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

Date of Decision: 15.5.2018.

+ W.P.(C) 3476/2018 & CM APP No.13705/2018

RITESH V. MATHANKAR Petitioner
Through : Mr. Kunal Sabharwal, Adv.

versus

UNION OF INDIA & ORS Respondents
Through : Ms. Anjana Gosain, Ms. Rabiya
Singh Thakur and Ms. Shalini Nair,
Advs. for R-1 to 4.
Ms. Suruchi Suri, Adv. for R-5.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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RAJIV SHAKDHER, J. (ORAL)

1. This writ petition is directed against the order dated 15.3.2018, passed by the Ministry of Civil Aviation, Government of India. This order came to be passed in an appeal preferred by the petitioner to the Secretary, Civil Aviation under Rule 3B of the Aircraft Rules, 1937.

1.1 The petitioner had filed an appeal against the order dated 23.6.2017, passed by the Directorate General of Civil Aviation (DGCA), whereby, his appeal against the order dated 10.8.2016, passed by the Joint Director General, was dismissed.

1.2 Thus, the order-in-original is the order dated 10.8.2016, passed by the Joint Director General, Civil Aviation. By virtue of this order, the Joint Director General, Civil Aviation proceeded to suspend the privileges of the

pilot licence, conferred on the petitioner, for a period of four years, commencing from the date on which he failed the breath analyser test.

2. The petitioner is aggrieved as, according to him, the punishment accorded to him is beyond the period prescribed in the Civil Aviation Requirements (in short 'CAR').

3. It is the petitioner's case that the respondents have combined the punishments of the "pre-flight" offence with the "post-flight" offence and accorded a punishment for a term which is beyond that which is provided under the relevant provisions of CAR.

3.1 Furthermore, the petitioner, in support of his case, submits that insofar as the pre-flight offence is concerned, he had already suffered a suspension and, that too, for a period of three (3) months. Likewise, insofar as the post-flight offence was concerned, according to counsel for the petitioner, under paragraph 9.2 of CAR, the maximum period for which suspension could have been ordered was a period of one (1) year for the first offence.

4. Pertinently, there is no dispute raised by counsel for the respondents that insofar as the post-flight offence is concerned, it is a singular offence, which was committed by him on 10.8.2016 at Calicut.

4.1 As regards the pre-flight offence, according to the respondents, this offence was committed by the petitioner on 14.6.2015 at Chennai.

4.2 It is also not disputed by the respondents that the petitioner has already served a suspension of three (3) months for the pre-flight offence.

4.3 With regard to these aspects, the facts are recorded in detail in the impugned order itself and therefore, for the sake of convenience, the relevant part of the said order is extracted hereafter :

"...Capt. Ritesh Vijay Mathankar was tested BA positive on

14.06.2015 in pre-flight BA examination at Chennai while scheduled to operate flight AI-905. His BA readings were 0.015 and 0.012 respectively. The Joint DG vide order dated 27.07.2015 suspended the privileges of pilot licence of the appellant for a period of 03 years as being second time BA positive case since earlier on 22.07.2012 he was tested BA positive in Pre-flight BA examination at Delhi for which he was kept off from flying duties for 03 months by M/s Air India. The aforesaid order dated 27.07.2015 passed by Joint Director General of Civil Aviation was challenged by the appellant before DG(CA) citing the procedural lapses in his 22.07.2012 BA case. His appeal was accepted and he was given benefit of doubt in his 22.07.2012 BA case and accordingly his 14.06.2015 BA case was considered as first time BA positive. Since he had already served 03 months suspension in 22.07.2012 BA case, he was cleared for resuming his normal flying duties.

3. Capt. Ritesh Mathankar was again tested BA positive on 10.08.2016 in post flight BA examination at Calicut after operating flight No. AI-998 (SHJ-CCI). His BA readings were 0.025 and 0.020 respectively. Since his failure in post flight BA test on 10.08.2016 was a repeat violation. Joint Director General of Civil Aviation vide order no. AP-/Post Flight Med/2016-AS dated 10.08.2016 suspended the privileges of pilot licence of the appellant for a period of three years under the proviso of Para 8.2 of CAR Section 5 Series F Part-III, Issue-III and additional 01 year under the proviso of Para 9.2 of the aforesaid CAR for being tested positive for alcohol consumption in a post-flight breath-analyzer examination. He has been suspended for a total period of four years.

4. Capt. Ritesh Mathankar made an appeal to DG(CA) against the order dated 10.08.2016 passed by JDG. He was accorded personal hearing by DG on 02.06.2017 and his appeal was dismissed vide DGCA order no. AP-I/PFMC/5/2017-AS dated 23.06.2017. Capt. Ritesh V. Mathankar again filed an appeal under Rule 3B of the Aircraft Rules, 1937 challenging the order dated 23.06.2017 passed by DG(CA). ... ”

5. In fact, on the previous date, i.e., 10.4.2018, I had sketched out the

contours of the dispute obtaining between the parties so as to zero down on the controversy which I am called upon to adjudicate in these proceedings. For the sake of convenience, the order dated 10.4.2018 is extracted hereunder:-

1. *Learned counsel for the petitioner says that the petitioner, pursuant to the impugned order has not been paid salary from January 2017. Learned counsel says that this is besides non-payment of flying allowances which is the logical consequence of the impugned order passed by the respondents herein.*

2. *The case of the petitioner, briefly, is that in passing of the impugned order, the punishment for pre-flight violation of Civil Aviation Regulation (sic. Requirements) (in short 'CAR'), and that for post-flight violation, as stipulated in CAR, have been wrongly combined.*

2.1 *It is the submission of learned counsel for the petitioner that the procedure for carrying out Breath Analyzer Test has also not been adhered to. According to the learned counsel for the petitioner, between the two tests, the Control Test had to be conducted which was not done. It is submitted on behalf of the petitioner that the Control Test was carried out after second Breath Analyzer Test was carried out.*

3. *My attention has been drawn to the order dated 15.3.2018, passed by respondent no.1/Union of India. Learned counsel submits that though the submissions made above on behalf of the petitioner have been recorded in paragraph 5, no finding qua the same has been returned therein.*

4. *To be noted, the first time the petitioner failed the Breath Analyzer Test was during the pre-flight test taken at Chennai, on 14.6.2015. I am also informed that the petitioner suffered three months suspension on account of the same.*

4.1 *Second time around, the petitioner failed the post-flight*

Breath Analyzer Test, which was carried out, on 10.8.2016, at Calicut Airport. The record shows that an FIR was filed with respect to the second incident. This FIR is dated 26.8.2016. The police, however, after investigation, has, evidently, filed a closure report. This closure report is dated 6.4.2017. The concerned court, thereafter, closed the complaint on 28.6.2017. Pertinently, while an opportunity was given by the concerned court to file a protest petition, I am informed that no protest petition has been filed.

5. *Issue notice. Ms. Suruchi Suri accepts notice on behalf of respondent no.5, while Ms. Anjana Gosain accepts notice on behalf of respondent no.1 to 4. Counter affidavit will be filed within three weeks from today. Rejoinder thereto, if any, be filed within three days of counter affidavit(s) being received from counsel for the respondents.*

6. *In the meanwhile, list the matter for directions to enable the counsel for respondent no.5 to obtain instructions as to why no part of the salary is being paid to the petitioner, since January 2017.*

7. *Renotify the matter on 15.5.2018.*

6. As would be evident from the extract of the order dated 10.04.2018, even though opportunity was given to the respondents to file a counter affidavit in the matter, no counter affidavit has been filed. However, Ms. Gosain says that a counter affidavit will be filed by tomorrow. The petitioner, on the other hand, says that she is without the pay and allowances, since, January 2017.

6.1 Having considered the totality of circumstances, no further opportunity can be given to respondent No. 1 to 4, to file a counter affidavit in the matter.

6.2 At this stage, counsel for respondent no.5 says, on instructions, that flying allowance was paid to the petitioner till April 2017, albeit, under a mistake. It is submitted by the counsel for respondent no.5 that salary was not paid to the petitioner as he had not been reporting for work.

6.3 On the other hand, counsel for the petitioner says that since the licence of the petitioner has been suspended, he is not able to enter the designated area, and hence, cannot report for work.

7. Be that as it may, the issue obtaining between the parties is required to be adjudicated upon based purely on the provisions of CAR, which would be applicable in the present case.

7.1 The relevant Paragraphs of CAR which need to be noticed are: 8.1¹, 8.2², 9.1³, 9.2⁴ and 9.5⁵.

7.2 A careful perusal of the Paragraph 8.1 of CAR would show that in cases where the crew members are subjected to a pre-flight breath analyser examination, qua which they test positive, they are to be kept off flying duty and their licence/approval is to be suspended for a period of three (3)

¹ "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"

² "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."

³ "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."

⁴ "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."

⁵ "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."

months. Furthermore, paragraph 8.2 provides that if there is a repeat infraction by the crew member, inasmuch as he or she fails the pre-flight breath analyser test, then, the person concerned, can have his licence/approval suspended for a period of three (3) years.

7.3 Insofar as post-flight medical examination is concerned, the applicable provision is Paragraph 9. Paragraph 9, *inter alia*, mandates that where any crew member, who, tests positive for alcohol consumption in a post-flight breath analyzer test, an inquiry will be conducted in the manner provided therein and the involved crew member would be required to surrender his or her licence forthwith. In addition thereto, Paragraph 9.2 provides that apart from the delinquent crew member being asked to surrender the licence as provided for in Paragraph 9.1 of CAR, the licence/authorization/approval of the concerned crew member would be suspended for a period of one (1) year.

7.4 I may also indicate that Paragraph 9.5 of CAR, which, once again, relates to the failure by a crew member in clearing the post-flight breath analyser test, provides that in case there is a repeat violation, the licence/approval of the concerned crew member shall be cancelled.

8. In this particular case, what emerges from the record, as elucidated above, is that there was one pre-flight infraction and, one, post-flight infraction. Insofar as the pre-flight infraction is concerned, the petitioner has already suffered suspension of privileges of a pilot conferred on him, for a period of three (3) months. As regards the post-flight infraction, even though the petitioner's licence could have been suspended only for a period of one year, he has had his licence suspended, now, for twenty one (21) months.

8.1 Clearly, this is twice the period of suspension that could have been ordered qua the petitioner by way of punishment.

9. Given these circumstances, I am of the view that suspension of the petitioner would have to be lifted. It is ordered accordingly.

10. I must record the concern of Ms. Anjana Gosain that these are serious infractions and therefore, stringent action ought to be taken in the matters such as these.

10.1 While I share Ms. Gosain's concern, in my view, the best way forward to deal with such situations would be to amend CAR. CAR, as is framed, presently, does not give leeway to the respondents to extend the period of suspension, at least, not for a singular post-flight infraction beyond one (1) year.

11. Accordingly, the petitioner is directed to report to the respondents within 15 days from the date of receipt of a copy of this order. The respondents will take necessary action in accordance with the order passed today, and will also, grant the petitioner the requisite pay and allowances which may be due to him in accordance with the extant service regulations.

12. In view of the order that I have passed today, Ms. Anjana Gosain says that the captioned writ petition be closed. It is ordered accordingly. Consequently pending application shall also stand disposed of.

13. Dasti.

RAJIV SHAKDHER, J

MAY 15, 2018

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