

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 23.08.2018

CORAM

THE HONOURABLE MR.JUSTICE SATRUGHANA PUJAHARI

W.P.No.7128 of 2018 and WMP Nos.8826 and 8827 of 2018

Capt. Monish Chandran

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Petitioner

Vs

1. The Government of India,
Rep. by its Secretary,
Ministry of Civil Aviation,
B Block, Rajiv Gandhi Bhavan,
Safdarjung Airport, Aurobindo Marg,
New Delhi.
 2. The Director General of Civil Aviation,
O/o. The Director General of Civil Aviation,
Technical Centre, Opp. Safdurjang Airport,
New Delhi- 100 003.
 3. The Joint Director General of Civil Aviation,
O/o.The Director General of Civil Aviation,
Technical Centre, Opp. Safdurjang Airport,
New Delhi - 100 003.
 4. Jet Airways India Private Limited,
Rep. by its Chief People Officer,
Siroya Centre, Sahar Airport, Andheri (East),
Mumbai - 400 009
- ... Respondents

Prayer:- Writ petition filed under Article 226 of the Constitution of India praying for a writ of certiorarified mandamus calling for the records in connection with the order viz., AP-1/Post Flight Med/2016-AS dated 09.08.2016, issued by the 3rd respondent and the order as confirmed by 2nd respondent vide order Ref.AV.60011/118/2016-AS dated 04.09.2017 and upheld by the 1st respondent vide ref:AV-29011/77/2016-D G dated 12.03.2018 and quash the same and direct the 2nd respondent to remove the endorsement of suspension on the license viz., ATPL 5229 and further direct the 2nd respondent to issue renewal of license viz ATPL 5229.

For Petitioner : Mr.V.Prakash,
Senior Counsel
For RR1 to 3 : Mr.T.C.Thirumalaiswamy
Standing Counsel
For RR4 : No Appearance

ORDER

The case of the writ petitioner is that he joined in the Service of the fourth respondent Jet Airways as Co Pilot on 17.10.2005 became a captain of the flight in course of the time and now designated as a Senior Commander. He was also awarded Airline Transport Private Licence (in short ATPL) bearing No.5229 in October 2012. However during the course of his employment, on 24.10.2011, during a pre flight breath analyser test, he was found positive at Mumbai Airport before he was scheduled to fly in flight No.9W118 and as such, according to Para 8 of Civil Aviation Requirement (in short CAR) his licence was suspended for three months. On 03.08.2016, he was also a commander in an aircraft of the sixth respondent bearing No.9W525 from Abu Dhabi to Chennai and landed in Chennai at 14.42 hrs of 03.08.2016. After his landing in Chennai, during post flight breath analyzer examination, he was found positive. However, the writ petitioner made protest alleging that the same was due to malfunctioning of the breath analyser, inasmuch as during preflight breath analyser test at Abu Dhabi, before boarding the flight, the test was negative and in the meanwhile he had not consumed any alcohol, not taken any sedative / narcotic / stimulating drug and in the repeat test which was also not done according to the prescribed norms, a different reading came out. Hence, he made protest in accepting of such report as the same was defective. In spite of the aforesaid, the positive report was submitted to the 3rd and 4th respondents, pursuant to which his service was terminated by the fourth respondent on 05.08.2016 and the third respondent, without giving any chance of hearing, arbitrarily suspended the license of the petitioner for four years vide the impugned order dated 09.08.2016 and consequently necessary endorsement was made in the ATPL of the petitioner. Absolutely no chance of hearing was given to the petitioner by the third respondent though the same affects the livelihood of the petitioner. The petitioner's appeal in this regard was transferred to the the second respondent and the second respondent in a hurried and haste manner, also confirmed such order of the third respondent vide order dated 15.02.2017, without appreciating the materials in proper perspective and without giving any chance of hearing to the writ petitioner. Against the same, the petitioner preferred an appeal before the first respondent, who also confirmed such order of the third respondent vide order dated 12.03.2018. The

writ petitioner as such assails such decision of the third respondent, which has been confirmed by the second and first respondents, to be illegal, arbitrary and contrary to law inasmuch as no chance of hearing was given to him more particularly by the third respondent before such adverse order affecting the livelihood of the petitioner, was passed. Furthermore the second and first respondents having also not appreciated the aforesaid fact and also the protest of the petitioner that the breath analyser was not functioning properly and as such the decision of the third respondent in this regard was illegal and improper, hence the impugned orders are liable to be quashed. The same is moreso in view of the fact that there was non application of mind on the part of the first to third respondents, which is apparently visible from the penalty imposed clubbing both the delinquency of positive breath analyser test of preflight and post flight and imposing a penalty not prescribed in the CAR, holding the petitioner guilty of the delinquency of repeat violation as provided in the CAR. Hence, the petitioner has made the prayer to quash the impugned order of the third respondent which has been confirmed by the first and second respondents and exonerate the petitioner from the stigma of being found positive in the post-flight breath analyser test and consequently remove the endorsement made pursuant to such stigma and direct them to renew the ATPL licence of the petitioner which is going to expire in October 2018.

2. Counter affidavit has been filed by the first to third respondents justifying the action taken against the petitioner inasmuch as the Civil Aviation requirement and the Aircraft Rules mandate such an action against the writ petitioner for having found positive in breath analyser test repeatedly. Disputing the averment that no chance of hearing was given to the petitioner before the penalty imposed as per the CAR guidelines, it has been averred that the petitioner was given due opportunity of hearing by the respondents in all stages, more particularly the first respondent, therefore the contention that the impugned orders are bad being violative of principle of natural justice, is without any substance. Since the petitioner was tested positive and made repeat violation of the Aircraft Rules as provided in Rule 24 (1) of the Rules, penalty as prescribed for repeat violation was imposed on him on a harmonious reading of the provision of para 8.2 and para 9.2 of the CAR, Section 5 series F part III issue 3, therefore there being no illegality and infirmity in the impugned orders, this writ petition filed challenging the impugned order is devoid of merit and liable to be dismissed.

3. No one has made appearance on behalf of the fourth respondent and no counter affidavit has also been filed on

behalf of the fourth respondent. No relief also having been sought for against him, this Court is of the view that the fourth respondent's presence is not required for disposal of this writ petition and as such proceeds to disposal of this writ petition on the consent of the parties at the stage of admission.

4. During the course of hearing, the learned counsel appearing for the writ petitioner, submits that since the breath analyser was not functioning properly as seen from the materials on record and no appropriate opportunity of hearing was given to him, the impugned orders passed cannot be sustained. The same is moreso in view of the fact that the aforesaid order though visits the petitioner with an adverse consequence affecting his livelihood still the principle of Audi Alteram Partem, a salutary principle of natural justice, was not followed by the 3rd respondent and on that score alone, the impugned order of the third respondent is liable to be quashed. Otherwise also the first to third respondents under a misconceived notion having held the case of the petitioner to be repeat violation of the 24(1) of the Aircrafts Rules and imposed a penalty, which is also not there in the CAR, the impugned orders are unsustainable. In this regard, notice of the court has been drawn to the provision contained in Paras 8 and 9 of the CAR prescribing the penalty for violation of 24 (1) of the Aircraft Rules. Drawing the notice of this Court to the aforesaid, it is submitted that since a person who test positive in pre-flight breath analyser, if in a subsequent occasion found positive again in pre-flight breath analyser test, only can be said to be guilty of repeat violation of pre-flight breath analyzer and also same is in the case of post flight breath analyzer and the petitioner's case is not covered by repeat violation of any of the two tests, the penalty imposed for repeat violation, therefore was misconceived. The same is moreso when there is no provision of clubbing of positive pre-flight analyser test with the positive post-flight breath analyser test to come to a finding of repeat violation. So also no penalty of four years suspension, being provided on the date of commission of the proven delinquency, imposition of such a penalty speaks of total non application of mind and ignorance of the provisions in this regard by the concerned respondents, hence the impugned orders are liable to be quashed.

5. Per contra, the learned counsel appearing for the first to third respondents however justify the impugned orders with the submission that after taking into consideration the materials on record and giving appropriate opportunity of hearing to the petitioner, the penalty imposed having been passed, the same cannot be found fault with, more particularly, when the aforesaid is based on the facts of being found positive on breath analyzer and no material was produced before the

authority that the breath analyzer test was not conducted appropriately as contemplated under para 6 of the CAR. Therefore, this court should not disturb the finding on facts that the petitioner found positive in post flight breath analyser test and admittedly he having found positive on a pre flight breath analyser test committed repeat violation, particularly when the same has been scrutinized and found to be correct by the appellate Authority also, in exercise of writ jurisdiction, when such jurisdiction is not appellate one. So far as the punishment imposed is concerned, it is submitted that since the petitioner has tested in breath analyzer positive in two occasions, no doubt one is pre-flight analyzer and another one is post-flight analyzer, he can be stated to have committed repeat violation of requirement of Rule 24 (1) of CAR and the penalty imposed as such cannot be said to be impermissible. Hence, this writ petition appears to be devoid of merit and liable to be dismissed, submits the learned counsel for the first to third respondents.

6. Before appreciating the contention raised by the learned counsel appearing for the parties with regard to sustainability of the finding that the petitioner was found positive in the post-flight breath analyser test after his landing in Chennai Airport from Abudhabi, it would be apposite to mention here that the petitioner has not disputed the fact that such a breath analyser test was conducted. However, according to the petitioner there being malfunctioning of the instrument, the same should not have been taken into consideration as he had made protest in this regard, the same is moreso when the test was not conducted in the manner prescribed in Para 6 of CAR. However, it appears to this Court that the aforesaid is a finding of fact. The statutory authority i.e the 3th respondent no doubt has not addressed such contention of the petitioner in very many words while accepting the positive report and proceeding against the petitioner for such delinquency and passing the impugned order. But such contention of the petitioner has been addressed taking note of his objection in the appeal and the facts on record by the second respondent while confirming the same in the appeal. The first respondent in the appeal filed also after giving chance of personal hearing addressing such contention, passed a detailed order on the finding of delinquency and confirmed the impugned order. This Court while exercising the writ jurisdiction under Article 226 / 227 of the Constitution of India never exercise the jurisdiction of Appellate Authority and substitutes its finding on facts by re-appreciating the material on record, is well settled. The jurisdiction necessarily a supervisory one. However, in exercise of the jurisdiction under Article 226 of the Constitution of India, this Court only annul the decision impugned but under Article 227 of the Constitution of India it

also gives further direction. Therefore even if the writ jurisdiction of this Court is extensive one but it is not so wide and large to enable the High Court to convert into a Court of Appeal and examine the correctness of the decision impugned. The boundaries of the High Court writ Jurisdiction under Article 226 are clearly and strongly built and cannot be breached without risking the jurisprudential confusion. It is only when in the circumstances, the Government /subordinate tribunal / Authority exercise the jurisdiction not vested in it or acted in utter disregard to the statutory provision or the order passed is in violation of the principle of natural justice and also the order suffers from a perversity, this Court in exercise of the writ jurisdiction used to quash the same and also give such a direction as it may deem fit and proper in the facts and situations. The aforesaid is the law laid down by the Apex Court in a different occasions dealing with the power of High Court under Articles 226 & 227 of the Constitution of India. It is never the case of the petitioner that the first to third respondents exercised the jurisdiction without Authority of law.

7. The case of the petitioner is that such order was passed in utter disregard to the fact on record and also without adhering to the principle of natural justice and also the penalty imposed one is impermissible. So far as the finding on fact is concerned as stated earlier though the 3rd respondent in the impugned order has not addressed the contention raised in this regard but the first and second respondents have taken into consideration the same and the first respondent after giving a chance of personal hearing to the petitioner, refused to interfere with the order of the 3rd respondent that the petitioner was found guilty of the violation of CAR and can be penalised as per the CAR with regard to ATPL. Therefore, such finding on fact, this Court is unable to interfere inasmuch as nothing has been brought to substantiate the same was passed in violation of principles of natural justice and also the statutory requirement and suffers from any perversity.

8. However, the petitioner also challenges the penalty imposed to be contrary to the Civil Aviation Requirements. To appreciate the contentions raised by the learned counsel appearing for the parties, it would be apposite to have a look on the Rule 24(1) of the Aircraft Rules and relevant provision of CAR. The Rule 24 (1) of the Rules read as thus:-

" No person acting as, or carried in aircraft for the purpose of acting as pilot, commander, navigator, engineer, cabin crew or other operating member of the crew thereof, shall have taken or used any alcoholic drink, sedative, narcotic or stimulant drug or preparation within twelve hours of the commencement of the flight or take or use any such preparation in the

course of the flight, and no such person shall, while so acting or carried, be in a state of intoxication or have detectable blood alcohol analysis or in a state in which by reason of his having taken any alcoholic, sedative, narcotic or stimulant drug or preparation, his capacity so to act is impaired and no other person while in a state of intoxication shall enter to be in aircraft or report for duty”.

The relevant paras of the Civil Aviation Requirement authorising the third respondent to impose the penalty with regard to the license of the petitioner for such violation of Rule 24(1) of the Rules read as thus.

8. Action on Positive Test

8.1 Any crew member that tests pre-flight breath analyzer examination positive for the first time / refuses to undergo the pre-flight breath-analyzer examination / refuses to undergo the pre-flight breath analyzer examination second time upon tested positive during the first test/ operates the aircraft without undergoing pre-flight breath analyzer examination / attempt to evade the pre-flight breath analyzer examination by leaving the airport premises shall be kept off flying duty and their license / approval suspended for a period of three months.

8.2 In case of a repeat violation of the provisions contained in Para 8.1 of this CAR, the license / approval of the crew member shall be suspended for a period of three years.

8.3 In case of a second repeat violation of the provisions contained in Para 8.1 of this CAR, the license / approval of the crew member shall be cancelled.

8.4 An instructor / Examination /Check Pilot/ Check Cabin Crew detected positive for alcohol consumption during pre-flight breath-analyser examination, will lose such ratings/ authorisation for a period of three years in addition to the action mentioned in Para 8.1 and 8.2 of this CAR.

8.5 Maintenance personnel detected positive for alcohol consumption during breath-analyser examination shall be off-rostered. Penal action on such cases shall be taken as per the provisions of para 8.1 and 8.2 of this CAR.

8.6 All such violations shall be endorsed on the individual's license by DGCA. It shall be the responsibility of the Chief of Flight Safety / Accountable Manager to submit the license / authorisation to DGCA for necessary endorsement.

8.7 Whenever an expatriate pilot, operating in

India is detected positive for alcohol consumption during pre-flight breath analyzer examination, the FATA shall be canceled and the expatriate pilot shall never be considered for issue of the FATA. In addition, the concerned license issuing authority of the country shall be informed.

9. Post Flight Medical Examination

9.1 Any crew member who tests positive for alcohol consumption in a post flight breath analyzer examination shall have contravened Rule 24 of the Aircraft Rules 1937. The details of his / her post flight breath analyzer examination, licenses, ratings and approvals shall be immediately submitted along with original license/ authorization / approval to the Director of Air Safety (HQ) , DGCA. Action on such cases shall be taken in accordance with the proviso of Schedule VI of the Aircraft Rules, 1937. Pending action under schedule VI of the Rules, the involved crew member shall surrender the licenses forthwith.

9.2 In addition to action indicated in para 9.1 of this CAR, the license / authorization / approval of person shall be suspended for a period of one year. In case of an expatriate pilot, the punitive action shall be in accordance with para 8.7 of this CAR.

9.3 Any crew member that refuses to undergo the post-flight breath analyser examination/attempts to evade the post-flight breath-anaklyser examination by leaving the airport premises shall be kept off flying duty and their license/ approval suspended for a period of three months.

9.4 An instructor / Examiner / Check pilot/Check Cabin Crew detected positive for alcohol consumption during post-flight breath-analyzer examination, will lose such ratings / authorisation for a period of three years in addition to the action mentioned in Para 9.1 of this CAR.

9.5. In case of a repeat violation of the provisions contained in Para 9.1 of this CAR, the license / approval of the crew member shall be cancelled.

(underlining are mine)

9. A perusal of the aforesaid would go to show that a person is not supposed to be in the influence of alcoholic drink, sedative, narcotic or stimulant drug or preparation while conducting himself as a Pilot, Commander, Navigator, Engineer, Cabin Crew or other acting member of the Crew in an aircraft inasmuch as the same is prejudicial for the safety of the persons traveling in an Aircraft. To prevent such person operating the Aircraft a pre flight breath analyser test and also a post flight breath analyser tests are conducted as per

the requirement of the CAR. Hence, a person is supposed to undergo pre-flight analyzer test before boarding. If any of the aforesaid persons test positive in pre-flight breath analyser test he is prevented from discharging his duty and thereby the dangers that may occur to the passengers for discharge of such duty in the influence of alcohol and the intoxicant drugs is avoided. The punishment therefore provided for aforesaid persons on being test positive during pre-flight test is lenient than a person who test positive on post flight medical examination. However for 1st and 2nd repeat violation found in pre flight breath analyser more severe punishment are provided as a crew member person appears to have repeated the violation of Requirements of rule 24 (1) of the rules in spite of earlier being tested positive. So far as the pre-flight analyser is concerned on the first occasion, if some one tested positive, his license / approval is required to be suspended for three months as provided in para 8.1 of the CAR and for first repeat violation of the same his license is to be suspended for three years and for second repeat violation, even though, it is preflight positive test his license has to be cancelled.

10. So far as the post flight breath analyzer examination is concerned, the delinquency being serious one, if some one tested positive on the first occasion he has to forthwith surrender his license to the Joint Director of Civil Aviation and besides penal action as provided in the Aircraft Rules, under the CAR his licensed authorization and approval is liable to be suspended for one year and on repeat test of positive besides the penal action as provided in Aircraft Rules, his license is liable for cancellation.

11. From the aforesaid, it appears that there is no clubbing of the delinquency of positive breath analyzer in pre-flight and post-flight. Both delinquency operates independently and as such a crew member who tested positive in Breath analyzer test during pre-flight cannot be stated to have committed repeat violation by testing positive once in post-flight breath analyzer test thereafter and vice versa. The lexical meaning of the word "repeat" also is "to do the same thing again or which occurs again". A perusal of the aforesaid provision of CAR quoted supra also appears to this Court that the same has taken note of the aforesaid lexical meaning of repeat while prescribing the penalty for repeat violation or in other word, the repeat delinquency as seen from the underlined provisions. Nowhere in the relevant para of the CAR quoted supra it has been indicated that a positive breath analyser whether found during pre-flight or post-flight can be clubbed with another positive test irrespective of the situations or circumstances in which such subsequent positive breath analyser was made. Therefore, there being no indication of earlier

breath analyser in a pre-flight test to be clubbed with the post-flight breath analyser test, the first to third respondents proceeded on a wrong premises holding the first occasion of positive test in the post breath analyser to be a repeat violation inasmuch as the petitioner was undisputedly found positive on an earlier occasion in a pre-flight test. The same speaks that the third respondent remain oblivious to the mandate of CAR while imposing the penalty with regard to the licence of the petitioner when he was found positive in the post flight breath analyser test. So also the third respondent appears to have remained oblivious to the fact that a person cannot be imposed with a penalty for a delinquency with two punishment i.e., even if it is a case of repeat violation inasmuch as for a repeat violation a stringent penalty has been provided in the CAR for such repeat violation in any of the aforesaid situations. The penalty imposed therefore being impermissible and not provided also in the CAR, cannot be sustained. The first and second respondents also while sitting on appeal against the order of the third respondent remained oblivious to the aforesaid and confirmed such penalty.

12. Hence the penalty imposed being misconceived and contrary to the CAR as seen from the relevant paras of the CAR quoted supra, the same cannot be sustained scrutiny in the eye of law.

13. I would therefore allow this writ petition in part by quashment of the penalty imposed by the third respondent which has been confirmed by the second and first respondents in the appeals preferred, without interfering with the finding on the delinquency of being test positive in a post flight breath analyser test for the first occasion inasmuch as the same in no circumstances can said to be repeat violation and remit back the matter to the first respondent to revisit the penalty imposed keeping in mind the CAR guidelines supra as it then was, within a period two weeks of receipt of a copy of this order.

14. With the aforesaid the writ petition stands disposed of. No costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To

1. The Government of India,
Rep. by its Secretary,
Ministry of Civil Aviation,
B Block, Rajiv Gandhi Bhavan,
Safdarjung Airport, Aurobindo Marg,
New Delhi.
 2. The Director General of Civil Aviation,
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Rep. by its Chief People Officer,
Siroya Centre, Sahar Airport, Andheri (East),
Mumbai - 400 009
- +1cc to Mr.T.L.Thirumalaisamy, Advocate, S.R.No.57786
- +1cc to Mr.K.Krishnamoorthy, Advocate, S.R.No.57766

NA (CO)
GSP (03/09/2018)

WP.7128 of 2018

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