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

Reserved on : 13th April, 2018

Date of decision : 4th July, 2018

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RFA 58/2013

AIRLINE ALLIED SERVICES LTD

..... Appellant

Through: Mr. Sarojanand Jha, Advocate.
(M-9971000692)

versus

JOHN ARTHUR ANIN

..... Respondent

Through: Mr. Sunil Kumar Agarwal & Mr.
Neelam Agarwal, Advocates.
(M-9811268891).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Plaintiff was an airline pilot, employed with Airline Allied Services Ltd. (*Defendant*) vide Fixed Term Employment Agreement dated 5th May, 2008 for the period from 5th May, 2008 to 4th May, 2009. The contractual salary payable was USD 8,500 per month and vide letter dated 8th July, 2008, the same was increased to USD 9,000 per month. His agreement was extended by a further period of one year commencing from 5th May, 2009 to 4th May, 2010.

2. It is the Plaintiff's case that while he was stationed in USA on three weeks scheduled leave, for giving training to other Pilots on behalf of the Defendant in Seattle, his contract was extended for a further period of one year from 5th May, 2010 to 4th May, 2011. The Defendant asked the

Plaintiff vide e-mail dated 13th April, 2010 to apply for Visa as soon as possible. On 20th April, 2010, the Plaintiff applied for his Visa with the Indian Consulate in Chicago, through a Visa Service Agency and completed all the documentation required for the same by 20th April, 2010. He was scheduled to depart from USA on 4th May, 2010. Despite submission of all the documents, even as on 11th May, 2010, the Visa was not issued and he was informed by the Visa service agency that no further documents had been requested by the Indian Consulate. Thereafter he was informed that the clearance from India was not given to the Consulate and hence the visa was not issued.

3. The contractual salary for the month of 5th May, 2010 to 4th August, 2010 was not paid despite request. He was also not paid three months' salary in a row and hence the Plaintiff got issued a legal notice dated 20th August, 2010. On 8th September, 2010, he received an email from the Defendant asking the Plaintiff to come to India on a tourist Visa and thereafter on 16th September, 2010, the Defendant terminated the services of the Plaintiff w.e.f. 7th October, 2010 without making payment of the salary from the period 5th May, 2010 to 4th September, 2010.

4. The subject suit was instituted on 23rd September, 2010 when the Plaintiff was still in the service of the Defendant. The Plaintiff sought the following reliefs in the suit.

“(i) Grant a Decree of Declaration in favour of the plaintiff and as against the defendant thereby declaring the termination of service of the plaintiff by the defendant vide its Letter Reference No.AASL/PERS/2010 dated 08/09/2010 as wrongful and null and void and of no effect for all intent and purposes,

- and*
- (ii) Grant a decree for USD 36000/- (USD thirty-six thousand) in favour of the plaintiff and as against the defendant along with Pendente lite and future interest at the rate of 12% per annum from the date of institution of the suit till the passing of the decree and thereafter till the date of its realization.*
 - (iii) Award the costs of the suit to the plaintiff as against the defendant.*
 - (iv) Grant any other suitable relief, which this Hon'ble Court may deem just and proper in the circumstances of the case in favour of the plaintiff and against the defendant in the interest of justice."*

5. The suit was filed through his Power of Attorney holder Mr. Praveen Kumar, as the Plaintiff was not in India. In the written statement, the Defendant claimed that the service contract of the Plaintiff was terminable with 30 days notice. It was also claimed that the Plaintiff did not render any service or perform any duty during this period and that he had abandoned his services. The Defendant relied upon the email dated 8th September, 2010 by which it called upon the Plaintiff to apply for a tourist Visa and that he would be serving one-month notice period from the day of his departure from the USA. On 9th March, 2011, two applications i.e. an application under Order XI Rule 14 and an objection taken by the Defendant under Section 35 of the Indian Stamp Act were dealt with. The Trial Court held that all the documents are admitted between the parties and hence there is no requirement by the Defendant to produce the original documents. On the issue of Stamp Act, the Power of Attorney was directed to be admitted

subject to payment of duty which is chargeable along with the penalty of ten times. The followings issues were framed in the matter on 19th April, 2011:

- “1. *Whether the relief sought by the plaintiff namely that the termination of his contract be declared null and void, is not maintainable in view of the provisions of the Specific Relief Act? OPD*
2. *Whether the plaintiff is entitled to an amount of USD 3600 against the defendant? OPP*
3. *Relief*”

6. Both parties agreed that the matter need not be listed for evidence and that the arguments be heard on the issues that have been framed. However, on 5th September, 2011, the Trial Court came to the conclusion that a trial would be required to establish the various facts and the Defendant was thereafter directed to produce the originals. An objection was taken that the Power of Attorney holder cannot give evidence. However, the said objection was rejected on 23rd September, 2011. The Power of Attorney holder was accordingly examined and discharged on 23rd September, 2011. Thereafter the Defendant led evidence of Mr. Arun K. Goyal. On 9th January, 2012, the suit was decreed by the Trial Court. The Defendant moved for a review of the said judgment which was dismissed. The operative portion of the relief granted in the impugned judgment is under: -

“In view of my findings on issue No. 2, the suit of the plaintiff is decreed for a sum of Rs. 16,35,120/- (Rupees Sixteen Lacs Thirty Five Thousand One Hundred Twenty Only, which is equivalent to 36,000 US dollars) alongwith interest @ 6% per annum from the date of filing of suit to the date of realization. Plaintiff is also entitled to costs of the suit. Decree sheet be prepared accordingly.”

7. The present appeal has been preferred against the said impugned judgment. Notice was issued in the appeal on 28th January, 2013. On 17th July, 2013, the delay in filing of the appeal was condoned and the Appellant was directed to furnish a bank guarantee to the satisfaction of the Registrar General within eight weeks. The said bank guarantee was filed on record and the same has been extended from time to time. The last bank guarantee dated 13th November, 2017 for a sum of Rs.19,44,265/- is valid up to 9th September, 2018. The documents that have been exhibited on record are: -

- i. PW-1/1, Power of Attorney in favour of Mr. Praveen Kumar duly Apostilled in the State of Illinois, USA.
- ii. PW-1/2, Fixed Term Employment Agreement dated 5th May, 2008.
- iii. PW-1/3, letter dated 8th July, 2008 by which the salary was fixed as USD 9,000/-
- iv. PW-1/4, contract extension letter dated 20th April, 2009 by which the contract was extended for one year commencing from 5th May, 2009 to 4th May, 2010.
- v. PW-1/5, letter dated 13th April, 2010 by which the contract was extended for a further period of one year from 5th May, 2010 to 4th May, 2011.
- vi. PW-1/6, FedEx Express US Airbill for Visa application dated 20th April, 2010.
- vii. PW-1/7, copy of Visa application filed by the Plaintiff with the Visa Agency in the USA along with the copy of Visa application form dated 15th April, 2010.
- viii. PW-1/8, Alliance Air Project Details/Annexure II form.

- ix. PW-1/9, acknowledgment of the Visa Agency.
- x. PW-1/10 & PW-1/11, emails from the Visa Agency regarding the status of the application.
- xi. PW-1/12, emails between the Plaintiff and the Defendant dated 11th May, 2010.
- xii. PW-1/13 to PW-1/19, emails from the Plaintiff to the Defendant.
- xiii. PW-1/20 to PW-1/24, legal notice dated 20th August, 2011 along with the speed post receipt and AD cards.
- xiv. PW-1/25, email dated 8th September, 2010.
- xv. PW-1/26 and PW-1/27, notice of termination dated 8th September, 2010 sent on 16th September, 2010.
- xvi. DW-1/1, Board Resolution of Defendant dated 26th August, 2016.
- xvii. DW-1/3, letter written by the Defendant on 10th June, 2010 to the Visa Counsellor, Indian Embassy, USA.

8. PW-1 in his evidence exhibited his affidavit which was similar to the plaint. He stated that the Plaintiff was on scheduled leave which was granted by the Defendant and the Plaintiff's service was required from 5th May, 2010. He also admitted that the Defendant does not have any control over the processing of the Visa which is done by a separate Department of the Indian Government. Since his passport continued to remain with the Consulate General of India, he also could not endeavour to take employment anywhere else.

9. DW-1 in his evidence stated that the Defendant has admitted in his written statement that the Agreement was extended from 5th May, 2010 to 4th May, 2011. He could not confirm if DW-1/3 was in fact sent to any Consulate in the USA as no postal receipt etc. to support the same was filed.

He admitted that the duties of the Plaintiff were not limited to flying only but also to supervise and other managerial functions. He further deposed that since the Plaintiff could not join the Defendant's services in Delhi, it implies his abandonment of service. He confirmed that during the validity and continuation of the Agreement, the Plaintiff was prohibited from taking up any other employment from any other agency.

10. The Trial Court held that the suit filed by the Plaintiff through his Power of Attorney is maintainable. The Trial Court held that the Agreement was a terminable contract in view of the legal position and Section 14 of the Specific Relief Act. Defendant argued on Issue No.2, that the Agreement between the parties stood frustrated as per Clause 56 of the Contract Act. This submission was rejected by the Trial Court.

Analysis and Evidence

11. In the present appeal, the submission of the Defendant is that since the Plaintiff did not render any service, he cannot claim the salary for the period of four months. The Defendant was not to be blamed for the non-issuance of the Visa by the Indian Consulate despite its best efforts. It was further argued that the Plaintiff having not reported to duty on 5th May, 2010 for whatever reasons, the salary is not liable to be paid.

12. On the other hand, learned counsel for the Plaintiff has submitted that the contract stood extended for a further period of one year. The Plaintiff was in the USA and was providing training to the Pilots of the Defendant. Despite the non-issuance of Visa, his services could have been utilised by the Defendant. However, they chose not to do so. In any event, until the date of termination and the notice period of one month is over, the Plaintiff

is entitled to his salary. It was also submitted that the Plaintiff did not take up any employment during this period.

13. Before proceeding to decide the issues raised in this appeal, some of the terms of the Agreement are relevant and are quoted hereunder: -

“ *RECITALS*

A *The Pilot has represented to the Company that he is a qualified pilot being holder of a valid Entry Clearance Visa into India together with a license validation issued by the Indian Director General of Civil Aviation (“DGCA”) and a work permit issued by the relevant Indian authorities to perform his obligation under this Agreement and is therefore fully competent to enter into this Agreement.*

B *That the Pilot has represented to the Company that he is qualified pilot and has license to fly the aircraft CRJ-700 and is fully competent to enter into this Agreement.*

C *In order to secure the performance of this Employment Agreement the Pilot has Undertaken that during the validity period of this Agreement he will not accept form of employment/jobs from any other agency/authority/airlines in India unless he is specifically authorized/assigned jobs/services/tasks in writing by the Employer.*

1. *APPOINTMENT*

The Company hereby appoints Pilot to fly the Aircraft and the Pilot accepts the appointment and agrees to work with the Company on the terms and conditions contained in this Agreement.

The Pilot shall, for the duration of the Term,

be based at DEL or such other location in India that the Company may decide from time to time (“ the Base”).

3. **TERM**

The parties agree that the employment shall commence from 05/05/2008 (“Date of Appointment”) to 04/05/2009 (extendable subject to clearance of regulatory authority and shall not leave the employment of the Company before the expiry of contracts from the Date of Appointment, unless any of the parts decide to terminate the contract by sending a three-month’s advance notice of termination to the other part.

4. **PERFORMANCE OF THIS AGREEMENT**

The pilot understands that he shall work with the company from 05/05/08 to 04/05/09 and in case of breach of this agreement by the pilot or the company, the Agreement will be treated as terminated and provisions contained herein for Termination with Cause shall be applicable and no further amounts will be considered as payable, or services considered due. In addition to the same, the company shall also have the right to take any other action initiated by the Company against the Pilot, and vice-versa.

6.1. **DUTIES**

*The Pilot shall serve the Company as a Pilot or the designation assigned to him from time to time, **in any part of the world** and on any of the routes served by the Company, including the operation of scheduled, chartered test, training, ferry and special flights as required by the Company. The Pilot shall perform all flying, training*

supervisory duties and managerial functions assigned by the Company, and in accordance with such rules or like rules as may be issued by the Company from time to time. The Pilot agrees that he shall be responsible and accountable to the Chief Pilot of his designated base/the Executive Director (Operations) or any other person as informed to him from time to time by the Company.

The Pilot agrees and undertakes that he shall be responsible for ensuring the validity and currency of all licenses, ratings, endorsements, permits, etc. required for the discharge of his duty as a Pilot or any other designation assigned to him from time to time and that the Pilot shall ensure that all licenses, ratings, permits etc. are valid and current before he commences a flight. The Company agrees to provide reasonable assistance to the Pilot for the maintenance of currency and validity of his license, ratings, permits, etc. The company will pay the necessary costs and expenses to keep the required Pilot licenses, ratings, endorsements, permits, etc. in a current and valid state, thorough the valid duration of the contract.

6.3 TRAINING

The Pilot shall undertake training courses on Class room, Simulator, Aircraft etc. deemed necessary by the Company, required by the DGCA or any other government authority.

6.5 DOMICILE

It is agreed between the parties that the

*Company may position/place the Pilot at any case decided by the Company, **within India or outside India abroad** and the Pilot shall accept the same without any objection whatsoever. The Employer further agrees and undertake that during the term of this agreement, the Pilot shall not request for change of place of posting for any reason whatsoever except for posting to a place where as a foreigner the Pilot will have the right to request a change of base on the grounds of genuine safety concerns or needs such as a place afflicted severely due to terrorist activities.*

7.1 REMUNERATION

- (a) In consideration of the provision of the Pilot's services hereunder the Company shall, pay in equivalent Indian Rupees to the Pilot an amount equal of USD 8500 per month (when the same would be authenticated by DGCA) net of Tax per month for 85 hrs block hrs before the 7th day of the next month for the completed month's services by transfer to the Pilot's designated bank account in India or issue an Account Payee cheque in pilot's name.*
- (b) Payment shall be based on the certified details each calendar month during the Term upon receipt of certified attendance and Flying hours report duly certified by Executive Director (Ops.)/Chief Pilot, Alliance Air for the completed month.*

8. TERMINATION

(i) FOR CAUSE

If the performance of the Pilot is deemed by

the Company to be unsatisfactory, the Company may at any time, upon written notice to the Pilot terminate the employment.

Without limitation, the following acts and omissions/commission shall constitute unsatisfactory performance for the purposes of this section.

- (i)(j) The employee through his own fault, ceases to hold (for any period of time), any one of the permits, licenses or travel documents, (including visas) necessary to perform his duties with the Company; or*
- (ii) Without Cause
By sending a one-month's advance notice of termination to the other part, either the Employer or the Employee can terminate the contract without cause."*

14. From the facts on record, it is clear that the contract has been extended from time to time. The last extension on 13th April, 2010 as per Exhibit PW-1/5 reads as under: -

*"REF.NO.ASSL/PERS/2010
Dated 13/4/2010*

***Capt John Arthur Annin
Instructor, CRJ-700
Delhi***

Subject: - Contract Extension

This has reference to your Fixed Term Employment Agreement that you had signed with Alliance Air on 05/5/2008 and letter no AASL/PERS/2009 dated 20th April 2009 regarding extension of contract which is valid upto 4/5/2010.

We are pleased to inform you that Competent Authority has decided to extend your existing contract further for a period of one year commencing from 5/5/2010 on existing terms and conditions.

Kindly acknowledge the same.

For Airline Allied Services Ltd.

*Sd/-
(Shrawan Shangari)
Manager Personnel”*

15. Thus, the existing contract stood extended till 4th May, 2011. The first question is as to whether the Plaintiff is entitled to a declaration as prayed for. The declaration which is sought by the Plaintiff is that the termination is wrongful and null and void. A perusal of the Agreement itself shows that the same is a terminable contract. The Trial Court has rightly relied upon the judgment of the Supreme Court in ***Indian Oil Corporation Ltd. V. Amritsar Gas Service & Ors. 1990 (2) SCALE 1056***, and also Section 14 of the Specific Relief Act. As per Section 14(1)(c), specific performance cannot be granted in respect of any contract which is determinable in nature. The contract, in the present case between the parties, is one which operated for a period of one year and was renewed from time to time. The nature of the Agreement itself is such that there are several contingencies upon which the contract can be terminated. As per clause 4, any breach could result in termination. The judgment of the Supreme Court is clear and categorical and this is also settled position in law. Thus, the declaration sought for by the Plaintiff cannot be granted.

16. The next question that arises is as to whether the Plaintiff is entitled to the salary for four months. A perusal of the evidence on record reveals that there is no doubt about the fact that the Plaintiff was on a scheduled leave in the USA to provide training to the other Pilots of the Defendant in Seattle. This is specifically pleaded in the paragraph 8 of the plaint which is reproduced herein under: -

“That while the plaintiff was stationed in U.S.A. on three weeks scheduled leave, and, for providing the instructions / training to the other pilots in the simulator on behalf of the defendant in Seattle, the defendant vide its letter No.AASL/PERS/2010 dated 13th April 2010 further extended the said Fixed Term Employment Agreement dated 5th May 2008 for a further period of one year commencing from 5th May 2010 to 4th May 2011 on the existing terms and conditions. The defendant through e-mail dated 13th April 2010 further asked the plaintiff to apply for VISA as soon as possible.”

17. It is relevant to note that in the written statement, there is no specific denial to the fact that the Plaintiff was on scheduled leave. The Defendant only denies that between 5th May, 2010 and 4th September, 2010, the Plaintiff was not rendering any service or performing any duties. However, for the period prior to 5th May, 2010, the written statement is silent. As per clause 6.1 of the contract, the Plaintiff's service could be availed by the Defendant *“in any part of the world”*. As per clause 6.5, the Defendant could position or place the Pilot *“within India or outside India abroad and the Pilot shall accept the same without any objection whatsoever”*.

18. Admittedly, for whatever reasons, the Visa enabling the Plaintiff's travel to India was not renewed, however, this fact was not within the

Plaintiff's knowledge i.e. he could not have predicted it. During the term of the contract he was not permitted to work for any other company. The emails exchanged on record show that the Plaintiff took all steps within his control and command in order to obtain his Visa. He was in continuous correspondence with the Defendant who was also attempting to assist the Plaintiff to obtain his Visa. The email dated 8th September, 2010 is relevant and is set out below: -

*“From: Alliance Air
<allianceair@rediffmail.com>
To: johnaannin@aim.com
Date: Wed, Sep 8, 2010 6:58 am*

*Dear Capt John,
You are requested to withdraw your application for visa and apply for tourist visa to come to India and take your stuff from here. Also, we would be serving you 1 months notice from the day you leave for India.*

*capt Devi Sharan
ED OPS AASL”*

19. Thus, the Defendant was well aware that the contract had stood extended from 5th May, 2010 and, therefore, a one month notice was required to be served upon him for termination. The said termination dated 8th September 2010 was communicated to the Plaintiff only on 16th September, 2010 by means of an email. Thus, surprisingly, it appears that the Defendant had decided to terminate the Plaintiff, on the very date it asked him to obtain a tourist visa. The termination letter reads as under: -

*“REF. NO.AASL/PERS/2010
DATED 8/9/2010*

***Capt John Arther Annin
Instructor
CRJ-700
Delhi***

This has reference to Fixed Term Employment Agreement dated 5th May 2008 that you had signed with Alliance Air which was extended vide our letter no.AASL/PERS/2010 dated 13/04/2010 and which is valid upto 03/05/2011.

In terms of clause 8 (ii) of the Fixed Term Employment Agreement, it has been decided by the competent authority to terminate your services on expiry of 30 days notice period i.e. 07/10/2010.

You are advised to surrender all the property of Alliance Air, which may be in your possession so that your accounts may be settled by the Finance Department.

*(TARUN SHIVAM)
OFFICER (PERS)
For Manager Personnel"*

20. The letter categorically records that the earlier contract is valid up to 3rd May, 2011 and accordingly notice period of one month was being served vide letter dated 8th September 2010, served upon the Plaintiff on 16th September 2010. Thus the contract was valid and would expire only on 7th October, 2010. Since the Plaintiff continued to be an employee of the Defendant during this period, the Plaintiff is liable to pay the salary from the period 5th May, 2010 to 7th October, 2010. The termination was under Clause 8(ii) i.e., a termination 'without cause' and not a termination for any

breach. The Defendant itself did not believe in its notice that the Plaintiff had breached or had abandoned his duties. Thus, it could only take effect after the expiry of the notice period.

21. Insofar as mitigation is concerned, admittedly the Plaintiff could not take any employment as per the terms of the Agreement. The DW-1 clearly deposed that the Plaintiff's duties extended beyond flying and including training, supervisory and managerial functions. The contention of the Defendant that the Plaintiff abandoned his services, is not made out in this case. Admittedly, the Defendant had sent various pilots to the USA for training and could have utilised the Plaintiff's services within the USA. By not doing so, Defendant cannot argue that the contract stood frustrated. The email by which the Defendant requested the Plaintiff to come on a tourist Visa itself establishes that the Plaintiff had not abandoned his service.

22. In order to constitute frustration of a contract, there has to be an impossibility, intrusion or an occurrence of the event which makes the performance impossible. The impossibility did not arise so long as the application for Visa remained pending and parties were making attempts to obtain the visa. It is not unusual for Visa application to be pending for a few months. From the emails sent by the Visa Agency even till June, 2010, the Visa Agency was trying to obtain the Visa. The Defendant itself relied upon letter dated 10th June, 2010 which it claims to have set to the Indian Embassy. So, until 10th June, 2010, there was no justification for the non-payment of the salary. On 20th August, 2010, a legal notice was got issued by the Plaintiff subsequent to which the termination took place on 8th September, 2010 given to the Plaintiff on 16th September, 2010. The contract, at the time when it was extended, was not an Agreement to do an

impossible act. The contract could have become void only if and when the issuance of the Visa became an impossibility. Moreover, the services of the Plaintiff could have been utilized even in the USA and thus the impossibility was only partial in nature i.e. that he could not serve in India. DW-1 admits this in his cross examination:

“It is correct that as per clause 6.1 of Ex. Pw 1/2 the duties of the plaintiff were not limited to flying only, it further extends to training, supervisory duty and managerial functions also as may be assigned by the company, it is incorrect to suggest that while the plaintiff was waiting for his Visa between 05.05.2010 to 04.09.2010 the defendant had several opportunities to use his services as an Instructor to train other pilots in Seattle, Washington, USA which he was already doing or use his services in any other ways in any parts of the world but failed to request his services.”

In the facts of this case, the contract cannot be held to be void under Section 56.

23. The counsel for the Defendant has argued that the remuneration is to be payable only upon the flying hours having been achieved by the Plaintiff as per clause 7.1(a) and 7.1(b). The contract itself contemplated services beyond flying and thus it cannot be said that the services of flying was compulsorily to be rendered in order to be entitled to remuneration.

24. There is no abandonment by the Plaintiff. The Trial Court has rightly held that the Plaintiff is entitled to the salary for the period from 5th May, 2010 till 4th September, 2010. In fact, even as of 4th September, 2010, the notice period has not been included. The Defendant/Appellant is directed to pay the decretal sum along with interest to the Plaintiff as directed by the

Trial Court.

25. If the payment is not made within four weeks, the bank guarantee which is lying with the Registrar General of this Court shall be encashed and the amount shall be released to the Plaintiff. The remaining amount shall be paid to the Plaintiff within a period of four weeks by the Defendant along with interest @ 12% per annum on the balance amount from the date of decree till the date of payment. Since the Plaintiff is represented through a power of attorney holder, it is directed that the payment be made directly to the Plaintiff after converting the decretal amount into US Dollars through RTGS/NEFT/Wire Transfer, upon the Plaintiff filing his bank account details within two weeks.

26. The appeal is dismissed in the above terms. No order as to costs.

PRATHIBA M. SINGH, J.
Judge

JULY 04, 2018
Rekha