. Arjun Singh,
Advs.

Versus

CAPT. RICHARD SLOAN NORRIS

..... Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **10.02.2016**

IA 1974/2016

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 39/2016

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act', in short) is to the award dated October 31, 2015 passed by the learned Arbitrator, whereby the learned Arbitrator has

granted a sum of USD 34000/- in favour of the respondent herein, against the petitioner minus the tax as per Indian laws, with interest over the balance amount with effect from June 1, 2012, till the date of realisation.

2. The brief facts are, it was the case of the respondent, the claimant before the learned Arbitrator, who is a US citizen and pilot by profession, was engaged by the petitioner, an Indian company for providing Air management services to various customers. The petitioner was providing services to M/s. Electrosteel Aviation Ltd (EAL), who was desirous of purchasing a Phenom 100 aircrafts from Empresa Brasileira de Aeronautica, a Brazilian company, during the year 2011 . No Indian pilot had a valid licence endorsed by DGCA to fly the said aircraft in India. The petitioner planned to recruit a foreign pilot for the plane to be purchased by EAL. After negotiating the terms of employment, it was the case of the respondent, that he accepted the proposal of the petitioner for service in India at annual salary of USD 96000/-. The appointment of the respondent was for three years at USD 8000/- pm + perks. His services were to commence from October 12, 2011. The DGCA granted the security clearance and had called upon the petitioner to submit the documents for validation of respondent-claimant's foreign pilot licence in India. The

employment VISA was given by the concerned Consulate in the month of November 2011. It was the case of the respondent that the employment VISA was delayed deliberately, caused by the petitioner herein, as the petitioner did not submit requested documents and applications with Indian Embassy in time. It was his case that though, he was employed with the petitioner with effect from October 12, 2011, his salary was arbitrarily withheld, without assigning any reason. He had referred to his E-mails and a conference call made by him in the month of December 2011 and January 2012. In March 2012, the petitioner proposed the respondent to undergo four days Recurrent raining at CAE in Dallas at Texas for the period March 23, 2012 to March 27, 2012. The respondent was assured that on acceptance of his proposal of undergoing recurrent training, one month's salary could be transferred to his account immediately and all expenses incurred by him for the training, would be borne by the petitioner.

3. On the grant of VISA, the respondent arrived at in India in the month of April 2012. It is noted that because of ill health, he left from India for Phillipines. He underwent on surgery on May 3, 2012. It was the case of the respondent that despite his serious illness, he was always willing to join the petitioner. It was his case that the petitioner failed to revert to him

regarding retaining of services and failed to make payment of due salary.

4. The petitioner had denied the fact about entering into a contractual employment with the respondent. According to the petitioner, the respondent has suppressed the true and material facts and deliberately made false allegations and misrepresented. It is their case that in order to enable a foreign pilot fly commercial aircraft, within the territory of India, he has to have a valid Foreign Aircrew Temporary Authorization (FATA) certificate issued by DGCA. The FATA certificate is issued subject to the validity of applicant's licence qua the said aircraft and endorsement of recurrent training, rating, medical and proficiency checks of the pilot and on meeting the requirements as laid down in the training manual of the operator. It was the case of the petitioner, that in the absence of valid FATA, no pilot could legally fly the aircraft within the territory of India.

5. According to the petitioner, the FATA certificate issued by DGCA is initially valid for a period of one month. After May 25, 2012, after the expiry of one month, the FATA became illegal and invalid. It was their case, that, the respondent never appeared in the written examination within 90 days of issuance of FATA despite having clear knowledge of the fact that he has to clear the examination. According to the petitioner, the FATA

certificate issued to him itself mentions at point 8 about this examination and his FATA, therefore, could not have been renewed without clearing the examination after July 24, 2012. Thus, subsequent to this date, the respondent could not fly lawfully the aircraft within the territory of India. The petitioner's case was also that, the entitlement of the respondent for salary was only if he was legally in position to discharge his part of the contract i.e. flying the aircraft. According to the petitioner, the respondent had not informed the petitioner about his illness and health conditions. The petitioner had referred to Email dated May 19, 2012 sent to the respondent, requesting him to undergo the medical examination and confirm the same. He was also told about the FATA rules and regulations, which stipulate, without examination, the FATA is useless. The respondent did not respond to the email. It was the case of the petitioner that the terms and conditions of the contract clearly show that his contract was to stand terminated, if he was in contravention of the terms and conditions of the contract.

6. Out of the pleadings, the following issues were framed:

1) Whether there was breach of employment contract on the part of claimant or on the part of the respondent?

2) *Whether the contract entered into between claimant and respondent was voidable contract on account of fraud committed by claimant;*

3) *Whether Capt. Sandeep Saraf is competent person to sign or act on behalf of respondent;*

4) *Whether the claimant was medically fit for flying aircraft in India between 12.10.2011 and 11.10.2012;*

5) *Whether the claimant did not have valid FATA/flying license making him eligible to fly an aircraft within India during the relevant period;*

6) *Whether the claimant was entitled to sum of US\$ 1,23,076.00 toward the arrear of salary, US\$ 52,709.93 as interest over the arrear of salary, US\$ 21,642.59 toward the additional expense incurred, US\$ 11,018.73 as interest over the additional expense, mental harassment and agony US\$ 41,000.00, US\$ 94,356.16 toward the loss of opportunity from 12.10.2011 to 14.2.2013 @ US\$ 70,000.00 per annum, US\$ 22,893.64 as interest over claim of loss of opportunity;*

7) *Whether claimant is entitled for the payment of pendent lite and future interest of 18% p.a. on the total amount claimed in this claim petition from the date of demand till the date of realization;*

8) *Whether the respondent is entitled to recover the amount of US\$6000 given by it to claimant, as claimed in counter claim.*

7. Against the issue No. 1, it was held by the learned Arbitrator that the contract between the petitioner and the respondent got frustrated with effect from April 10, 2012 when the claimant became medically unfit and concealed this fact from the petitioner and DGCA.

8. Issue No. 3 was decided in favour of the petitioner.

9. Insofar as issue No. 4 is concerned, it was held that the respondent was not physically fit to fly the aircraft in India w.e.f. April 2012 and the respondent has also not offered himself for medical examination in India before the DGCA.

10. As regards issue No. 5, it was held by the learned Arbitrator that, the respondent did not have a FATA/flying licence making him eligible to fly an aircraft in India. It was observed, FATA granted to the respondent was invalid due to fraud played by him and obtained in contravention of Aircraft Rules, 1937 of medical fitness.

11. On issue No. 6, the learned Arbitrator held that the respondent is not entitled for salary beyond April 10, 2012, on the premise that obligation of the petitioner, at the most, started from November 11, 2011.

12. On issue No. 7, the learned Arbitrator granted interest @ 10 % p.a. to the respondent.

13. On issue No. 8, it was held, the petitioner is not entitled to recovery of amount of USD 6000 given by it to the respondent.

14. Mr. Tanmay Mehta, learned counsel appearing for the petitioner would urge that the conclusion of the learned Arbitrator is contradictory. He has drawn my attention to pages 23, 33, 34 and 37 of the award, wherein, the learned Arbitrator has held that the respondent could not have employed by the petitioner before he was legally entitled to be employed. He has heavily relied upon the conclusion of the learned Arbitrator that the respondent had obtained FATA by fraud and the fact that the respondent has concealed his illness, which would have disentitled him to a valid medical clearance, which is a prerequisite for flying an aircraft in the country. He would also place reliance on clause 5.1 and 5.2 of the terms of employment.

15. Having heard Mr. Mehta, learned counsel for the petitioner, this Court is only concerned with the salary granted by the learned Arbitrator between November 2011 to April 2012. Even though, Mr. Mehta vociferously highlighted the contradictions in the award on the aspect whether the respondent was entitled to the salary from the date of his appointment, suffice to state, that the terms of employment of the respondent, included the following:

“We are pleased to offer you employment as Aircraft Captain in Pinnacle Aircraft Limited with effect from 12th October, 2011....

XXX

XXX

XXX”

16. Clauses 5.1 and 5.2 of the Contract Letter, read as under:

*“5. SERVICES TO BE RENDERED DURING
TENURE OF EMPLOYMENT—*

5.1 You shall faithfully and competently carry out all duties assigned, including flying/ground duties/chance in duties assigned to you in the Captain duty/Flight Roster in accordance with the flight and duty time limitations (FDTL) stipulated by the company and/or the DGCA. This will be regulated by the Company’s sole direction. You will not be entitled to refuse to comply with the above mentioned instructions/directions of the company. In addition, you shall abide by the DGCA and company operations Manual and other administrative instructions as may be issued by the company from time to time.

5.2 Your employment is subject to holding proper valid license, endorsement for Bell 404 and medical/Technical fitness to fly”.

17. The reliance placed by Mr. Mehta on aforesaid clauses 5.1 and 5.2 suggest that the respondent could not have piloted the aircraft without the

necessary approval from the DGCA, but that does not mean, that the petitioner's employment would not have started till the time, he piloted and flew the aircraft, without further necessary approval, moreso, in view of the stipulations in the appointment letter, which I have highlighted above. It is one thing to say that the respondent is in the employment of the petitioner and another thing that the respondent could not fly an aircraft without necessary approvals. In other words, the conclusion of the learned Arbitrator, more specifically, in para 32, which I reproduce as under, reveals that the learned Arbitrator has granted the amount on the premise that the obligation of the petitioner started on November 11, 2011 till April 10, 2012, when the contract have become void due to his medical unfitness.

“32. As already discussed the obligation of the respondent at the most started from 11th November, 2011. The claimant landed in India on 1st April, 2012. In his rejoinder, he states that he left India on 12th April (para 9). However, the mails show that he had written to Ashwin of Titan on 10th April, 2012 that he was planning to leave India and to go to Manila to be with his family, without disclosing his illness. His FATA was applied when he was in India but FATA came when he was not in India. The respondent had written him mail on 19.5.2012 to report for medical and had given clear warning that in case he did

not respond to the email or does not report for medical, his contract would come to an end. He did not inform respondent that he was going to Kochi at invitation of Capt. Sheik. It is apparent that contract between the parties actually came to an end when claimant concealed his sickness/ailment, applied for FATA without disclosing the ailment and without going for medical check up in India. He was not in a condition to fly. Thus he was not entitled for salary beyond 10th April, 2012 from the respondent. I, therefore, consider that he was entitled only for 5 month salary from the respondent@ US\$ 8000 p.m. Out of this, he was already paid US\$ 6000. Thus towards salary, he was entitled for a sum of US\$ 34000. He is not entitled for expenses as claimed by him in respect of amounts spent in obtaining employment visa for himself, his wife etc., the FEDEX visa etc. etc., The contract between him and the respondent did not provide that the respondent shall bear expense pertaining to his employment visa etc. In fact the emails show that it was he who was seeking employment outside US due to recession in US market and since he was seeking employment, it was his obligation to obtain employment visa. No amount can be awarded to him in respect of loss of opportunity suffered by him as he from April, 2012, was very well knowing that his contract in India had become void due to his being medically unfit. If any opportunity had been

knocking at his door, he would have availed the same. From the pleadings it appears the recession/slump in US was continuing and there was no opportunity for him. In India he was trying for a contract with Electrosteel, Kalyan family and Titan simultaneously. Respondent did not stop him from entering into contract with any of the three. Electrosteel, Titan Aviation and Kalyan family were in his contact through Capt. Sakeer C. Sheik and were interested that he should be in India to fly the aircraft either of Electrosteel or of Kalyan family. He had availed a slot of training available with the school for Electrosteel and undergone training also in the name of Electrosteel. The correspondence between him and the respondent does not show that the respondent had undertaken to bear the training expenses. Respondent only assured him of sending one month pay so that he may undertake the training. The respondent instead of sending one month pay sent him US\$ 6000 instead of US\$8000. I, therefore, consider that he is not entitled for any expenses.

18. Further clause 5, relied by Mr. Mehta relates the nature of duties to be performed by the respondent. The learned Arbitrator has awarded USD 34,000, to the respondent, after deducting USD 6000 already paid to the respondent. The conclusion of the learned Arbitrator is a plausible view as

on an interpretation of the terms of employment. The nature of the jurisdiction of this Court in exercise of its power under Section 34 of the Act is well settled inasmuch as the Division Bench of this Court in the case of *National Highways Authority of India Vs. M/s. Lanco Infratech Ltd., date of decision March 7, 2014, ILR (2014) 2 Delhi 1187* held that the interpretation of contract is a matter within the jurisdiction of the Arbitral Tribunal and thus, even if an error exists, this is an error of fact within the jurisdiction, which cannot be re-appreciated by the Court under Section 34 of the Act.

19. In view of the above discussion, I do not think, the impugned award of the learned Sole Arbitrator need to be interfered with. The petition is dismissed.

IA 1973/2016 (stay)

In view of the order passed in the petition, the present application is dismissed as infructuous.

V. KAMESWAR RAO, J

FEBRUARY 10, 2016

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