

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

% *Judgment Reserved on: March 28, 2019*
Judgment Delivered on: 1st July, 2019

+ **BAIL APPLN. 2935/2018**

CAPTAIN ARVIND KATHPALIA Petitioner
Represented by: Mr.Ramesh Gupta, Sr.Advocate with
Mr.Rajiv Mohan, Mr.Abhimanyu
Kampani and Mr.Tejasv Mehra,
Advocates

versus

STATE Respondent
Represented by: Ms.Rajni Gupta, APP for the State
with Insp.Prashant Yadav, PS IGI
Airport
Mr.Adit S.Pujari and Ms.Surabhi
Dhar, Advocates for the
complainant/intervener

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By this petition, the petitioner seeks anticipatory bail in case FIR No.475/2018 under Sections 201/204/465/466/471/506/202/217/279/280/120-B IPC and Section 11 of the Aircraft Act registered at PS IGI Airport.
2. The abovenoted FIR was registered on 24th August, 2018 pursuant to the directions of the learned ACMM, Patiala House Courts under Section 156(3) Cr.P.C. on a complaint filed by the Indian Commercial Pilots Association. The allegations in nutshell against the petitioner are that on

19th January, 2017, the petitioner deliberately avoided the Breath Analyzer Test while piloting Flight Air India-174 from New Delhi to Bengaluru and return flight AI-173. By the time the doctor on duty informed the flight dispatcher that the petitioner had not reported for pre-flight medical examination, the flight had already departed to Bengaluru and the flight dispatcher informed the petitioner to get done the Breath Analyzer Test after his landing at Bengaluru, however the petitioner still did not undertake the Breath Analyzer Test. Further on arrival back to New Delhi, the petitioner went to the pre-flight medical room and made a false entry in the register for flight AI-174 which was thus not counter signed by the doctor on duty. The register being a statutory record required to be maintained by the Airport Service Provider i.e. Air India Ltd., interpolation therein amounts to the offence of forgery.

3. Learned counsel for the petitioner contends that the petitioner had to attend a meeting of the DGCA and as the petitioner was getting late for the flight, he could not get the Pre-Flight Breath Analyzer Test done. Learned counsel further states that non-conducting of the Pre-Flight Breath Analyzer Test by the petitioner will not lead to the presumption/conclusion that the petitioner was drunk and thus not competent to pilot the aircraft. No criminal offences are made out and the FIR in question is a handi work of persons who are jealous about the petitioner's promotions which he has earned because of his hard work. The petitioner has been falsely implicated. He be granted anticipatory bail as he has joined the investigation as and when directed and is ready and willing to join the same as and when further directed.

4. Learned APP for the State reiterating the allegations leveled against the petitioner submits that the offences committed by the petitioner are serious offences as he risked the lives of number of passengers, hence no anticipatory bail be granted.

5. Learned counsel for the complainant contends that despite the complainant having pointed out the offences committed by the petitioner, no action was being taken compelling the petitioner to file a Civil Writ petition before this Court and also a criminal complaint before the learned ACMM on which directions were issued under Section 156(3) Cr.P.C. to register FIR. Learned counsel for the complainant submits that the petitioner has committed multiple criminal infractions which include:-

“(1) Missing a mandatory pre-flight Breath Analyzer Test before operating a flight AI 174 from New Delhi to Bengaluru in Violation of Section 5, Series F, part 111, Issue III of the Civil Aviation Requirements (“CAR”) on Air Safety which has been issued under Rule 24 of the Aircraft Rules, 1937 (“Aircraft Rules”) which is punishable under Section 11 of the Aircraft Act.

(2) Refusing to take the mandatory post flight Breath Analyzer Test at Bengaluru Airport, despite being informed by the Flight Dispatched to do so.

(3) Returning to New Delhi from Bangalore, and instead of taking the post flight breath analyzer test, going to the pre-flight medical room at the New Delhi Airport and making interpolations and false entries in the statutory register maintained to keep a track of the members of the crew who have taken a breath analyzer test, and thereby tampered the register that would have been evidence of his refusal to take the pre-flight Breath Analyzer Test with respect to Flight AI 174.

(4) Threatening and intimidating witnesses to retract and change their statements made before a disciplinary authority;

(5) Deliberate Interpolations and tampering in statutory records made by the Petitioner (specifically in the statutory register that is required to be maintained as per the Rules framed under the Aircraft Act 1937) with a view to destroying evidence and forging the same with an intent to show that the Petitioner had in fact taken a pre-flight Breath Analyzer Test prior to operating AI 174.”

6. It is the case of the complainant that the Breath Analyzer Test is mandatory as per Section 5, Series F, Part II of the Civil Aviation Requirements. The grievance of the complainant was that despite the complainant bringing to notice the allegation against the petitioner to the Joint Secretary, Director General, Civil Aviation, these allegations, no action was taken against the petitioner. Further the petitioner's Air Transport License was also suspended for a period of three months as penalty under the Civil Aviation Rules vide order dated 15th February, 2017 but no cognizance on the offence committed by the petitioner regarding manipulation of the record was taken.

7. Relying upon the decision of the Supreme Court in (2011) 1 SCC 694 Siddharam Satlingappa Mhetre Vs. State of Maharashtra & Ors. learned counsel for the complainant submits that the antecedents of the petitioner are not clean because earlier also he was found indulging in such activities, the nature and gravity of the accusation is very serious for the reason the petitioner risked lives of number of persons and there is every likelihood that the petitioner may flee from the justice or repeat similar offences.

Petitioner is also influencing the witnesses and hence no anticipatory bail be granted.

8. Considering the rival contentions of the parties, this Court had called for an additional status report from the State after noting down the schedule time of the flights and whether the petitioner as he claims that he had to attend a meeting at DGCA and came at the last minute is justified or not. As per the additional status report filed the duty chart of the flight was prepared on 18th January, 2017 and it was communicated to the petitioner on the same day through telephone. On 19th January, 2017 the petitioner attended a meeting at DGCA which was scheduled for 15:00 hours. Though the minutes of the meeting are noted wherein the presence of the petitioner is also noted however the starting and finishing time of the meeting is not noted. Office of the DGCA and that of the petitioner are situated across the road and thus minimal travel time is required.

9. Statement of the driver of the cab who brought the petitioner to the airport has been recorded who stated that he picked up the petitioner at around 16:10/16:15 hours and dropped him at the designated place near the airport at 16:40 hours. As per the roster, the petitioner was required to report at 16:30 hours and was to get his pre-flight medical examination done which he did not do. As per the check list available, the petitioner reported at 16:40 PM. The petitioner reached the flight dispatcher's office at 16:40/16:45 hours and remained there for 10-15 minutes and thereafter left the dispatch room at 17:05/17:10 hours and proceeded to the aircraft which normally takes 10 to 15 minutes. As the flight was delayed by 20 minutes due to a lift related issue and security measures, the flight departed at 17:45 hours.

10. A civil writ petition was filed by the complainant before this Court wherein to come to a conclusion the learned Single Judge noted the introductory paragraphs of Civil Aviation Requirement in Short CAR which are also relevant for this matter.

““1. INTRODUCTION

1.1 It is a well-known fact that even when the blood alcohol levels are zero in the body, there could be some effect of hangover, which is mainly due to congeners. These congeners may take 15 to 18 hours to get dissipated and may produce ill effects for up to 36 hours depending upon the amount of alcohol consumed. Even 12 hours after a bout of drink, when blood alcohol level remains zero, there is decrement in task performance. Alcohol present in body even in small quantities jeopardises flight safety on several counts and is likely to adversely affect an aviator well into the hangover period.

1.2 Alcohol also interferes with the enzymatic cellular process or oxidation, causes hypoxia and reduces individual's tolerance with increase in altitude. It is known that a low alcohol blood level between 30 mg% to 50 mg% disturbs the sensor-motor, visual and cortical reaction. Consumption of alcohol results in significant deterioration of psychomotor performance and decreases the amount of mental capacity available to deal with many essential tasks involved in the conduct of safe flight. Should an emergency occur in-flight, the crew member under the influence of alcohol is not capable of dealing with the problem.

1.3 Two ounces of whiskey raises the alcohol level to 50 mg. The amount of alcohol in a can of beer is approx. the same as in a single mixed drink. Wine, champagne, ale and other alcoholic beverages have same effects as liquor, though the concentration of alcohol varies from one beverage to the other.

1.4 Therefore, in the present state of our knowledge, the level of blood alcohol compatible with safe flying is 'Zero', which is also recommended by ICAO. It is equally important to intensify the educational programme for crew members regarding the inherent dangers of flying after consumption of alcohol.

1.5 This Civil Aviation Requirement lays down the procedure to be followed for the breath-analyzer examination of the crew members for consumption of alcohol and actions to be taken by the operators. It also dwells on the procedure to be followed by the authorities concerned in the event of an accident.

1.6 This CAR is issued under the provisions of Rule 24 read with Rule 133A of the Aircraft Rules, 1937 for information, guidance and compliance by all concerned.

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11. The learned Single Judge held that the rationale beside implementing CAR is that even when the blood alcohol limits are zero in the body, there could be some effect of hang-over due to congeners, which may take 15 to 18 hours to get dissipated and may produce ill effects for up to 36 hours depending upon the amount of alcohol consumed. Even 12 hours after a bout of drink, when blood alcohol level remains zero, there is decrement in task performance. Alcohol present in body even in small quantities jeopardizes flight safety on several counts and is likely to adversely affect an aviator well into the hang-over period.

12. Rule 24 and 133A of the Aircraft Rules 1937 where-under CAR has been issued read as under:

“81. CAR has been issued under Rule 24 read with Rule 133 A of the Aircraft Rules 1937 (hereinafter referred to as the Rules). Rule 24 stipulates as under:

24. Prohibition on consumption of intoxicating and psychoactive substances – (1) 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 whatsoever in his breath, urine or 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 or be in aircraft or report for duty.

(underlining supplied)

82. Regulation 2 of CAR defines Pre-flight Breath-analyzer Examination as “Examination conducted on crew member before departure of a flight to measures alcohol in his/her exhaled air so as to determine the concentration of alcohol in the blood.”

83. Regulation 2 of CAR defines Post-flight Breath-analyzer Examination as “Examination conducted on crew member after arrival of a flight to measures alcohol in his/her exhaled air so as to determine the concentration of alcohol in the blood.”

13. The Safety Regulations stipulated by CAR are as under:

“4. SAFETY REGULATIONS

4.1 As per the provision of Rule 24 of the Aircraft Rules, ‘no person acting as, or carried in aircraft for the purpose of acting as pilot, commander, navigator, engineer, cabin crew or the other operating member of the crew thereof, shall have taken or used any alcoholic drink, sedative, narcotic, or stimulant drug preparation within 12 hours of the commencement of the flight or taken or use any such preparation in the course of the flight, and no such person shall, while so acting or carried, be in state of intoxication or have detectable blood alcohol whatsoever in his breath, urine or 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 or be in aircraft or report for duty.’

4.3 The operator/crew member/maintenance personnel shall ensure that there is no contravention of Rule 24 of the Aircraft

Rules, 1937 by conduct of breath-analyzer examination before operation of flights in India as well as outside India.

4.3.1 For all scheduled flights originating from India, each flight crew and cabin crew shall be subjected to pre-flight breath-analyzer examination.

4.3.4 In case of flying training institutes, instructors and student pilots undertaking solo flying shall undergo preflight breath-analyzer examination before first flight of the day.

4.3.5 In case of diversion of flights, due to unforeseen circumstances, to an airport where facility for pre-flight breath-analyzer examination is not available, the flight crew and cabin crew shall undergo post-flight breath analyzer examination at first landing.”

14. It is thus evident that no member of the crew can take any alcohol preparation so as to impair his capacity and in terms of Regulations the operator/ crew member/ maintenance personnel are obliged to ensure that there is no contravention of Rule 24 of the Rules by conduct of Breath Analyzer Examination before operation of flights in India as well as outside India.

15. Further Regulation 4.3.1. mandates that in all scheduled flights originating from India, each flight crew and cabin crew is to be subjected to Pre-Flight Breath Analyzer Examination and Regulation 4.3.5 mandates that in a case of diversion of flights, due to unforeseen circumstances, to an airport where facility of Pre-Flight Breath Analyzer is not available the flight and cabin crew shall undergo Post-Flight Breath Analyzer. Thus, the necessity and mandate of a Pre-Flight Breath Analyzer Examination cannot be minisculed.

16. The issue which needs consideration in the present petition is that though the importance of a Pre-Breath Analysis is mandatory, whether it can

be presumed that the person/ the pilot or the crew member who has not undertaken the Pre-Flight Breath Analyzer has consumed alcohol so as to impair his faculties. In the absence of such a presumption, the petitioner yet to face the trial and punishment provided under Section 11 of the Aircrafts Act being imprisonment for 2 years or fine of ₹10 lakhs, this Court deems it fit to grant anticipatory bail to the petitioner.

17. It is therefore directed that in the event of arrest the petitioner be released on bail on his furnishing a personal bond in the sum of ₹50,000/- with two sureties of the like amount subject to the satisfaction of the Arresting Officer/ SHO concerned, further subject to the condition that he will join the investigation as and when directed and will not leave the country without the prior permission of the Court concerned.

18. Petition is disposed of. Order dasti.

(MUKTA GUPTA)
JUDGE

JULY 01, 2019

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