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

+ LPA 439/2018, CM Nos. 32088-32091/2018

CAPT S K KAPUR

..... Appellant

Through: Ms. Sanya Kapur and Mr. Sagar
Aggarwal, Advs.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Amit Mahajan, CGSC with
Mr. Dhruv Pande, Adv.

CORAM:

HON'BLE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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20.08.2018

CM Nos. 32089-32091/2018 (for exemption)

Exemption allowed, subject to all just exceptions.

Applications stand disposed of.

LPA 439/2018

1. The present appeal has been filed by the appellant challenging the order dated July 23, 2018 passed in W.P. (C) No. 7503/2018 and CM 28652-28653/2018 whereby the learned Single Judge has dismissed the writ petition filed by the appellant herein.

2. The challenge in the writ petition was to an order dated April 24, 2017 passed by the Joint Deputy Director, Director General of Civil Aviation and to the order dated October 26, 2017 passed by the Director General of Civil

Aviation. Vide order dated April 24, 2017, the appellant's pilot license was suspended for a period of a three years in terms of paragraph 8.2 of the Civil Aviation Requirement issued on August 04, 2015 (CAR-2015). The appellant was tested positive for alcohol in a Pre-flight Breath Analyzer Test (BA Test) conducted on April 07, 2017 at the Delhi Airport. Prior to this action, the appellant was also tested positive for alcohol on March 13, 2010 while scheduled to operate Flight No.S2-231 from Delhi to Bangalore.

3. The respondent No.3 i.e. the Joint Deputy Director has proceeded on the basis that the appellant had repeated the violation and, therefore, his license was required to be suspended for a period of three years. The appellant claimed that his testing positive in the BA Test conducted on April 07, 2017 at Delhi cannot be considered as the repeat violation in terms of paragraph 8.2 of the CAR-2015. In other words, the case of the appellant was that his first violation was prior to the issuance of the CAR-2015 and therefore, cannot be taken into account. The issue before learned Single Judge was whether the appellant failing the BA Test on April 07, 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.

4. The learned Single Judge by relying upon paragraphs 8.1 and 8.2 of the CAR-2015 has concluded that testing positive for alcohol after November 13, 2009 was considered as violation inviting the punitive measure. Paragraphs 8.1 and 8.2 read as under:

“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.”*

5. In this respect, the learned Single Judge has in para 12 of the impugned order stated that the CAR-2009 was revised on November 30, 2010 and the punitive measure for testing positive for consumption alcohol was specified in paragraph 6 of the CAR-2009 as revised. Learned Single Judge also referred to the fact that CAR-2009 was further revised on June 18, 2012 and paragraph 7 of CAR-2009 as revised in 2012 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 PPMC/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."

6. The learned counsel for the appellant has primarily made three submissions; (i) that the BA Test conducted on April 07, 2017 at Delhi cannot be considered as a repeat violation; (ii) that in the case of Ms. N. Lhouvum, who was tested positive for alcohol initially on April 27, 2007 and later on July 08, 2012 was suspended for a period of five years as the same was considered as a second violation. In the appeal preferred before the DGCA, she contended that her first violation was prior to November 13,

2009 the date on which first CAR on the said violation was issued. The appeal was accepted by the DGCA on April 09, 2013. The appellant has sought parity; (iii) that there are three other cases of Capt. Anik Chowbey, Capt. Amit Kumar Yadav and Ms. Jyoti Jangda, in which cases the pilots being similarly placed like the appellant were suspended for only three months.

7. Insofar as the first submission is concerned, the learned Single Judge has considered the said plea in the following manner:

“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.”

8. The aforesaid conclusion of the learned Single Judge is justified. On the date of second violation, i.e. April 07, 2017, there exist in the CAR, a provision which stipulates in the eventuality of repeated violation the pilot license shall be suspended for three years. Further, paragraph 7.1 of CAR-2009 as revised in 2012 states as under:-

“XXXXXX

XXXXXX

XXXXXX

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.”

9. Insofar as the second submission is concerned, the same has been dealt with by the learned Single Judge in para 16 which is reproduced as under:

“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.”

10. The aforesaid conclusion of the learned Single Judge is also justified. He has rightly expressed reservation on the merit of the decision as the said decision is contrary to the provision of CAR-2015 inasmuch in her case, she tested positive for the first time on April 27, 2007 and second time on July 08, 2012 when CAR-2009 as revised on June 18, 2012 was in place and paragraph 7.1 of the same which is already reproduced above stipulates suspension of license in case the crew member fails in the test after November 13, 2009 again. No benefit can be claimed by the appellant by

referring to the case of Ms. N. Lhouvum. Insofar as the third submission is concerned, no such plea was taken by the appellant before the learned Single Judge or in this appeal. We do not see any infirmity in the impugned order of the learned Single Judge and dismiss the appeal but by stating liberty shall be with the appellant to approach the Director General of Civil Aviation by way of a representation and by referring to the three cases as referred to by him through her counsel during the course of the arguments for reconsideration of his case on the ground of parity.

11. If such a representation is made within two weeks from today, the same shall be considered by the DGCA within four weeks and an order shall be passed. If the appellant is still aggrieved by the order to be passed by the DGCA, the appellant can avail statutory appeal if any available under the Rules.

CM No. 32088/2018

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

AUGUST 20, 2018/aky