

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: April 06, 2021

+ RFA 433/2016, CM No. 24214/2016

AIRLINES ALLIED SERVICES LIMITED

..... Appellant

Through: Mr. Abhinav Agnihotri, Adv.

versus

ASHOK KUMAR MALHOTRA

..... Respondent

Through: Mr. Sanjeev Sahay, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This is an appeal preferred by the appellant / defendants under Order XLI read with Section 96 of the Code of Civil Procedure, 1908 impugning the judgment dated March 1, 2016 passed by the Additional District Judge, Saket Courts, in the suit bearing No. 241/15, with the following prayers:

“In view of the above circumstances, the Appellant humbly prays that this Hon'ble Court may be pleased to;

(a) allow the present appeal and set aside the Judgment dated 01.03.2016 passed by Shri Ajay Pandey, Ld. ADJ in Suit No. 241/2015;

b) pass such other and further order/orders as may be deemed fit and proper in the facts and

circumstances of the present case.”

2. For the sake of convenience the appellant and the respondent in the present appeal, shall hereinafter be referred to as defendant and plaintiff respectively. The facts in brief are as follows. The plaintiff joined the services of the defendant on July 01, 2004 for a period of one year till June 30, 2005 and a Fixed Term Agreement dated July 01, 2004 ('FTEA', for short) to this extent was executed between them. The FTEA also provided the details of pay, allowances and benefits payable to the plaintiff including Flight Related Allowances ('FRA', for short) comprising of flying allowances, and executive allowances. Article VII of the FTEA, which deals with the pay and allowances was amended vide letter of agreement/amendment dated August 04, 2005 w.e.f. October 01, 2004. Subsequently, period of service of the plaintiff was extended from July 1, 2005 to June 30, 2006 and thereafter vide letter of extension / amendment of agreement, dated June 20, 2006, the FTEA was extended for a further period of commencing from July 1, 2006 to June 30, 2011. Article VII of the FTEA was revised w.e.f. August 01, 2006 and further revised w.e.f. February 14, 2008 through a letter of agreement/ amendment executed on February 14, 2008.

3. It was the case of the plaintiff before the Trial Court that his services were terminated by the defendant vide termination notice dated January 12, 2010 against the terms of contract of service executed between the parties and that the defendant did not pay the complete salary and allowances due to the plaintiff

w.e.f. September, 2009 to January 12, 2010. Thus, the suit was filed by the plaintiff for recovery of Rs.16,82,712/- along with *pendente lite* interest and future interest and litigation expenses towards the alleged dues of salary and allowances not paid by the defendant.

4. The claim of the plaintiff before the Trial Court as noted from the Plaint is as follows:

“The claim of the plaintiff due from the defendants is as follows:

MONTH	TO BE PAID	PAID	DUE
Sept 2009 flying allows	Rs.290500	Rs. 67783	Rs.222717
Exec allows.	Rs. 49000	Rs. 11433	Rs. 37567
Freighter allows.	Rs. 30000	Paid	Nil
Oct.2009 flying allows	Rs.290500	Not Paid	Rs.290500
Exec allows.	Rs. 49000	Not Paid	Rs. 49000
Freighter allows.	Rs. 30000	Paid	Nil
Nov.2009 flying allows	Rs.290500	Not Paid	Rs.290500
Exec allows.	Rs. 49000	Not Paid	Rs. 49000
Freighter allows.	Rs. 30000	Not Paid	Rs. 30000
Dec.2009 flying allows	Rs.290500	Not Paid	Rs.290500
Exec allows.	Rs. 49000	Not Paid	Rs. 49000
Freighter allows.	Rs. 30000	Not Paid	Rs. 30000
Jan.2010 flying allows	Rs.116200	Not Paid	Rs.116200
Exec allows.	Rs. 19600	Not Paid	Rs. 19600
Freighter allows.	Rs. 12000	Not Paid	Rs. 12000
Total	Rs. 1535800	Rs.79216	Rs. 1486584

It is pertinent to mentioned here that in the month of September and October 2009 the defendants paid the fixed freighter allowance, but arbitrarily stopped paying the freighter allowance and other allowances from September 2009 to till January 2010 without any stipulated rule in the service contract/letter of agreement effective from 14-02- 2008 or assigning any valid reason whatsoever despite several reminders.

Other payment calculation

*In 5 days IRL.R 4 days
Refresher + 39 days PL =39
Day @4500/per day =* *Rs. 175500*

*Refund of amount recovered
SOL package DEL>JAMMU<DEL
(Ref. AASL/ADMIN/ SOL/Dt 25/11/2009)
This was within entitlement for the
year 2009* *Rs. 20628*

Total Amount *Rs.1682712”*

5. The defendant on the other hand took a preliminary objection before the Trial Court that the plaintiff had been paid all dues pursuant to his termination and a Memorandum of Understanding dated May 12, 2011 ('MoU', for short) was entered into between the parties which provided that all issues including financial issues are deemed to have been settled and therefore, there exists no legally enforceable claim against the defendant.

6. It was stated by the defendant before the Trial Court that it was constrained to terminate the services of the plaintiff in terms of Clause 5.02 of FTEA with immediate effect vide a letter dated January 12, 2010 owing to the fact that the plaintiff had become incapable of performing his duties as a Pilot. It was also stated that from September, 2009 till his termination on January 12, 2012 the plaintiff was not fit to serve as a Pilot and in terms of FTEA, the defendant was not liable to any pay or allowance. For the month of September, 2009 when the plaintiff was available to serve as Pilot, he was in fact paid the equivalent

amount as FRA.

7. Based on the averments of the parties, the trial court went ahead and framed the issues on December 8, 2014, viz., (1) *whether the plaintiff is entitled for recovery of the suit amount as prayed for? OPP.* (2) *Relief.* Thereafter, evidence was duly led by the parties and based on the documents and arguments of the parties, the Trial Court passed the impugned Judgment.

8. It was noted by the Trial Court that the dispute between the parties revolved around whether FRA were required to be paid to the plaintiff by the defendant as per Exhibit PW-1/6 and Exhibit PW-1/7 which are subsequent amendments / partial modifications to Article VII, Pay and Allowances, of the FTEA, for a period spanning from September 2009 till January 12, 2010. The plaintiff relied upon Clause 7.01.02 in Exhibit PW-1/6, and the relevant term from Exhibit PW-1/7 which is a subsequent modification to the rates specified in Exhibit PW-1/6. The relevant clauses are reproduced as under:

“ Ex.PW1/6:-

.....

**“Clause 7.01.02 FLIGHT RELATED ALLOWANCES
(Fixed)**

Flying Allowance at 70hrs. @ Rs. 1825 per hrs. Rs. 127750/-

Executive Allowance at 70hrs @ Rs.518 per hrs. Rs.36260/-

7.01.02.1 Conditions

i) In case the Pilot is required by the Company to undertake additional flight simulator duty as Pilot Not Flying (PNF) for training another pilot he will be paid @ Rs. 700/simulator hour.

ii) There will be a quarterly review of the block actual flying hours. Shortfall in flying hours at 70hrs / month,

i.e., 210 hrs per quarter (3 consecutive months due to unauthorized absenteeism would entail recovery on the basis of the applicable hourly rate, without prejudice to clause 10 and 12 of the 'contract'. Shortfall in flying hours on account of sanctioned leave will not affect pay and allowance as laid down in this agreement and would not entail any recovery."

Xxxxxx

PW1/7:-

.....

7.01.01 A) SALARY

.....

VARIABLE ALLOWNACE ON 70 HRS. (FIXED)

7. Flying Allowance Rs.283500 @ Rate/hr. 4050/-

8. Executive

Allowance Rs.49000 @ Rate/hr. 700/-

Total Rs.332500/-

Freighter allowance Rs. 30000/-
(To be paid w.e.f 14/02/08)

Other payment calculation is 5 days IRLR, 4 days refresher + 39 days PL=39 days @ 4500/-=
175500/12=14625/- per month.

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9. The defendant on the other hand relied upon Clause 1.01 of Exhibit PW-1/2 (FTEA), and contended before the Trial Court that the first and foremost warranty given by the plaintiff for being engaged in the services of the defendant was that he

would be capable of flying the company aircraft and discharging his duties as a Pilot in command or co-pilot to fly domestic and international flights, meeting all requirements specified by DGCA. The relevant clause reads as under:

“ARTICLE – I GUARANTEED QUALIFICATIONS

The Pilot represents and warrants to the Company that:

1.01 CAPABILITIES

The Pilot is qualified, licenced and capable to fly the Company aircraft as Pilot-in-Command/Co-Pilot and will continue to be, throughout the terms of his/her agreement, capable of:

- a) carrying out the duties of a Pilot-in-Command/Co-Pilot to fly both domestic & international flights using the Aircraft belonging to the Company, owned or on lease, and*
- b) meeting all the requirements as specified by the Directorate General of Civil Aviation (DGCA), India, to act as Pilot-In-Command/Co-Pilot of the Aircraft.”*

10. It was also the case of the defendant before the Trial Court that on September 8, 2009 a routine proficiency test was conducted by DGCA approved Examiner on the plaintiff and the plaintiff was judged as unfit. Thereafter, on a request made by the plaintiff to the DGCA for allowing him to undergo additional training so as to get a chance for another test, additional training was provided to the plaintiff on December 2, 2009 and December 3, 2009. Subsequent thereto, proficiency test was conducted by a DGCA approved examiner on December 4, 2009 and the plaintiff once again failed to clear the said test and the examiner declared the plaintiff as ‘Non-Proficient’ for Pilot proficiency and ‘Non-Fit’ for IR renewal. It was contended by the defendant that the

petitioner having been declared unfit in the proficiency test on September 8, 2009 and the proficiency test conducted on December 4, 2009 has resulted in the breach of Clause 1.01 of FTEA making the defendant incapable of utilizing the services of the plaintiff for the very purpose he was engaged. In other words, the defendant was not liable to make any payment. Moreover, it was contended before the Trial Court that the plaintiff out of his freedom has even signed the MoU settling all dues with the defendant.

11. It was the stand of the defendant before the Trial Court that since the plaintiff was declared unfit, he was in breach of his various representations and in particular the undertaking as embodied in Clause 1.01 of FTEA and FRA was not liable to be paid to the plaintiff from September, 2009 and Freighter Allowance from November, 2009 till his termination. On the bona fide conduct of the defendant, it was stated that even the expenses incurred for additional training of the plaintiff was waived by the defendant. It was further contended before the Trial Court that the plaintiff is not entitled to FRA as the same is under the head of “VARIABLE ALLOWANCE ON 70 HRS (FIXED)”. He was eligible and admittedly has been paid his basic salary and other allowances (including Freighter Allowances for the months of September, 2009 and October, 2009) from September, 2009 till his termination, which are not dependent upon him flying the aircraft. It was also submitted that as per Clause 7.01.02.1 of Exhibit PW-1/3 (another subsequent amendment to FTEA dated August 4, 2005 w.e.f October 1,

2004) any shortfall in flying hours attributable to the Pilot shall entail proportionate adjustment in FRA on the basis of applicable hourly rate.

12. It was the plea of the plaintiff before the Trial Court that if his performance was found unsatisfactory, the defendant should have proceeded to terminate his employment under Clause 5.02 of the FTEA and having kept him in their employment, the defendant is liable to make payment of his salary and dues. By relying upon Clause 7.01.02.1 of Exhibit PW-1/6, it was also contended by the plaintiff that the only condition which may disentitle him to claim FRA as per Exhibit PW-1/6 and PW-1/7 would be his unauthorized absence from the job and the same was not the case of the defendant.

13. Having noted the averments and evidence and contentions of the parties on the issues framed, the Trial Court while passing the impugned Judgment noted none of the documents/agreements executed between the parties contemplated a situation where a pilot being declared unfit by the DGCA approved examiner for a particular period has been dealt with and by relying upon *the pay slips Ex.PW1/8 and letter agreements/amendments, Ex.PW1/6 and Ex.PW1/7*, held that FRAs were fixed and were part of the salary dues of the plaintiff. The only exception, under which the defendant could not have paid the said amount was carved out under Clause 7.01.02.1 of Exhibit PW-1/6 which provided that the defendant was entitled for recovery of flight related allowances only in the case of unauthorized absenteeism of plaintiff.

14. It was further held by the Trial Court that the case of the defendant was further negated because the plaintiff was actually paid freighter allowances for the entire month of September, 2009 and October, 2009; observing that the freighter allowance is given to the pilots for carrying the freight from one destination to another destination while flying the plane. In addition thereto the command pay of the plaintiff was also included in the salary paid to him though the plaintiff was not supposed to command the plane during the period when he was grounded or not allowed to fly the plane because of being declared unfit by DGCA approved examiner. Accordingly, the Trial Court went ahead and held that the plaintiff was entitled the FRAs.

15. On the plea/stand of the defendant that the MoU was executed between the parties settling all dues and financial claims, the Trial Court observing that just below the MoU, being Exhibit PW-1/22, plaintiff has written that his dues of salary amount as per the terms of his contract may be furnished and paid, held that plaintiff did not surrender his dues under the contract between the parties. Rather according to the Trial Court, the plaintiff continued to insist for the payment accordingly. It was also observed by the Trial Court that mere signatures of plaintiff at the specified place in already typed document cannot be construed as acceptance of said memorandum of understanding (Exhibit PW-1/22) without protest, as full and final settlement between the parties.

16. On the basis of the above mentioned observations and findings the Trial Court passed the impugned judgment and

decreed the suit in favour of the plaintiff for an amount of Rs. 16,82,712/- (as claimed by the plaintiff) with pendente lite interest @ 12% per annum and future interest @6% per annum.

17. The present appeal has been filed by the defendant aggrieved by the impugned Judgment. It is the case of the defendant as contended by Mr. Abhinav Agnihotri that the finding of the Trial Court is erroneous and is liable to be set aside as the plaintiff was in violation of the primary condition of the FTEA whereby the plaintiff had given an undertaking that he is qualified, licensed and capable to fly the company aircraft as a Pilot and will continue to be, throughout the term of his agreement, the primary basis on which the plaintiff was employed as a Pilot by the defendant. According to him, the Trial Court has not appreciated the aspect as contemplated in Clause 1.01 of the FTEA and also failed to appreciate the admission of the plaintiff in his cross-examination that he was in breach of the said condition w.e.f. September 8, 2009, the date on which the plaintiff failed the routine proficiency test conducted by DGCA approved examiner.

18. It was submitted by Mr. Agnihotri that apart from the routine proficiency test conducted on September 8, 2009, the plaintiff also failed to clear the proficiency test conducted on December 4, 2009 after additional training was provided to the plaintiff on December 2/3, 2009. According to him, the plaintiff is not fit to perform his duties as a Pilot and hence was not entitled to any FRAs which are in their basic nature liable to be paid only if the Pilot is fit to fly and the Trial Court has not

returned any findings on this aspect. He also submitted that a perusal of Article VII of Exhibit PW-1/6 and Exhibit PW-1/7 makes it clear that FRA is variable in nature.

19. It was submitted by Mr. Agnihotri that the Trial Court has erroneously observed that if the performance of the plaintiff was unsatisfactory the defendant should have terminated its services without considering the fact that the issue was not whether the performance of the plaintiff was satisfactory or not but the fact that the plaintiff was not fit to perform the services for which he was employed. He also stated that the Trial Court fell short of considering the aspect that it was the plaintiff himself, who sought additional training to undertake another test and it was the plaintiff's failure in the second test also that constrained the defendant to terminate his services.

20. Mr. Agnihotri also vehemently contested the finding of the Trial Court that FRA was a fixed component and was not payable only under 'unauthorized absentism' and not otherwise. This he stated by relying upon sub-clause (i) of Clause 7.01.02.1 of the original FTEA which clearly provided that in case of any shortfall in flying hours attributable to the Pilot proportionate adjustments from pay and allowances would be made on the basis of available applicable rate. He further stated that the amendment to Article VII brought in vide Exhibit PW-1/6 w.e.f. August 1, 2006 in fact, only provided an additional condition for deduction from pay and allowances under the heading 'unauthorized absentism' and the original conditions remained intact which is clear from a provision at the end of the document Ex.PW-1/6

which states that “the remaining terms and conditions of the existing contract remain unchanged” and therefore, any condition not in contradiction to the amended clauses would remain in force.

21. Without prejudice he also stated that falling short of Clause 1.01 of FTEA would even otherwise render him as being ‘unauthorized absent’.

22. He also stated that the Trial Court failed to appreciate the due execution of MoU settling all dues under the terms of the plaintiff’s contract. In fact, the MoU clearly provided that “all issues including financial issues shall be deemed to have been settled between both the parties”. He contested the finding returned by the Trial Court of the MoU being signed under protest by stating that the plaintiff has only mentioned at the bottom of the document after signing it that the “full and final salary account as per the terms of my contract may be furnished and paid”. This, according to Mr. Agnihotri, is not a protest and the full and final salary account would be only the amount as agreed in the MoU and nothing beyond. Further, it is also stated by him that salary payable to the plaintiff, does not include the FRA which is a variable pay and separate from salary, which is clear from Ex. PW1/7. In this regard, he also stated that even in the cross-examination, the plaintiff had specifically admitted that he had executed the MoU only after reading and understanding the terms and conditions contained therein and that it is a settled law that once the party has accepted executing a document after understanding its terms and conditions the said party cannot resile

away from honouring the said contract.

23. On the other hand, it is the case of the plaintiff as contended by Mr. Sanjeev Sahay, learned counsel that vide the letter of extension dated July 1, 2006 pay, allowance and benefit under Clause 7.01.02 stood amended and flight related allowances (FRA) were made fixed. Clause 7.01.02.1 (ii) was amended to the effect that shortfall due to unauthorized absentism would entail recovery on the basis of hourly rate applicable and by virtue of the said amendment reasons attributable to a Pilot was changed to unauthorized absentism.

24. It was submitted by Mr. Sahay that the factum of amendment and variable pay being made fixed is duly admitted by the defendant in their written statement before the Trial Court. It was also submitted by him that neither in written statement nor in evidence, had the defendant alleged that the pay, allowance and benefit which was effective from July 1, 2004 shall have interplay after subsequent amendments. In this regard, he has relied upon the Apex Court Judgment in *Nandkishore Lalbhai Mehta v. New Era Fabrics Pvt., (2015) 9 SCC 755*, wherein, it was held that no amount of evidence can be looked into upon a plea which was never put forward in pleadings.

25. That apart, it was submitted by Mr. Sahay that the defendant has not pleaded that the period when plaintiff was not able to fly would be treated as unauthorized absentism. Neither has any issue framed in this regard, nor had the defendant raised a query questioning the same during cross-examination of the plaintiff. He has also drawn the attention of the Court to the

termination letter dated January 12, 2010 to state that termination was not due to unauthorized absentism.

26. It was further submitted by Mr. Sahay that the plaintiff failed in the proficiency test due to malafide actions of the Capt. Javed Ahmed and Capt. Rajendra Singh and that the issue was raised by the plaintiff vide letter dated September 14, 2009. It is also stated by him that Capt. Sanjay Sen, DGCA had declared plaintiff fit after the plaintiff underwent additional training on December 2 and 3, 2009 under him.

27. Mr. Sahay submitted that the issue of shortfall attributable to the Pilot was first raised during the final arguments before the Trial Court and the same was rightly considered and rejected by it. More so, according to him, the primary thrust in the present appeal is on the acceptance by the plaintiff of the payment in terms of the MoU, which plea is impermissible in terms of the Apex Court Judgment in *Central Inland Waters Transportation Ltd. & Anr. v. Brojonath Ganguly & Anr.*, AIR 1986 SC 1571, wherein it was held that an unfair or unreasonable contract entered between the parties of unequal bargaining powers is void under Section 23 of the Indian Contract Act, 1872.

28. Mr. Sahay has also placed reliance upon Supreme Court Judgment in the case of *Krushnakant B. Parmer v. UOI*, (2012) 3 SCC 178, wherein it was held that the question whether 'unauthorized absence from duty' amounts to failure of devotion to duty or behavior unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances. He also relied

upon *State of Punjab v. Dr. P.L. Singla*, (2008) 8 SCC 469, wherein the Supreme Court held that wherever there is unauthorized absence of an employee, two courses are open to the employer. The first one is to condone the unauthorized absence by accepting the explanation and sanctioning the leave for the period of the unauthorized absence in which event the misconduct shall stand condoned. The second is to treat the unauthorized absence as misconduct, hold an enquiry and impose punishment for the misconduct. Similarly, reliance was also placed on *Chennai Metropolitan Water v. T.T. Murali Babu*, (2014) 4 SCC 108, wherein it was held by the Supreme Court that the unauthorized absence by an employee as a misconduct cannot be put into a straight jacket formula for imposition of punishment and that it will depend upon many factors as laid down in *Dr. P.L. Singla (supra)*.

29. Having heard the learned counsel for the parties, it is to be decided whether the Trial Court is justified in allowing the suit of the plaintiff for recovery of Rs.16,82,712/- with pendent lite and future interest.

30. The first submission of Mr. Agnihotri, challenging the impugned judgment / decree was that, the Trial Court has erred in overlooking the fact that the plaintiff having executed the MoU and having received all the payments in terms thereof, could not have raised the claims, which were granted by the Trial Court. I am not in agreement with this submission of Mr. Agnihotri for the reason, firstly the Trial Court has held that the defendant having continued the employment, and / or availed the services of

the plaintiff, is liable to pay the salary and dues to the plaintiff and the mere signing by the plaintiff at a specified place in an already typed document, cannot be construed as an acceptance of the MoU. That apart, the fact is that the defendant being a 'State' within the meaning of Article 12 of the Constitution of India, is required to act fairly and not arbitrarily to deny the wages, as agreed by it in FTEA. Also, I find that plaintiff's notes / statement on the MoU / Final Settlement Document, do show, that the plaintiff has stated that full and final settlement as per the contract be paid. In other words, the plaintiff had not given up his claim for the dues as payable under the contract / FTEA. He has, therefore, rightly filed the suit, making a claim for unpaid dues.

31. On merits, the plea of Mr. Agnihotri was that the plaintiff was not entitled to any allowance as, he became incapable of performing his duties as Pilot. In this regard, he has placed reliance on Article 1.01 of Exhibit PW-1/2 i.e. FTEA (reproduced in paragraph 4), which stipulated that the plaintiff is engaged in the services of the defendant being capable of flying the company aircraft as pilot in-Command / Co-Pilot and will continue to be, throughout the term of his / her agreement, and further capable of meeting all the requirement as specified by DGCA.

32. It was the case of the defendant before the Trial Court and also before this Court that on September 08, 2009 in a routine proficiency test conducted by DGCA approved examiner, the plaintiff was judged as unfit. Thereafter, on a request made by the plaintiff to the DGCA for allowing him to undergo additional

training, so as to get a chance for another test, additional training was provided to the plaintiff on December 02, 2009 and December 03, 2009. Subsequent thereto, proficiency test was conducted by DGCA approved examiner but the plaintiff again failed to clear the test and was declared as unfit for IR renewal. So, the plea of Mr. Agnihotri was that between September 08, 2009 till his termination on January 12, 2010, the plaintiff was unfit for flying and as such the services of the plaintiff were terminated during the said period, and that the plaintiff could not have been paid the allowances relatable to his flying.

33. On the other hand, the plea of Mr. Sahay for the plaintiff was, Article VII, as amended w.e.f. August 01, 2006, provided for deduction from pay and allowances only under the head of 'unauthorized absenteeism' and as such the original condition remained unchanged. In other words, it is only for unauthorized absence, the Fixed Allowance / Executive Allowance under the FTEA could have been deducted / denied.

34. I am not impressed with this submission made by Mr. Sahay. The stipulation on which he has relied upon is only applicable if the plaintiff is capable of flying but remained unauthorizedly absent. That is to say, he is not flying for the reason attributable to him; by not taking permission of the employer to remain on leave. However, the situation is different in this case, inasmuch as the plaintiff was unable to fly being 'unfit'. He cannot fly, even if he presents himself before the employer. In fact, it is with this view that FTEA stipulates 'Salary' and 'Allowances' under different heads. The payment of

the Salary is relatable to the very relationship of, employer / employee that exist between the parties till termination of FTEA. But the Allowances presupposes, the plaintiff flying the aircraft, which is determined in 'hours'. This is the very reason, vide amendment dated July 01, 2006, the defendant specified 70 hours as Fixed Flying Hours irrespective of number of hours flown by a pilot, i.e. even if a pilot fly less / more than 70 hours, he would still get paid for 70 hours and on the rates specified therein. However, it does not follow even an unfit pilot has to be paid for 70 hours.

35. This I say so because, the contract of employment / FTEA was for appointment of a pilot and subject to the plaintiff capable of flying as per the requirements of DGCA in terms of Article 1.01. Concedingly, the plaintiff was declared unfit by the DGCA on September 08, 2009. Despite plaintiff himself asking for a further training, which request was acceded to, he was still found, unfit. The Trial Court allowed the suit/claim of the plaintiff by holding that; (i) flying allowances are fixed and are part of Salary due to the plaintiff; (ii) the defendant has actually paid Freighter Allowance for the months of September and October 2009, though such charges are payable when the plaintiff is actually flying the plane; and (iii) the Command Pay of the plaintiff was actually paid to him, though the plaintiff was not supposed to command the plane when he was unfit to fly.

36. I am of the view that the Trial Court has erred in holding Flying Allowance is part of the Salary due to the plaintiff. This I say so, because the Salary and Flying Allowances were under

different heads in FTEA. If the intent was to include the Flying Allowance as part of Salary, the FTEA would have stated so. Those allowances, the defendant intended to make part of Salary like Command Pay etc., were stated specifically. The inclusion of Command Pay was never intended to be made, subject to the plaintiff actually flying the aircraft. The reliance placed by the Trial Court on the Command Pay to grant the Flying Allowance and Executive Allowance is clearly unsustainable.

37. Insofar as the Freighter Allowance is concerned, the Trial Court has granted the same on the analogy that it was actually granted for the months of September and October 2009. I find no illegality in the order of Trial Court in that regard for the reason, there is no stipulation depicting fixed hourly payment against Freighter Allowance, as has been done in the case of Flying Allowance / Executive Allowance. No doubt, it was the stand of the defendant that the payment is made to the pilots for carrying the freight from one destination to another destination by flying the aircraft. But the fact is, the Freighter Allowance was paid for the months of September and October, 2009. Moreover, it was not the case of the defendant that the same was given wrongly / erroneously and also the defendant has not made any counter claim along with the written statement seeking refund of the Freighter Allowance paid for the months of September and October 2009. Therefore, the denial of Freighter Allowance for the month of November, 2009, December, 2009 and 12 days for January 2010 is clearly unsustainable.

38. Insofar as the claim of the plaintiff for 'Other Payment' is

concerned, the case was that the amount was denied to him for no reason. The defendant, in its written statement has stated that the said amount is payable on the basis of the attendance, which the pilot is able to achieve and as the plaintiff was unavailable from September 2009 onwards, the plaintiff was paid as per the attendance.

39. From the stand taken by the defendant, it is noted that the benefit was denied to the plaintiff, as he was unavailable from September 2009 onwards. I may state here that it is one thing to say that the plaintiff was unavailable for flying being unfit but the same cannot be said for marking attendance as the plaintiff continued to be in employment till January 12, 2010, when his services were terminated. Surely, till such time, he cannot be denied the said payment as it is not relatable to flying. The plaintiff is entitled to payment under the head Other Payment, but not to the extent of Rs.1,75,500/-, as has been granted by the Trial Court. The Trial Court has clearly erred in considering the amendment to the Letter of Agreement dated February 14, 2008, which under Caption 'E' stipulates 'Other Payment' to be Rs.14,625/- per month (with the calculation marked as 'Other Payment Calculation', giving the breakup). If that be so, for the period between September 2009 to December 2009 and 12 days of January 2010, the amount shall be Rs.64,161/- ($14625 \times 4 + 12$ days) and not the one, as granted by the Trial Court. To that extent, the judgment / decree of the Trial Court is liable to be set aside.

40. Insofar as the claim for refund of an amount of

Rs.20,628/- is concerned, there is no serious challenge by Mr. Agnihotri in this regard and hence, calls for no interference.

41. In view of my discussion above, the judgment / decree with regard to the Flying Allowance / Executive Allowance is liable to be set aside. It is ordered accordingly. The respondent / plaintiff shall be entitled to Freighter Allowance for the period November 2009 till January 12, 2010 @ Rs.30,000/- per month and Rs.64,161/- under the heading 'Other Payment'. Further, in the absence of any serious challenge to the refund of the amount of Rs.20,628/-, the same is upheld. The appeal is allowed in terms of the above.

42. The impugned judgment / decree dated March 01, 2016 passed in Suit No. 241/2015 by the Additional District Judge, Saket District Courts, is modified to the aforesaid extent. Decree sheet be drawn accordingly. No costs.

43. I may state here that in terms of order dated July 12, 2016, the appellant has deposited in this Court, the decretal amount. Vide the order dated July 03, 2017, this Court observed, the respondent to consider withdrawal of the decretal amount deposited by furnishing a security bond to the satisfaction of the learned Registrar General of this Court and to refund the same with interest, in the event, the appeal succeeds. Subsequently, the respondent had filed an application being CM No. 31361/2017 for release of the decretal amount deposited by the appellant to him. The said application was allowed vide order dated September 19, 2017. Thereafter, the matter was listed before the learned Registrar General on September 27, 2017, when the

learned Registrar General, noted that the appellant has deposited an amount of Rs.22,73,088/-. It is also noted in the said order that the respondent has deposited Term Deposit Receipts (TDRs) issued by Yes Bank, Saket Branch amounting to Rs.25,77,000/- as security bond. The learned Registrar General had also recorded the statement of the Bank Manager and the respondent herein. The respondent has categorically stated that he shall refund the amount with interest, in the event the appeal succeeds.

44. In view of the above and the appeal having been partially allowed in terms of this order, the respondent is directed to refund the excess amount received by him with interest by depositing the same in the Registry of this Court with intimation to the appellant and its counsel. The amount deposited by the respondent shall be released by the Registry to the appellant through its counsel. On being satisfied, after notifying the appellant, the Registry shall release the lien on the TDRs submitted by the respondent as security.

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In view of the order passed in the appeal, this application has become infructuous.

V. KAMESWAR RAO, J

APRIL 06, 2021/aky