

John Arthur Annin vs Airline Allied Services Limited on 20 January, 2012

IN THE COURT OF SHRI K. VENUGOPAL, ADJ-I
SOUTH-WEST DISTRICT, DWARKA COURTS: NEW DELHI

Civil Suit No. 581/2011
Case ID No. 02405C0234442010

John Arthur Annin
Son of Terry Annin
Currently Resident of 554,
Washington Drive, Arnold
Missouri 63010, U.S.A.
Through Power of Attorney
Praveen Kumar Son of Sh. I. P. Sharma Plaintiff

Vs

Airline Allied Services Limited
Domestic Arrival Terminal, 1st Floor,
I.G.I. Airport, Palam, New Delhi - 110037Defendant

Date of institution of the suit: 23.09.2010
Date on which judgment was reserved: 22.12.2011
Date of decision: 09.01.2012

Civil Suit No. 581/11
JUDGMENT

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1. The present suit is filed by the plaintiff who is a citizen of USA through power of attorney for declaration and recovery of amount.

2. Brief facts are that the plaintiff was appointed and employed by the defendant vide fixed term employment agreement (hereinafter referred to as FTEA) dated 05.05.08 as a Pilot for a period of one year i.e. from 05.05.08 to 04.05.09. Initially the contractual salary was fixed at US dollars 8,500 per month and the same was enhanced to US dollars 9,000 per month by letter dated 08.07.08. The FTEA was extended for one more year, commencing from 05.05.09 to 04.05.10 on the existing

terms and conditions. While the plaintiff was stationed in USA for 3 weeks scheduled leave for providing instructions/training to the other pilots in the simulator on behalf of the defendant in Seattle, the defendant further extended the employment for one more year i.e. 05.05.10 to 04.05.11 on existing terms and conditions vide letter dated 13.04.10. The defendant also asked the plaintiff to apply for necessary Visa as soon as possible through email dated 13.04.10. The plaintiff promptly applied for Visa through Travisa Visa Service, Chicago on 20.04.10 by complying all necessary documentations. The same was informed by the plaintiff to the defendant through email. The plaintiff did not get Visa from Indian Consulate within the expected time and the plaintiff requested the defendant to help the processing of Visa of the plaintiff. The defendant through email dated 11.05.10 informed the plaintiff that the defendant will try to help the plaintiff to expedite his Visa. However the plaintiff did not get visa to come to India despite making efforts. The defendant did not pay the contractual salary to the plaintiff from 05.05.10 onwards as per the terms of FTEA despite repeated demands made by the plaintiff. The plaintiff also informed the defendant that he is still under the defendant's FTEA and he has not received his Visa for no fault on his part.

3. It is also averred in the plaint that as per the defendant's FTEA dated 05.05.08 which is extended by letter dated 13.04.10, the defendant is under legal obligation to pay the contractual salary of US dollars 9,000 for salary for a period of 3 months i.e. from 05.05.10 to 04.08.10. The plaintiff was constrained to send a legal notice dated 20.08.10 through his Counsel demanding the defendant to pay 27,000 US dollars. The defendant vide its letter dated 08.09.10 illegally terminated the service of the plaintiff w.e.f 07.10.10 without paying the salary for a period of 4 months i.e. 05.05.10 to 04.09.10. The termination of the contract of service by the defendant is illegal, malafide and violative of principle of natural justice. In the present suit the plaintiff seeks a declaration declaring the termination of service by the defendant by letter dated 08.09.10 as wrongful, null and void. The plaintiff further seeks to recover from the defendant salary for a period of 4 months i.e. from 05.05.10 to 04.09.10 amounting to Rs. 36,000 US dollars.

4. Defendant filed written statement. In the written statement it is contended by the defendant that the present suit is a gross abuse of law and the plaintiff has come to the Court with unclean hands by raising false and vexatious claim. The plaint filed through power of attorney is not a plaint in the eyes of law and even otherwise the power of attorney is not duly stamped, therefore the suit is liable to be dismissed at the threshold. It is further contended in the written statement that the contract was on annual basis which is terminable by the defendant with 30 days notice. Therefore, the plaintiff is not entitled to any declaration and the termination of his service is not wrongful, null and void. Since the contract is terminable one, no declaration can be granted under the Specific Relief Act. It is further contended that the plaintiff was in USA during the period between 05.05.10 to 04.09.10 and was not rendering any service or performing any duties for the defendant and hence the plaintiff has abandoned his services, therefore the plaintiff is not entitled to claim any salary for the period as claimed.

5. The Ld. Predecessor Court vide order dated 09.03.11 impounded the power of attorney filed by the plaintiff and the plaintiff was directed to pay Rs. 550/- as stamp duty alongwith penalty and the said amount was paid by the plaintiff.

6. The Ld. Predecessor Court after going through the pleadings of the parties framed the following issues:

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 Rs. 36,000 US dollars against the defendant? OPP

3. Relief.

7. The Ld. Predecessor Court also noted that no other issue is raised or pressed upon by the parties and also noted the submission of the Ld. Counsel for the defendant stating that he does not press the objections taken by him in para 3 and 4 of the preliminary objections of the written statement filed on behalf of the defendant.

8. To prove his case the plaintiff has examined PW 1, his power of attorney holder. In course of evidence, PW 1 exhibited the following documents:

i. Ex. PW 1/1 is the power of attorney.

ii. Ex. PW 1/2 is the FTEA dated 05.05.08. iii. Ex. PW 1/3 is the letter dated 08.07.08 by which contractual salary of the plaintiff was enhanced from US dollars 8,000 to 9,000.

iv. Ex. PW 1/4 the letter dated 20.04.09 by which the FTEA dated 05.05.08 was further extended for one year i.e from 05.05.09 to 04.05.10. v. Ex. PW 1/5 is the letter dated 13.04.10 for further extension of FTEA from 05.05.10 to 04.05.11.

vi. Ex. PW 1/6 is the FedEx Express US Airbill for Visa application dated 20.04.10.

vii. Ex. PW 1/7 (4 pages) is the Visa application.

viii. Ex. PW 1/8 is the Alliance Air Project Details/Annexure II form. ix. Ex. PW 1/9 is the email dated 21.04.10.

x. Ex. PW 1/10 is the email dated 27.04.10 and its reply with respect to the query of the defendant regarding the arrival of Visa.

xi. Ex. PW 1/11 is the email dated 11.05.10 regarding written explanation sought by the defendant for delay in obtaining Visa.

xii. Ex. PW 1/12 is the reply to the email Ex. PW 1/11.

xiii.Ex. PW 1/13 is the email dated 12.05.10 by the plaintiff explaining the delay in obtaining Visa, to the defendant.

xiv. Ex. PW 1/14 and PW 1/15 are emails dated 22.05.10 and 28.05.10 respectively sent by defendant.

xv. Ex. PW 1/16 is the email dated 09.06.10 by the plaintiff demanding payment of the salary from 05.05.10 to 04.06.10.

xvi. Ex. PW 1/17 is the email dated 15.06.10 by the plaintiff informing the defendant that he has not received his Visa for no fault of his. xvii. Ex. PW 1/18 is the email dated 8.07.10 sent by the plaintiff demanding payment for his past two months salary.

xviii. Ex. PW 1/19 is the email dated 19.07.10 by the plaintiff informing the defendant that he has not received his Visa for no fault of his and seeking defendant's help.

xix. Ex. PW 1/20 is the legal notice dated 20.08.10 sent to the defendant by plaintiff's Counsel demanding payment of salary.

xx. Ex. PW 1/21 and PW 1/22 are the postal receipts of the legal notice. xxi. Ex. PW 1/25 is the email dated 08.09.10 sent by defendant asking the plaintiff to come to India on tourist Visa so that defendant can serve one month legal notice on the plaintiff.

xxii. PW 1/26 is the email dated 16.09.10 informing the plaintiff about his termination from service.

xxiii. Ex. PW 1/27 is the letter dated 08.09.10, terminating the services of the plaintiff w.e.f 07.10.10.

9. Defendant examined Sh. Arun K. Goyal as DW 1 and exhibited the following documents:

i. Ex. DW 1/1 is the certified copy of the Company's Board Resolution dated 26.08.96.

ii. Ex. DW 1/2 is the copy of FTEA dated 05.05.08.

iii. Ex. DW 1/3 is the copy of letter by defendant requesting Visa Councilor, Indian Embassy, USA for grant of plaintiff's Visa.

10. My issue wise findings are as under:

11. The onus to prove this issue is placed on the defendant. Ld. Counsel for the defendant contended that the suit is not maintainable for 2 reasons which are as follows:

1. The power of attorney cannot institute a suit.

2. Even if power of attorney is allowed to institute a suit he cannot prove the facts by examining himself.

12. Law with regard to the competency of power of attorney to institute a suit and plead on behalf of the plaintiff is well settled. The Hon'ble Apex Court in Janki Vashdeo Bhojwani and another V. Indusind Bank Ltd. and others, (2005) 2 Supreme Court Cases 217, held as follows:

"Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

13. As per the dictum laid down in the above case the power of attorney can plead and act on behalf of the plaintiff. However he cannot depose as to the facts which are not in his personal knowledge. In the present case plaintiff filed suit through his power of attorney. Most of the facts pleaded are admitted by the defendant except the liability to pay the suit amount. In view of the facts and circumstances of the case, I proceed to adjudicate the dispute on admitted facts and evidence available on record.

14. DW 1 in his evidence deposed that there is an FTEA i.e. Ex. PW 1/2 between the plaintiff and the defendant. It is further deposed by DW 1 that the FTEA dated 05.05.08 for the period 05.05.08 to 04.05.09 was extended vide defendants letter dated 20.04.09. While the plaintiff was in USA, the agreement was proposed to be extended again for one year i.e. from 05.05.10 to 04.05.11 subject to the plaintiff's fulfilling all requirements such as license, Visa etc. necessary for the plaintiff to render his service for defendant in India. It is further deposed that the defendant asked the plaintiff to apply for Visa. However, the same could not be received/secured by the plaintiff. DW 1 further stated in his evidence that the FTEA with the plaintiff was on annual basis which was terminable in nature. In view thereof the plaintiff is not entitled to any declaration and the termination of his service is not wrongful, null and void. It is also stated by DW 1 that the parties have the right to terminate the contract as per clause 8 (2) of the FTEA.

15. On perusal of FTEA i.e. document Ex. PW 1/2, it is seen that there is a clause which provides for termination of the contract. Clause 8 (1) provides for termination of the contract for cause and clause 8 (2) provides for termination of the contract without cause. Clause 8 (2) of the FTEA reads as follows:

"8. TERMINATION

(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."

16. Section 34 of Specific Relief Act reads as follows:

"Discretion of Court as to declaration of status or right

- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation - A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

17. As per the above section, the condition to be specified for granting a mere declaration is that the declaration must relate either to the plaintiff's legal character or to right in a property.

18. The Ld. Counsel for the defendant vehemently argued that where the agreements are determinable in nature, specific performance of the same can not be granted and where no specific performance can be granted there is no question of declaration or injunction. Ld. Counsel further argued that the prayer of the plaintiff is not maintainable in the eyes of law and the present suit for declaration is liable to be dismissed.

19. The Ld. Counsel for the plaintiff submitted that the said FTEA is for complete one year and therefore it cannot be terminated in between. Ld. Counsel further contended that even if it is terminated it can be terminated by giving either 3 months notice as per clause 3 of the agreement or with one month notice as per clause 8 (2) of the agreement. Ld. Counsel further submitted that the termination letter dated 08.09.10 only gives a notice of 30 days instead of one month as stipulated under clause 8 (2) of FTEA and therefore the termination is illegal and liable to be declared as null and void.

20. As I stated above, the condition for granting a decree for declaration is the plaintiff should have a right in the subject matter. It was held in Indian Oil Corporation Ltd. V. Amritsar Gas Service & Ors. 1990 (2) SCALE 1056, that:

"Sub section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in the nature determinate'. In the present case, it is not necessary to refer to the other clauses of

Sub section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding read with the reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant. Corporation is contrary to the mandate in Section 14 (1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained.

21. In this context reference may also be made to the "Law of Contract" by G.S. Treitel, 15th Edition at page 762. It states that if the party against whom specific performance is sought is entitled to terminate the contract, the order will be refused as the defendant could render it nugatory by exercising his power to terminate. This principle applies whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance.

22. Similar question came up for consideration in the case of "Indian Oil Corporation Ltd. V. Shriram Gas Service" [57 (1995) DLT 279] where it was held that:

"the agreement was determinable and therefore the injunction for performance of such an agreement could not be granted."

23. Also, in the matter of Everest Enterprises V. Steel Authority of India Ltd., [(W.P. (C) No. 12943/2006] it was held:

"Even if the agreement of the petitioner was not determinable before the expiry of its term and could not be terminated without notice of month, perusal of Sections 14 and 41 of Specific Relief Act reflect that a contract cannot be specifically enforced which in its nature is determinable and injunctions are not to be granted on breach of contract, non performance of which could not be specifically enforced and/or when a party has an equally efficacious remedy available to him and under civil law. Under Section 14 (1) (a) of the Specific Relief Act, the specific performance of an agreement cannot be granted, breach of which can be compensated by money. The petitioner has impugned the action of the respondents in terminating the contract by communication dated 7th August, 2006 before the expiry of the term of the contract. Perusal of the agreement between the parties, it is apparent that the agreement was determinable and has been determined by the respondent. Even if the inference is that the agreement between the parties was not terminated validly and could not be terminated, then the petitioner shall only be entitled for damages and the petitioner will not be entitled for specific performance of this agreement. Section 14 (1) (c) of the Specific Relief Act also prohibits specific performance of an agreement which by its nature is determinable. Even injunction cannot be granted under Section 41 of the Specific Relief Act to prevent the breach of contract performance of which cannot be specifically enforced especially in the case of the petitioner who had not even been handed over the sit for cleaning and maintenance as the petitioner is claiming

possession of the premises to execute his contract for cleaning and maintenance."

24. After going through the evidence and the documents placed before the Court I am of the opinion that the FTEA i.e. PW 1/2 is a contract which is determinable as per the terms mentioned there in. By issuing a termination notice defendant has not acted in breach of any terms and conditions of the FTEA. Therefore, in my opinion the termination of contract by defendant is not illegal and hence does not call for any interference by this Court. In view of the above facts and the settled legal position, this issue is decided in favour of the defendant and against the plaintiff.

25. Plaintiff claims an amount of 36,000 US dollars from the defendant. The claim of the plaintiff is based on the terms of Ex. PW 1/2 which is extended from 05.05.10 to 04.05.11. The case of the plaintiff is that the Ex. PW 1/2 was already existing and is extended for one more year i.e. from 05.05.10 to 04.05.11. The said extension has taken place when the plaintiff was in US on a scheduled leave. The extension of the contract was communicated to the plaintiff by way of email. After the extension of the contract, the plaintiff applied for a Visa on 20.04.10 through an agency namely Travisa Visa Service. However for the reasons unknown, the plaintiff could not get the Visa in time and therefore could not come to India.

26. The case of the plaintiff is that the delay in obtaining Visa from Indian Consulate is informed to the defendant time to time. It is further the case of the plaintiff that the FTEA has come into force from 05.05.10 and the plaintiff has acted upon the terms of the contract by not joining in any other employment and also by applying promptly for Indian Visa as suggested by the defendant. It is further the case of the plaintiff that though he could not come to India, he was always ready and willing to provide service to the defendant under FTEA and therefore the defendant is liable to pay salary for 4 months which amounts to 36,000 US dollars.

27. Ld. Counsel for the plaintiff argued that not getting Visa is not the fault of the plaintiff but only due to the circumstances which were not under the control of the plaintiff. Ld. Counsel also argued that since the plaintiff was ready to provide his service, the defendant could have utilized his services in the US itself. Ld. Counsel further argued that the defendant had several opportunities to use the plaintiff's service as an instructor to train the Pilots in US but the same was not availed by the defendant.

28. The Ld. Counsel for the plaintiff pointed out to the cross examination of the DW 1 where it was stated 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 mandatory function as may be assigned by the company."

29. On the other hand, the Ld. Counsel for the defendant argued that the contract between the parties got frustrated for the reasons beyond the control of any party. Since the contract is frustrated, the parties are relieved from discharging their liabilities under the contract. Even then the defendant has waited for 4 months and thereafter terminated the contract since the plaintiff failed to obtain Visa to return India and join duties. As per the contentions of the Ld. Counsel for the defendant, the contract is never deemed to have come into effect as the very object is frustrated. It is

also contended that the plaintiff has not provided any service to the defendant during the period 05.05.10 to 07.10.10 and therefore defendant is not liable to pay any salary to the plaintiff.

30. At this stage it is necessary to examine whether the contract between the parties got frustrated as contended by the defendant.

31. Section 56 of the contract reads as under:

"Agreement to do impossible act --- An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful --- A contract to do an act which, after the contract is made, becomes impossible or, by reason of some even which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful --- Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

32. The second para of the above section propounds the doctrine of frustration of contract by supervening impossibility or illegality. The doctrine of frustration was evolved as a device by which the rule as absolute contracts is reconciled with a special exception which justice demand. The Supreme Court in *Govindbhai Gordhanbhai Patel and Ors. V. Gulam Abbas Mulla Allibhai*:

(1977) 3 SCC 179 observed that the meaning of expression impossible of performance as used in Section 56 of the Indian Contract Act has to be taken the same as observed by Lord Loreburn in *Tamplin Steamship Co. Ltd. V. Anglo-*

Mexican Petroleum Products Co. Ltd., (1916) 2 AC 397 in following exposition of the law relating to frustration. "The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible".

33. In *Travancore Devaswom Board V. Thanath International*, (2004) 13 SCC 44, the Supreme Court observed that in the performance of a contract, one often faces, in the course of carrying it out, a turn of events which are not anticipated e.g. an abnormal rise or fall in prices, sudden depreciation of currency, an unexpected obstacle to execution or the like. It was held that these do not affect the bargain that has been made. There was no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an un contemplated turn of events, the performance of the contract has become onerous.

34. The Court in *Eacom's Control (India) Limited V. Bailey Controls*:

74(1998) DLT 213 observed that in the cases of self-induced disability, which could have been removed by the petitioner himself, Section 56 of Contracts Act was not applicable. Unless the supervening event is such which can be said to have struck at the root of the contract and the basis of the agreement has been taken away, the party is not justified in pleading frustration of contract.

35. In *Interore Fertichem Resources SA V. MMTC of India Ltd.*, 146 (2008) DLT 61, the Court observed that while considering frustration of contract, the real question is whether the frustrating event relied upon is truly an outside or extraneous change of situation or whether it is an event which party seeking to rely on had the means and opportunity to prevent it, but nevertheless caused or permitted it to come about.

36. *Ld. Counsel for the defendant* relied on a decision of the Hon'ble Apex Court in *Industrial Finance Corporation of India Ltd. V. Cannanore Spinning and Weaving Mills Ltd.* [2002] 2 SCR 1093, the Apex Court has held that:

"Three conditions are required to trigger off doctrine of frustration under Section 56 of the Contract Act.

i. A valid and subsisting contract between the parties;

ii. There must be some part of the contract yet to be performed; and iii. The contract after it is entered into becomes impossible of performance."

37. In this case the Supreme Court quoted with approval some English decisions in which it has been held that frustration occurs without default of either party because of circumstances beyond the control of the parties. In such circumstances performance becomes impossible as performance would require the parties to perform something radically different from that which was undertaken in the Contract.

38. *Ld. Counsel for defendant* also relied on *Smt. Sharda Mahajan V. Maple Leaf Trading International (P) Ltd.*, CP NO. 349 of 2004. In the said case, Hon'ble High Court of Delhi held that:

"When contractual obligations become practically impossible of performance due to intervening circumstances, the contract stands frustrated. This is because the unexpected event or change in circumstances was not postulated by the parties, thereby the contract as a whole becomes practically and commercially impossible. In such cases the parties are released from their obligations. Delay beyond reasonable time which is abnormal and unexpected also frustrates a contract if it causes fundamental breach. Once the very purpose and object of the contract is frustrated, the parties are not under any obligation to perform the same. What is required to be seen is whether fundamental assumption on the basis of which contract was entered into has ceased to exist due to intervening events which has led to a radically different situation. The intervening circumstances should change the basis on which the parties had rested their bargain.

When the circumstances change drastically and the altered circumstances were never visualized or contemplated, the contract becomes *ex facie* unenforceable. The doctrine *non haec in federal veni* (it was not this that I had promised to do) is applicable. The Courts accept that a contract which is impossible of performance in practical sense need not be performed."

39. Ld. Counsel for the defendant further relied on *Hari Singh V. Diwani Vidyawati*, AIR 1960 J & K 91 wherein it was held that:

"Where the contract has become void due to frustration, as a result of circumstances beyond the control of the parties, the affected party is not entitled to any damages but is entitled to be reimbursed only for so much of the benefit which the defendant had received from him."

40. Section 56 of the Indian Contracts Act provides for applicability of frustration of contract only in those cases where by some reason or some event, which the promisor could not prevent, the contract could not be performed. Wherever the events can be prevented or contract can still be performed despite happening of events, the contract can not be said to be frustrated under Section 56 of the Indian Contracts Act.

41. From the conspectus of the above said decisions, doctrine can be applied only in those cases whereby some reason or some event which the promisor could not prevent, the contract could not be performed. There is no general liberty reserved to the Court to absolve a party from liability to perform his part of contract, merely because on account of an unanticipated turn of events, the performance has become onerous.

42. In the present case the defendant has extended the contract FTEA while the plaintiff was in US. The defendant is well aware that plaintiff requires the Visa which has to be granted by Indian Consulate for the plaintiff to enter India. In chief examination DW 1 clearly spoke to this effect by saying that the defendant asked the plaintiff to apply for Visa. Further correspondence between the parties through emails also clearly prove that both the parties are aware of the fact that the plaintiff requires a Visa to come to India and work for the defendant. In my considered opinion when the parties know the fact of Visa conditions and still entered into contract that does not amount to supervening impossibility which frustrates the contract. For the aforesaid reasons, the contract cannot be said to have been frustrated under S. 56 of the Contract Act.

Whether the plaintiff is entitled to salary as claimed.

43. The contention of the plaintiff is that in pursuance of the contract he promptly applied for Visa. It is further his contention that the plaintiff is always ready and willing to perform his duties under the contract.

44. Ld. Counsel for the plaintiff argued that the services of the plaintiff could have been availed by the defendant in the US also. Attention of the Court is drawn to the clause 6 of the FTEA wherein it was mentioned that the defendant is at liberty to assign the duties to the plaintiff in India or

anywhere outside India. Clause 6 of the FTEA provides as under:

"6. CONDITIONS GOVERNING EMPLOYMENT 6.1 DUTIES The Pilot shall served 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 bas/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, endorsement, permits etc. in a current and valid state,through the valid duration of the contract."

45. The Ld. Counsel for the plaintiff relied on the decision of Hon'ble High Court of Delhi in D.C.M. Limited and Anr. Vs. Mahabir Singh Rana, [2010 (114) DRJ 475]. In the said case, Hon'ble High Court held that:

"It was for the appellants/management to ensure that the notice pay for three months was enclosed with the termination notice and/or forwarded to the respondent. It was not for the respondent/employee to run from pillar to post for collecting the same after receiving the termination notice. Therefore, the termination notice was itself improper."

46. In the above said case the respondent was permanent employee of the appellant company and the service conditions are different from the conditions of FTEA in the present case. In the above cited case, the respondent/employee was terminated by the company without giving a notice pay. The facts of the case in hand are different and therefore the said judgment is not applicable in the present case.

47. Ld. Counsel for the plaintiff further relied upon the decision of the Hon'ble High Court of Delhi in Filmistan Exhibitors Ltd. V. N.C.T., thr. Secy. Labour and Ors., 131(2006) DLT 648. In the said case, the Hon'ble High Court has dealt with an issue on abandonment of service. It was held by the Hon'ble High Court that:

"The petitioner had set up a case of abandonment of service. So far as the principles governing abandonment are to be concerned, an inference of abandonment or relinquishment of service is not easily drawn. Surrounding circumstances would require to be examined. An intention to abandon service would be gathered from the period of absence, response to a notice calling upon the workman to resume duty. Such intention may be inferred from the acts and conduct of a party and the same is pure question of fact.

..... It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the act and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute as 'abandonment of office'."

48. Ld. Counsel for the plaintiff further relied on a decision of the Hon'ble High Court in Union of India (UOI) V. Modi Korea Telecom Ltd., which dealt with the principles with regard to the frustration of contract.

49. It is argued by the Ld. Counsel for the defendant that as per the clause 7 of the FTEA, the payment of the salary to the plaintiff was dependent on 2 conditions which are as follows:

"I. That the plaintiff complete 85 block hrs
th
before 7 day of the next month for the completed

month's services, and only thereafter the payments would be released by the Defendant. Which means that the Plaintiff would have to complete anywhere between 0-85 block hrs of service to the defendant, but for that the plaintiff has to be present in India for providing the service.

II. On receipt of certified attendance and flying hours report duly certified by Executive Director (Ops) Chief Pilot, Alliance Air for the completed month."

50. It is further argued that there is no evidence on record which shows that the plaintiff has complied or fulfilled any of the two conditions. Existence of the contract by itself would not entitle the plaintiff to any salary unless the conditions under clause 7 of the contract are fulfilled.

51. It is seen from the record that the FTEA was terminated by the defendant by letter dated 08.09.10. I already held that the said contract is not frustrated. It is evident from the material on record that the plaintiff in pursuance of the contract did not join in any other employment and sincerely tried to obtain a Visa in order to come back to India. Ex. DW 1/3 which is brought on record through DW 1 is the clear proof to the fact that when the FTEA is extended the defendant is in the knowledge of the fact that the plaintiff is not having visa and he has to apply for it. The contract between the parties was in subsistence till the time it was duly terminated by the defendant. The argument of the Ld. Counsel for the defendant that the plaintiff has not fulfilled the conditions

under clause 7 of FTEA, therefore not entitled to claim salary, does not hold water.

52. The Ld. Counsel for the plaintiff in his written arguments submitted that the defendant had several opportunities to use the services of the plaintiff as an instructor to train other pilots in Seattle, Washington, USA. The said contention deserves some consideration. In the cross examination of DW 1, the following question was asked by the Ld. Counsel for the plaintiff:

Q. Is it correct that during the period of 05.05.10 to September 2010 the defendant sent many pilots from India to instruct and train other pilots of the defendant in Seattle, Washington, USA?

53. DW 1 gave an evasive answer to the above said question by saying I do not have any knowledge. In view of clause 6 of the FTEA, I understand that there is a scope for the defendant to utilize the services of the plaintiff outside India also. However for reasons best known to the defendant, the defendant failed to do so. It is pertinent to mention here that it was specifically pleaded by the plaintiff in para No. 8 of the plaint that he was providing the training to other pilots in the simulator on behalf of the defendant in Seattle, USA. The said averments are admitted by the defendant in his written statement.

54. Clause 6.1 of the FTEA, states, " 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 The Pilot shall perform all flying, training, supervisory duties and managerial functions assigned by the Company".

55. Clause 6.5 of the FTEA, states, "Domicile - It is agreed between the parties that the company may position/place the Pilot at any place decided by the company, within India or outside India abroad and the Pilot shall accept the same without any objection whatsoever".

56. Hence, during the said period when the plaintiff's visa was being processed by the Indian Consulate at Chicago (as visa was neither allowed nor denied) the defendant could have well assigned him any of the suitable flying, training, supervisory duties and managerial functions as deemed fit by the defendant outside India.

57. For the aforesaid reasons, I am of the opinion that the defendant is liable to pay 36000 US dollars to the plaintiff as agreed under FTEA which is equal to 4 months salary i.e. from 05.05.10 to 04.09.10. Accordingly this issue is decided in favour of the plaintiff.

RELIEF

58. 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.

59. File be consigned to record room.

PRONOUNCED IN THE OPEN COURT
ON 09.01.2012

(K VENUGOPAL)
ADJ-I, South-West District,
Dwarka Courts, New Delhi