

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

+ **RFA No.268/2018**

% **Reserved on: 19th March, 2018**
Pronounced on: 22nd March, 2018

CAPT. DEEPAK GUPTA Appellant
Through: Mr. Rajeev Lochan, Advocate.

versus

PAWAN HANS HELICOPTERS LTD. Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

C.M. Appl. No. 10234/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.
C.M. stands disposed of.

C.M. Appl. No. 10235/2018 (for seeking permission to file dim and untyped annexures)

2. Allowed, subject to just exceptions.

C.M. Appl. No. 10236/2018 (for delay)

3. For the reasons stated in this application, the delay of 11 days in re-filing the appeal is condoned, subject to just exceptions.
C.M. stands disposed of.

RFA No.268/2018S

4. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the defendant no. 1 in the suit impugning the judgment of the trial court dated 31.10.2017 by which the trial court has decreed the suit filed by the respondent no. 1/plaintiff for a sum of Rs.10,00,000/- along with interest at 9% till the filing of the suit and 6% thereafter till payment. Suit has been decreed on account of the appellant/defendant no. 1/pilot breaching the terms of the Agreement/Bond of Indemnity and Service dated 23.2.2004, by not serving the respondent no. 1/plaintiff for five years.

5. The facts of the case are that appellant/defendant no. 1 was appointed by the respondent no. 1/plaintiff as a pilot for its fleet of helicopters. The respondent no. 1/plaintiff as per the plaint pleads that appellant/defendant no. 1 was given conversion training at its cost and the appellant/defendant no. 1 at the time of appointment in terms of the letter of appointment dated 5.2.2004 agreed to serve the respondent no. 1/plaintiff for a period of five years and for this purpose appellant/defendant no.1 executed an Agreement/Bond of Indemnity and Service dated 23.2.2004. The appellant/defendant no.

1 however gave his resignation within about three years in terms of the resignation letter dated 1.11.2006. The resignation letter did not specify any reason. The subject suit was therefore filed for recovery of the sum of Rs.10,00,000/- for committing breach of the terms and conditions of the Bond of Indemnity and Service dated 23.2.2004.

6. It may be noted that prior to filing of the suit the respondent no.1/plaintiff had sent letters dated 20.6.2007 and 27.7.2007 to the appellant/defendant no. 1 to comply with the terms of service bond and appellant/defendant no. 1 sent his letter dated 24.8.2007 accepting the liability of payment and expressed willingness to pay a pro-rata payment instead of Rs.10,00,000/-. Respondent no. 1/plaintiff replied that the bond amount cannot be reduced proportionately in view of the terms of the bond and since the appellant/defendant no.1 failed to pay the amount, therefore after serving legal notice dated 22.2.2008 the subject suit was filed.

7. Appellant/defendant no. 1 contested the suit and as per his written statement he pleaded that he was already an experienced pilot who had opted for voluntary retirement from the Indian Air Force after having a flight experience of about four thousand hours

and there was no requirement for any training being given to him. It was also pleaded by the appellant/defendant no.1 that services rendered by the appellant/defendant no. 1 to the respondent no.1/plaintiff company were not commensurate with the given experience of the appellant/defendant no. 1. It was pleaded that no provident fund or medical facilities were provided to the family members of appellant/defendant no. 1 and appellant/defendant no. 1 was made to stay away from his family throughout the week during assignment hours. Appellant/defendant no. 1 also claimed non-payment of certain leave encashment and other allowances by the respondent no. 1/plaintiff. It was pleaded in the written statement that appellant/defendant no.1 had paid Rs.20,000/- for conversion training. Execution of the Bond of Indemnity and Service dated 23.2.2004 was not denied but the said document was said to be devoid of legal sanctity. The bond dated 23.2.2004 was also pleaded to be unconscionable, unfair, etc and therefore void as per the relevant provisions of the Indian Contract Act, 1872, as also Article 23 of the Constitution of India. Appellant/defendant no. 1 therefore denied his liability to make payment of the bond amount, and prayed for the suit to be dismissed.

8. After pleadings were complete issues were framed and parties led evidence and which aspects are recorded in paras 6 to 8 of the impugned judgment, and these paras read as under:-

“6. On the basis of pleadings of the parties, following issues were framed on 19.03.2011: -

1. Whether the plaintiff is entitled to the mandatory injunction and permanent injunction as prayed for? OPP.
 2. Whether the plaintiff is entitled to any damages if, so to what extent? OPP
 3. Whether the present suit is not maintainable? OPD.
 4. Relief.
7. In order to prove its case, plaintiff examined Mr. Sanjeev Agarwal as PW-1 who exhibited his evidence by way of affidavit vide Ex. PW1/A wherein he reiterated the averments made in the plaint. During his deposition, he also relied upon and exhibited following documents: -
- Ex. PW1/1 : Copy of Power of Attorney dated 30th November 2004
 - Ex. PW1/2 : Offer of Appointment Letter dated 05.02.2004
 - Ex. PW1/3 : Bond of Indemnity and Service dated 23.02.2004
 - Ex. PW1/4 : Letter dated 05.08.2004 seeking endorsement on license of defendant no. 1
 - Ex. PW1/5 : Notice regarding resignation dated 01.11.2006 written by defendant no. 1
 - Ex. PW1/6 : Reply dated 20.06.2007 on behalf of plaintiff to Notice of resignation of defendant no. 1
 - Ex. PW1/7: Letter dated 27.07.2007 written on behalf of plaintiff to defendant no. 1 seeking deposition of Bond Amount for acceptance of resignation of defendant no. 1
 - Ex. PW1/8: Letter dated 24.08.2007 written by defendant no. 1 to plaintiff
 - Ex. PW1/9 : Reply dated 01.10.2007 sent by plaintiff to Letter of defendant no. 1 dated 24.08.2007
 - Ex. PW1/10(Colly): Envelope containing reply dated 01.10.2007 purportedly sent to defendant no.1 by plaintiff
 - Ex. PW1/ 11 : Letter dated 05.03.2007 written on behalf of plaintiff to DG, Civil Aviation
 - Ex. PW1/ 12 : Letter dated 20.11.2007 written on behalf of plaintiff to DG, Civil Aviation
 - Ex. PW1/ 13 : Notice dated 22.02.2008 sent on behalf of plaintiff to defendant no. 1
 - Ex. PW1/14 to Ex. PW1/ 16 : Postal Receipts
 - Ex. PW1/ 17 : Reply dated 07.03.2008 to notice dated 22.02.2008 sent on behalf of defendant no. 1

Ex. PW1/ 18 : Notice dated 18.01.2009 sent on behalf of plaintiff to defendants

Ex. PW1/ 19 to Ex. PW1/ 22: Postal Receipts

Ex. PW1/23 (Colly) : Application dated 18.12.2003 written by defendant no. 1 to General Manager P&A (NR) of plaintiff company along with resume of defendant no. 1.

Ex. PW1/ 24 : Application for employment of defendant no. 1 dated 23.01.2004

Ex. PW1/ 25: Letter dated 13.02.2004 written by defendant no. 1 to plaintiff company seeking time to join

Ex.PW1/ 26: Letter dated 08.04.2004 vide which Bond was submitted by defendant no. 1

Ex.PW1/ 27: Letter dated 08.04.2004 vide which defendant no. 1 joined services of plaintiff.

Mark 'A': Copy of Certificate of Incorporation of plaintiff company

Mark 'B': Copy of Circular AIC 03/93 dated 25.02.1993

Mark 'C': Copy of letter dated 30.06.2004 with regard to grant of permission to defendant no. 1 to undergo conversion training on Dauphin SA 365 N

8. Defendant no. 1 on the other hand examined himself as DW-1 who exhibited his evidence by way of affidavit vide Ex. DW1/A. He relied and exhibited following documents during his deposition: -

Ex. DW1/1 : Copy of Pass Book of defendant no. 1 of Syndicate Bank

Ex. DW1/2(Colly): Copy of passport of defendant no. 1

Ex. DW1/3 : Reply dated 07.03.2008 to Legal Notice dated 22.02.2008

Ex.DW1/4: Copy of reply dated 02.02.2009 to Notice dated 18.01.2008.”

9. The relevant issue which is called upon for decision in this appeal is with respect to issue no. 2 framed by the trial court as to whether the respondent no. 1/plaintiff was entitled to the damages as prayed for. In this regard trial court has held that bond was proved as Ex.PW1/3 and in terms of the bond appellant/defendant no. 1 had agreed to serve the respondent no. 1/plaintiff for a period of five years, but admittedly the notice of resignation was given on 1.11.2006 *vide*

Ex.PW1/5 prior to expiry of five years of service which commenced on 8.4.2004 *vide* Ex.PW1/27. The period of five years would have expired on 4.2.2009. Trial court also holds that issue of non-payment of provident fund and medical facilities to the family cannot be a valid contention of the appellant/defendant no. 1 inasmuch as the terms of appointment have to be governed in terms of the appointment letter Ex.PW1/2 and which did not provide grant of such amounts as claimed by the appellant/defendant no. 1. Trial court has also held that the contention of the appellant/defendant no.1 that he was not paid salary on time is a misconceived stand because no such evidence was led before the trial court besides the fact that this assertion was not made while issuing the notice of resignation. Trial court also holds that there was no pressure upon the appellant/defendant no. 1 for joining the services of the respondent no. 1/plaintiff and it cannot be held that Clause 8 of the bond is a result of undue influence, coercion, etc because the appellant/defendant no. 1 submitted the Bond Ex.PW1/3 on 8.4.2004 i.e after more than one and a half months of his signing of offer of appointment Ex.PW1/2. Appellant/defendant no.1 was also a well educated person having various degrees including of M.Sc. and therefore there does not arise any issue of alleged undue

influence or fraud, etc for execution of the bond Ex.PW1/3. Trial court has also held that the bond amount is an amount which is payable as liquidated damages under Section 74 of the Indian Contract Act in view of Clause 7 of the bond and which Clause 7 talks of payment of the bond amount with respect to not only expenses incurred by the respondent no. 1/plaintiff for providing services to the appellant/defendant no. 1 but also for loss of business/revenue opportunities and expenses to be incurred to make another person obtain the necessary experience to fly independently, salary of the new pilot during that period and other scheduled aspects on account of leaving of the services by the appellant/defendant no. 1 before the bond period. The relevant observations of the trial court with respect to provisions of Sections 73 and 74 of the Indian Contract Act and the relevant Clause 7 of the bond and the fact that losses cannot be proved numerically by the respondent no. 1/plaintiff company and therefore liquidated damages have to be granted are contained in the following observations:-

“ ...

Now, the question arises as to what is the quantum of damage which should be granted in circumstances of present case.

Section 73 and 74 of Indian Contract Act deals with the consequence of breach of contract. Section 73 lays down when a contract has been broken, the party who suffers by such breach is entitled

to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Section 74 lays down as when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

In “*ONGC v. Saw Pipes 2003(5) SCC 705*”, after noticing *Maula Bax v. Union of India AIR 1970 SC 1955*, Hon'ble Supreme Court held that in certain eventualities parties may contemplate payment of damages or compensation to cater to specific situations because the quantification of such damages by evidence is impossible or impracticable. The Court observed as follows:-

"Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered."

Defendant no. 1 filed certain judgments.

In judgment titled as “Vishal Engineers & Builders Vs. Indian Oil Corporation Limited (FAO {OS} No. 204 of 2010)”, Hon'ble High Court of Delhi discussed various judgments concerning Section 73 and 74 of Indian Contract Act and held as below:-

“In our view these observations have to be read in the context of the pronouncement of the Constitution Bench pronouncement in

Fateh Chand Case (Supra). If it is so, all that it implies is that where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation then that amount can be awarded as a genuine pre-estimate of the loss suffered by a party. It cannot be read to mean that even if no loss whatsoever is caused to party it can still recover amounts merely by reason of the opposite party being in breach.

.....
.....
We are, thus, of the considered view that the recovery of liquidated damages by the respondent in the absence of any loss whatsoever cannot be held to be permissible.”

Judgment in case titled as “*M/s Sicpa India Limited Vs. Shri Manas Pratim Deb (in RFA No. 596/2002)*” has also been filed by defendant no. 1 in which Hon'ble High Court of Delhi held as below :-

“As per the ratio of these cases, clauses of liquidated damages which are awarded once actual damages are proved. This legal position applies when losses from the breach of contract can otherwise be proved. When losses cannot be proved, then, of course the liquidated damages specified can always be recovered.”

In both the above-mentioned judgments, judgment in case titled as ONGC v. Saw Pipes (Supra) has been referred to.

In the present case, amount having upper limit of Rs. 10,00,000/- is liquidated damages and not by way of penalty. It becomes clear by reading Clause No. 10 of Ex. PW-1/3 in which it has been clearly mentioned that the said amount is by way of liquidated damages and not by way of penalty.

In Clause No. 7 of the bond Ex. PW-1/3, it has been mentioned as below:-

“That if the pilot fails to complete his bond period successfully, the pilot undertake alongwith the sureties that they shall jointly/serverally compensate the Company for all the expenses incurred by it on account of and in connection with his service. The said expenditure shall not only include the loss of business revenue/opportunities but also expenses /liquidated damages to be suffered, expenses to be incurred to make another person to obtain experience to fly independently, salary of the pilot during the period cost of supervision, cost of training skill test, proficiency test, checks and other other losses/expenses suffered due to leaving of said pilot. The decision of the Chairman-cum-Manager Director/General Manager or an officer nominated by the Chairman-cum-Managing Director shall be binding as to the total amount of the expenditure incurred and loss suffered by the Company on account of and in connection with the training/other expenses of the pilot. Although the above mentioned cost would be fairly high

amount, however, in case of breach of any condition of this bond by the pilot, he/she alongwith the sureties shall be liable to pay and reimburse to the Company by way of damages, the amount to the Company but the said recoverable amount of damages shall not exceed Rs. 10,00,000/- (Rupees Ten Lakhs only).

From language of Clause No. 7, having signatures of defendant no. 1 (signatures on Ex.PW-1/3 have been admitted by defendant no.1 in his cross-examination and at the same time it has been admitted by defendant no. 1 that bond was submitted by him to plaintiff company), it is clear that defendant no.1 knew that for the things mentioned in Clause No. 7, although the cost would be fairly high but reimbursement on account of heads as mentioned in clause no. 7 was limited not to exceed Rs. 10,00,000/-.

Though, no evidence has been led by plaintiff company as to the loss suffered actually on account of pre-mature resignation of defendant no. 1 but loss was caused to plaintiff company is evident from contents of Clause No. 7 of bond Ex. PW1/3 as mentioned above. Further, defendant no. 1 in his cross-examination has admitted that he was given conversion routine training. Defendant no. 1 in his cross-examination stated that he does not remember that he had been given instrument rating test at Port Blair after receiving on his CHPL (License). He further stated that there may be other tests but he does not remember then at this stage. Expenses must have been incurred by plaintiff company on conversion training and other tests undertaken by defendant no. 1 which defendant no. 1 in his cross-examination has stated to be not remembering but has not denied the same. Further, in case of pre-mature leaving of service of plaintiff company, loss must have been caused to plaintiff company in the form of expenses for getting trained other Pilot, getting passed various tests as required for the job and cost of selection of other candidate in place of defendant no. 1 including expenses on account of giving of advertisement in newspapers and giving of honorarium to selection board members etc.

Present case is a case in which though losses could not be proved numerically by plaintiff company but as liquidated damages have already been provided in bond Ex. PW-1/3 and it has been mentioned in Clause 7 of the bond that expenses on account of things mentioned in Clause 7 of the bond would be fairly high, liability of defendants was limited to jointly and severally to the extent of Rs. 10,00,000/-, I am of the view that amount of Rs. 10,00,000/- is reasonable compensation in view of judgment in case of ONGC v. Saw Pipes(Supra). ” (underlining added)

10. I completely agree with the aforesaid reasoning, discussion and conclusion of the trial court because admittedly the

bond had been executed and the bond was breached by the appellant/defendant no. 1 by leaving services prior to five years service period of the bond. When a pilot like the appellant/defendant no. 1 leaves suddenly then lots of schedules are thrown haywires with consequential loss of business opportunities, expenses of training of new pilot, other expenses and losses suffered on account of disruption of the business of the respondent no. 1/plaintiff which was in the business of providing transportation services, etc through its helicopters. Loss on account of such services therefore cannot be accurately calculated and the bond was thus in the nature of contract which falls under Section 74 of the Indian Contract Act entitling the respondent no. 1/plaintiff for liquidated damages specified in the bond amount.

11(i). Counsel for the appellant/defendant no.1 argued before this Court that appellant/defendant no.1 was to be posted at Delhi but he was instead posted at Mumbai, and there was an assurance that appellant/defendant no.1 would be posted at Delhi. Attention of this Court is invited to the letter dated 5.2.2004 issued by the respondent

no. 1/plaintiff of appointment showing the posting of the appellant/defendant no. 1 at Mumbai.

(ii) I cannot agree with this argument urged on behalf of the appellant/defendant no. 1 inasmuch as the letter of the respondent no. 1/plaintiff dated 5.2.2004 Ex.PW1/2 does not in any way provide that appellant/defendant no. 1 would be posted at Delhi. In fact the letter dated 5.2.2004 states that the present place of posting at the time of issuance of the appointment letter was at Mumbai and in accordance with the terms of service being parag 12(e) appellant/defendant no. 1 could be transferred anywhere in India or abroad at the discretion of respondent no. 1/plaintiff. Obviously, there was no assurance of the appellant/defendant no. 1 being posted at Delhi and in fact para 12(e) of the appointment letter specified otherwise. This argument of the appellant/defendant no. 1 is therefore rejected.

12. Learned counsel for the appellant/defendant no.1 then argued with respect to proportionate bond amount being only decreed in favour of the respondent no. 1/plaintiff, however, in view of the fact that the bond amount is the amount of liquidated damages which can be granted under Section 74 of the Indian Contract Act as it is not

possible to calculate the losses suffered by the respondent no. 1/plaintiff on account of appellant/defendant no. 1 suddenly resigning from his services with the respondent no. 1/plaintiff, therefore, appellant/defendant no. 1 was liable to pay the entire bond amount and which aspect has been discussed in detail by the trial court by reference to the law under Sections 73 and 74 of the Indian Contract Act, and which relevant discussion has already been reproduced above.

13. Learned counsel for the appellant/defendant no.1 then argued that the appellant/defendant no.1 after leaving services of the respondent no. 1/plaintiff did not work anywhere else, however, when asked to show any pleading in this regard or any evidence which was led by the appellant/defendant no. 1, the counsel for the appellant/defendant no. 1 could not show any pleading or evidence led, much less documentary evidence such as income tax returns, etc to the fact that appellant/defendant no. 1 did not work elsewhere after resigning from the services of the respondent no. 1/plaintiff. Even for the sake of arguments if what is argued on behalf of the appellant/defendant no.1 is correct, yet that will not exempt the

appellant/defendant no. 1 from making payment of the bond amount on account of the appellant/defendant no. 1 breaching the terms and conditions of the bond of serving the respondent no. 1/plaintiff for a period of five years.

14. There is no merit in the appeal. Dismissed.

MARCH 22, 2018

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VALMIKI J. MEHTA, J

