

\$~49

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

+ **W.P.(C) 7503/2018 & CM Nos. 28652-28653/2018**

CAPT S K KAPUR

..... Petitioner

Through: Ms Sanya Kapur, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Amit Mahajan, CGSC with Mr R.
M. Tripathi, Govt. Pleader for UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

23.07.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 24.04.2017 passed by Joint Deputy Director, Director General of Civil Aviation (respondent no. 3). The petitioner had preferred an appeal against the impugned order, which was disposed of by an order dated 26.10.2017 passed by Directorate General of Civil Aviation (DGCA). The said orders are, hereafter, referred to as the impugned orders.

2. By the impugned order dated 24.04.2017, the petitioner's pilot license was suspended for a period of three years in terms of Paragraph 8.2 of the Civil Aviation Requirement issued on 04.08.2015 (hereafter 'CAR-2015'). The petitioner had tested positive for alcohol in a Pre-flight Breath Analyzer Test (hereafter 'BA Test') conducted on 07.04.2017 at the Delhi Airport.

Prior to this action, the petitioner had also tested positive for alcohol on 13.03.2010 while scheduled to operate Flight No. S2-231 from Delhi to Bangalore.

3. In this view, the respondent no. 3 proceeded on the basis that the petitioner had repeated the violation and, therefore, his license was required to be suspended for a period of three years. The petitioner claims that his testing positive in the BA Test conducted on 07.04.2017 at Delhi cannot be considered as the repeat violation in terms of Paragraph 8.2 of CAR-2015. The petitioner contends that his first violation (testing positive for alcohol pursuant to BA Test) was prior to the issuance of the CAR-2015 and, therefore, cannot be taken into account.

4. The principal controversy to be addressed in the present petition is whether the petitioner failing the BA Test on 07.04.2017 can be considered as repeat violation so as to invite the punitive measure of suspension of his pilot license for a period of three years in terms of Paragraph 8.2 of the CAR-2015.

5. Briefly stated, the relevant facts necessary to address the aforesaid controversy are that the petitioner was scheduled to operate a flight - Flight No. S2-4721 (Del to Gau) on 07.04.2017. During the Pre-flight Medical Examination conducted on 07.04.2017, he tested positive for alcohol with a reading of 0.023% during the first BA Test and 0.016% in the second BA Test. He was, accordingly, sent back from the Airport. The petitioner had tested for alcohol in a pre-flight analyser test conducted on an earlier occasion as well. The BA Test conducted of the petitioner on 13.03.2010 as

a part of the routine pre-flight medical examination had shown positive results – 0.014% and 0.010% respectively.

6. The Joint Deputy Director, Directorate of Civil Aviation (Respondent No.3) passed an order holding that the petitioner had violated provisions of Paragraph 8.2 of the CAR-2015. By the said impugned order, the petitioner's pilot license (ATPL No. 1542) was suspended for a period of three years with effect from 07.04.2017, the date of his testing positive for alcohol.

7. The petitioner filed an appeal before respondent no.2 (Director General of Civil Aviation) against the impugned order dated 24.04.2017, which was rejected by the impugned order dated 26.10.2017.

8. The petitioner's explanation for testing positive for alcohol was that he was unwell on 06.04.2018 and was prescribed a medicine named "ALOE SOCOTRINE 200CH". He claimed that he had taken the aforesaid medicine prior to reaching the Airport and as the said medicine contained alcohol, he had tested positive for the same. The petitioner also claimed that he had used the perfume – 19V69 by Versace – which also contained 95% alcohol and the result of the BA Test could be attributed to the high level of alcohol in the perfume used by the petitioner on the date in question.

9. Ms Kapur, learned counsel appearing for the petitioner contended that the petitioner testing positive pursuant to BA Test on 07.04.2017, could not be considered as a repeat violation because the CAR-2015 was not in existence as on 13.03.2010 when the petitioner was tested positive for the first time. She further submitted that the violation of 13.03.2010 was also

not endorsed on the petitioner's license as a violation and, therefore, could not be considered as the first violation. She handed over the decision of DGCA dated 09.04.2013 relating to a case of one Ms N. Lhouvum, who was a part of the crew of Air India. She had tested positive for alcohol on 08.07.2012 prior to operating the Air India Flight (AI-358) at Chennai. She also had tested positive for alcohol pursuant to a pre-flight examination conducted on 27.04.2007. Ms N. Lhouvum was suspended for a period of five years as the same was considered the second violation. Air India Ltd. had preferred an appeal (HSC/13-125/28) before DGCA (respondent no.2) contending that her first violation was prior to 13.11.2009 (the date on which the first CAR on the subject violation was issued). The said appeal was accepted by DGCA by an order dated 09.04.2013.

10. Ms Kapur also contended that CAR-2015 could not be given a retrospective effect.

Discussions and Conclusion

11. At the outset, it is relevant to note that the first CAR expressly providing for a punitive measure for alcohol consumption prior to flight, was issued by DGCA on 13.11.2009 (hereafter 'CAR-2009'). CAR-2009 was further revised on 30.11.2010 and 18.06.2012. It was subsequently replaced by the CAR-2015. Thus, undisputedly, operating a flight after consumption of alcohol was expressly declared as a violation inviting punitive measures. Paragraph 7 of the CAR-2009, which provides for action to be taken in case of any crew testing positive is set out below:-

“7. ACTION ON POSITIVE TEST

Any crew member that tests positive or refusing to undergo the pre-flight Medical Examination/Breath Analyzer Test shall be kept off flying duty for at least 4 weeks and the company shall initiate disciplinary proceedings. Any crewmember attempting to evade the test procedure by leaving the airport premises before undergoing the complete test procedure will be considered to have a positive test result. An Instructor/Examiner/Check crew detected positive during the pre-flight medical examination will loose such ratings for at least 2 years.

Cases of Alcohol abuse should be treated as a medical disability, rather than an isolated disciplinary problem. Alcohol Abuse is defined as a pattern of drinking that result in one or more of the following situations within a 12-month period: failure to fulfil major work, school, or home responsibilities, drinking in situations that are physically dangerous. Research has shown that compassionate and empathetic counseling is more effective in recovery from alcohol abuse. In most cases, relapse rates are high & therefore the need for constant & regular checks to ensure compliance with instructions for quick & effective recovery. All alcohol abuse cases therefore, need to be followed up by the AMA / Medical Services Department of the concerned airline and in consonance with the Operations Department to ensure rehabilitation of the aircrew in a safe flying environment. Suggested action plan for such cases is presented in Appendix-III

Action taken shall be reported to Air Safety Directorate. However DGCA, if considers necessary

may alter the recommended action after a detailed examination of matter.”

12. The aforesaid CAR-2009 was revised on 30.11.2010 and the punitive measure for testing positive for consumption alcohol was specified in Paragraph 6 of the CAR-2009 as revised. CAR-2009 was further revised on 18.06.2012. Paragraph 7 of the CAR-2009 as revised in 2012 is relevant and reads as under:-

7. ACTION ON POSITIVE TEST

- 7.1 Any crew member that tests positive for the first time or refuses to undergo the PFMC/operates the aircraft without undergoing breath analyser test/attempt to evade the test procedure by leaving the airport premises shall be considered as BA positive. Such crew members shall be kept off flying duty and their license/approval suspended for a period of 3 months. In case the crew member is detected positive during PFMC for the second time, the license/approval shall be suspended for 5 years. For the purpose of this requirement, any crew member who has failed in PFMC before 13th November 2009 shall be considered as BA positive for the first time. In case the crew member fails in PFMC again after 13th November 2009, it shall be considered BA positive second time.
- 7.2 An Instructor/Examiner/Check crew/Cabin Crew In-charge detected positive during the pre-flight medical examination will lose Such ratings/authorisation for at least 3 years in addition to the action as mentioned above.

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

13. It is apparent that the CAR-2009 as revised expressly provided that the member who had failed the Pre-flight Medical Check (PFMC) again after 13.11.2009 would be considered as BA Test positive for the second time.

14. CAR-2009 was replaced by CAR-2015. Paragraph 8.1 and 8.2 of the said CAR-2015 are relevant and set out below:-

“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.”

15. It is clear from the above that the testing positive for alcohol after

13.11.2009 was considered as a violation inviting punitive measures. There is no dispute that the petitioner had tested positive for alcohol pursuant to a BA Test conducted on 13.03.2010. In this view, it is not possible to accept that merely because a fresh CAR was introduced, the earlier violations have to be ignored.

16. The case of Ms N. Lhouvum (*supra*) is of little assistance to the petitioner. This Court has reservations as to the merits of the said decision. But that apart, in that case Ms Lhouvum had tested positive, when there was no CAR on the subject. Thus, DGCA accepted the submission that in absence of any CAR on the subject, it could not have been violated. In the present case, CAR-2009 was in force when the petitioner had failed the BA Test for the first time.

17. The petitioner's contention that by treating the petitioner's violation on 07.04.2017 as a 'repeat violation' amounts to implementing the CAR-2015 retrospectively, is unmerited. In *The Queen v. The Inhabitants of St. Mary, Whitechapel (1848) 12 QB 120*, the Court pointed out that "*The Statute which in its direct operation of prospective cannot be properly be called a retrospective statute because a part of the requisites for that action is drawn from the time antecedent to its passing*". Thus, the fact that the petitioner is penalised under Paragraph 8.2 of the CAR-2015, which also takes into account the incident of 13.03.2010, would not by any stretch mean a retrospective application of the said Regulations.

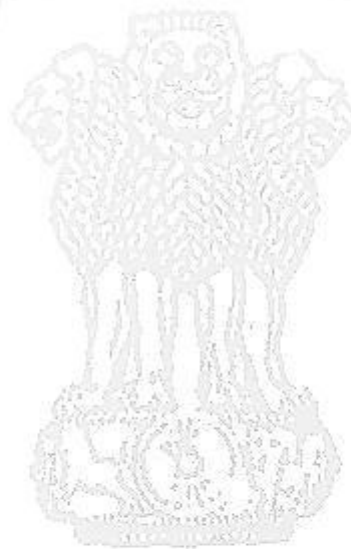
18. The petitioner's contention that the petitioner had not consumed any alcohol also cannot be accepted. The contention that the petitioner had used

the strong alcohol based perfume that would have distorted the BA Test result is also unmerited and was rightly not pressed by the Ms Kapur.

19. In view of the above, the petition is unmerited and is, accordingly, dismissed. The pending application also stands disposed of.

JULY 23, 2018
RK

VIBHU BAKHRU, J



न्यायमेव जयते