



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: September 20, 2023

+ RFA 433/2016

AIRLINES ALLIED SERVICES LIMITED

..... Appellant

Through: Mr. Abhinav Agnihotri and
Mr. Ankur Sharma, Adv.

versus

ASHOK KUMAR MALHOTRA

..... Respondent

Through: Mr. Sanjeev Sahay and
Mr. Shagun Saproo, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

CM APPL. 3408/2022

1. This review petition has been filed by the review petitioner (respondent, herein) seeking review of order / judgment dated April 6, 2021 passed by this Court in the above RFA being 433/2016, whereby this Court had partially allowed the appeal filed by the appellant by setting aside the Flying Allowance / Executive Allowance granted by the Trial Court in favour of the respondent. It was further held that the respondent shall be entitled to Freighter Allowance @₹30,000/- per month and ₹64,161/- under the heading 'Other Payment' for the period November 2009 till January 12, 2010. Accordingly, in paragraph 44 of



the impugned Judgment this Court has stated as under:

“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.”

2. It is stated that the respondent had earlier filed an SLP before the Supreme Court against the impugned judgment which was decided by the Supreme Court vide order dated December 13, 2021, wherein it is stated as under:

“Learned counsel for the petitioner seeks permission to withdraw the present special leave petition with liberty to file a review petition in the High Court.

Permission is granted to withdraw the special leave petition along with the liberty to file a review petition in the High Court. We also grant liberty to the petitioner to challenge the impugned order in case the decision of the High Court is adverse to petitioner.

The Special Leave Petition is dismissed as withdrawn.”

3. Since the respondent was granted liberty by the Supreme Court to file a review petition, it is pursuant thereto, the present review petition has been filed.

4. It has been submitted by Mr. Sanjeev Sahay, learned counsel appearing for the respondent that this Court did not consider the complete facts whilst partially allowing the RFA in favour of the appellant. It is his case that the appellant had previously admitted by



way of a written statement that the Flight Related Allowances were made fixed after the amendment of FTEA w.e.f. August 1, 2006. According to him, this Court while deciding the appeal did not take into consideration the admission made by the appellant in its written statement. He submitted that this Court by not realising the same, has ruled in favour of the appellant by holding that the respondent was not entitled to Flight Allowance / Executive Allowance.

5. According to Mr. Sahay this Court has erred in concluding that the Flying / Executive Allowance, though fixed in nature, were not part of the salary dues of the respondent. He submitted that the appellant pleaded such facts and made such submissions, which were neither pleaded nor argued during trial before the Trial Court, i.e., the appellant went beyond the pleadings and came before this Court pleading different grounds, bringing forth a completely new facet than what was pleaded before the Trial Court.

6. Mr. Sahay further submitted that this Court also failed to take notice of the salary slips that were issued to the respondent by the appellant. It has been his case that salary slips issued were clear enough to reveal that the Flight Related Allowances were fixed and part of the salary, as pay and allowances due to the respondent. The salary certificate, in terms of the amended contract specifies that Flight Related Allowances are fixed and total emolument is also fixed. He submitted that even the amendment to FTEA in Article 7.01.02 provides for deductions from the salary, i.e., reasonable adjustments from pay and allowances, but only in case of unauthorized absenteeism by the Pilot. He submitted that the respondent's case never fell under



any such category. Hence, the respondent was not entitled to any such deductions as per FTEA. He further submitted that, this Court should have taken note of the fact that respondent was unable to fly only on account of him being deemed unfit to fly. The respondent had salary slips to the effect wherein he was given all his allowances. Hence to hold in favour of the appellant by setting aside the judgment / decree of the Trial Court with regard to Flying / Executive Allowance goes not only against what has been provided in the salary slips but also against the amended FTEA as well.

7. He also submitted that this Court while deciding the RFA did not take into full consideration the impact of the change made after the amendment including the concept of equal pay for equal work. To avoid any more uncertainty, the pay, Flight / Executive Allowance and benefits thereof became fixed by virtue of the amendment to FTEA and moreover reasons attributable to a Pilot was changed to unauthorized absenteeism. Therefore, the amended FTEA and salary slips of the respondent clearly depict that the Flight Related Allowances were made fixed. The same was admitted by the appellant and subsequently proved before the Trial Court. So, he submitted, this Court's decision to treat some of the allowances as fixed while treating others as variable, without there being any particular basis, is incorrect.

8. He submitted that the essence of the review revolves around the findings of this Court that the appellant was correct in arbitrarily withholding and not paying the Flight Related Allowances, despite the respondent proving before the Trial Court that the same are fixed in nature and have been made part and parcel of the gross salary. He also



submitted that Court had not considered the salary slips of the respondent which manifest that he is being paid flying allowances even when he has zero hours of flying in a month. He submitted, even scaling down of the amount due under the heading ‘other payments’ on *pro-rata* basis was incorrect, therefore, the respondent is entitled to full amount as owed to him by the appellant originally.

9. According to Mr. Sahay, it is a well defined principle of law that parties cannot go beyond pleadings.

10. On the other hand, Mr. Abhinav Agnihotri, learned counsel appearing for the appellant would submit that the respondent has failed to make out a case for filing the review petition against the impugned judgment as the same does not bear any merit and is liable to be dismissed. According to him, the grounds contemplated under Order XLVII CPC of the Code of Civil Procedure, 1908 (‘CPC’, for short) have not been made in the present case and as such the review petition is liable to be dismissed.

11. He contested the stand taken by the respondent that the appellant had admitted that the Flight Related Allowances have been made fixed after the amendment of FTEA dated August 1, 2006 and the said admission was not taken into consideration by this Court. According to him, the appellant had in the written statement clearly mentioned that as the respondent was not fit to serve as a Pilot, he was not liable to be paid any pay or allowances in terms of FTEA. However, as a gesture of goodwill, the appellant paid basic salary and other allowances to the respondent from September, 2009 till his termination. He submitted that as the respondent was declared unfit



and was in breach of his representations lying in FTEA, the Flight Related Allowances were not paid to the respondent. Further, the fact that the Flight Related Allowances were variable is reflective from the 'Letter of Agreement-Amendment' at Page 80 of the paperbook filed in RFA which provides the details of pay and allowances payable to the respondent, wherein, it is provided that the Flight Related Allowances are variable in nature. In effect, he submitted that the attempt of the respondent by filing this review is to re-open the facts by raising same grounds that were raised in the appeal.

12. That apart, he also submitted that a plea of misinterpretation of the contract does not fall within the realm of error apparent on the face of record, which would warrant interference of this Court. According to him, the case set up by the respondent that this Court had not considered the salary slips of the respondent which reveal that the respondent has been paid flying allowance is vague, as the respondent has not even filed any salary slips, which according to him have not been considered by this Court. Moreover, no such averments regarding the salary slips were made while arguing the appeal before this Court. He laid emphasis on the fact that the respondent was, declared unfit to serve as Pilot and in breach of representations and undertaking as embodied in Clause 1.01 of the FTEA. In fact, the Flight Related Allowances were not paid to the respondent from October, 2009 and freighter allowance from November, 2009 till his termination. Thus, as the respondent was not found fit to perform his duties as a Pilot, he was not entitled to any Flight Related Allowances which are in the very basic nature only liable to be paid once the Pilot is declared to be



fit to fly.

13. In so far as the sub-clause (i) of Clause 7.01.02.1 is concerned, the amended clause provided an additional condition when the deduction from the pay and allowances would be made in case of shortfall in flying hours, i.e., in case of unauthorized absenteeism. He submitted, the original condition continued to remain in force as the same is borne out from the fact that amended contract itself contains a provision at the end of the document which stated “*the remaining terms and conditions of the existing contract will remain unchanged*”. Even otherwise, the fact that respondent was unable to fly as a Pilot and perform his services / duties under the terms of the contract would render the respondent as being unauthorizedly absent. Therefore, he submitted that this Court in the impugned judgment has rightly held that the payment of allowances pre-supposes the respondent flying the aircraft and as per which the FTEA stipulated salary and allowances under different heads.

14. He also laid emphasis on the fact that though the appellant was will within its right to terminate the services of the respondent after he was declared unfit to fly, but as the respondent had requested for additional training to be provided, the appellant did not terminate the services of the respondent and even as a *bona fide* and gesture of goodwill, paid him the basic salary and certain other benefits even though the respondent was not entitled to any amount. However, he further submitted that as the respondent was not fit to perform his duties as a Pilot, he was not entitled to any Flight Related Allowances, which are in their very basic nature only liable to be paid if the Pilot is



fit to fly.

15. Having heard the learned counsel for the parties and perused the record, it may be stated that the issues which are raised in the review petition have been dealt with by this Court in paragraphs 33 to 42 of the impugned judgment, which I reproduce as under:

“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/- (14625x4+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."

(emphasis supplied)

16. From the above, the only issue raised by the respondent is with regard to non-allowance of Flight / Executive Allowance in favour of the respondent.

17. Perusal of the paragraphs of the impugned judgment reproduced above would reveal that this Court has given some justification for setting aside the order of the Trial Court, as noted from the above, that too based on the interpretation of a contract executed between the parties herein.

18. I agree with the submissions made by Mr. Agnihotri that the interpretation of a contract though permissible in the first appeal, cannot be made a subject matter of a review petition. The grounds of review under Order XLVII CPC are very limited and the same are reproduced hereinbelow for ready reference:-

(a) On account of discovery of new and important matter or



evidence which, after the exercise of due diligence was not within the knowledge of the review petitioner or;

(b) On account, said evidence could not be produced by the review petitioner at the time when the decree was passed or order was made or;

(c) On account of some mistake or error apparent on the face of the record or any other sufficient reason.

19. It is not the case of the respondent that the review petition falls under heads (a) and (b) above. In so far as head (c) is concerned, suffice to state there is no error apparent on the face of the record.

20. Even, if it is assumed for a moment, as the case set up by the respondent, that this Court has not considered the salary slips filed by the respondent before the Trial Court wherein it is clearly depicted that the respondent was actually paid the Flight Related Allowances, it is the stand of the respondent only, in this Court, that no such salary slips were placed on record by the respondent before the Trial Court. In any case, the grounds on which review is being sought are primarily on the basis of the interpretation of provisions of the FTEA, more specifically Article VII, which relates to 'Pay and Allowance and Benefits', which reads as under:

“7.01 SALARY

<i><u>Salary Head</u></i>	<i><u>Amount</u></i>
<i>1. Basic Pay</i>	<i>Rs. 20,800/-</i>
<i>2. HRA</i>	<i>Rs. 6240/-</i>
<i>3. Admn. Allowance</i>	<i>Rs. 13650/-</i>
<i>4. Experience Allowance</i>	<i>Rs. 4777.50/-</i>



5. Sector Allowance	Rs. 7393.75/-
TOTAL	Rs. 52861.25/-

Experience allowance will increase by @ Rs. 1000/- per month after every subsequent completed year. The date of accrual for enhancement, in the allowance will remain unchanged.

7.01.02 FLIGHT RELATED ALLOWANCES (Fixed)

Flying Allowance at 70 hrs. @

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 of the block actual flying hours. Shortfall in flying hours at 70 hrs/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.

iii If the pilot is involved' in a reportable incident/accident, and as a consequence of which the Pilot is not permitted to exercise the privilege of his/her license by the Company/DGCA for a maximum period up to 3 months he/she will be entitled to full pay, allowance and benefits including minimum, guaranteed flying allowance. If the inquiry does not find the pilot blame worthy then the Pilots shortfall in flying, allowance for the quarter will not be attributable to him/her and will not entail any deduction in flying allowance provided that the shortfall of that quarter from 210 hrs is made upto in the next 2 quarters.



However, if the "inquiry finds the shortfall thereof as attributable to the Pilot it will entail shortfall deduction.

vi. Flying /Executive' Allowance rate will 'remain unchanged for flying-duties undertaken in excess of 70 hrs."

21. Mere reading of the aforesaid stipulations also makes me convinced that the respondent was not entitled to Flight Related Allowances, being unfit for flying as Pilot. The "other payment" has rightly been granted @ ₹14,625/- per month.

22. In view of my above conclusion, I do not find any merit in the review petition. The same is dismissed.

CM APPL. 3410/2022

Dismissed as infructuous.

V. KAMESWAR RAO, J

SEPTEMBER 20, 2023/jg