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

Date of decision: 23rd March, 2020

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W.P.(C) 2946/2020

AIR TRAFFIC CONTROLLERS GUILD (INDIA) Petitioner

Through: Mr. Piyush Sanghi & Ms. Khushbu Sahu, Advocates (M-9899699242)

versus

UNION OF INDIA & ORS Respondents

Through: Ms. Anjana Gosain, Advocate for R-1&2 (M-9810100674)
Mr. Anuj Aggarwal, ASC for R-2&4 (M-9891363718)
Mr. Sonal Kr. Singh & Mr. Rajat Dasgupta, Advocates for R-3/AAI (M-9999513037)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM APPL. 10240/2020 (for exemption)

1. Allowed, subject to all just exceptions. Application is disposed of.

W.P.(C) 2946/2020 & CM APPLs. 10239/2020 (for stay)

2. The present petition has been filed seeking temporary suspension of the Breath Analyzer Test (*hereinafter*, “BAT”) in view of the recent COVID-19 outbreak.

3. The case of the Petitioner, which is the representative association of the Air Traffic Controllers (*hereinafter*, “ATCs”) working under the Airport Authority of India (*hereinafter*, “AAI”), is that on a random basis 10% of

the ATCs are subjected to the BAT which uses equipment that could result in the spread of the COVID-19 virus. It is thus submitted that the use of the current equipment for conducting the BAT is prejudicial to the interests of the ATCs, especially during the COVID-19 outbreak.

4. Reliance is placed on the recent order of the Kerala High Court wherein the High Court had stayed the use of Breath Analysers on 18th March, 2020. The said order was thereafter modified vide order dated 19th March, 2020 and only those ATCs suspected to be under the influence of alcohol were permitted to be subject to BAT. It is submitted on behalf of the Petitioner that there are various other alternative modes of administering the breath-analyser tests, which should be adopted in place of the current equipment.

5. On behalf of Respondents Nos.1 and 2, Ms. Gosain, ld. counsel, submits that the Directorate General of Civil Aviation (*hereinafter*, “DGCA”) is conscious of this position and has taken a decision to only subject 2% of the ATCs to BAT on a random basis after obtaining self-declarations from the ATCs. Ld. counsel submits that DGCA is open to considering other options which are perceived to be safer for the ATCs.

6. Ld. counsel for the AAI submits that the AAI has already written to the DGCA to suspend BAT.

7. After hearing counsels for the parties it is clear that the apprehension expressed by the Petitioner’s members is genuine in nature. While there is no doubt that breath analysing tests are essential to ensure that ATCs who come to perform their functions are not under the influence of alcohol, even if there is a remote chance in the use of BAT equipment resulting in further spread of COVID-19 virus, the same ought to be prevented. Several

representations have been made by the Petitioner, however the DGCA's position is that the BAT would be conducted in a random manner and instead of conducting it on 10% of the ATCs, the same would be reduced to 2%.

8. A perusal of the representations made by the Petitioner shows that the BAT is performed prior to each shift. The equipment used could become a source of further spread of the COVID-19 virus. There was a need for the authorities to, in an emergent manner decide on an alternate, less invasive and less risky equipment for conduct of breath analyser tests. However, from the submissions made today, clearly, no alternative method has been finalised at this point. After the Kerala High Court had expressed initial apprehensions, the authorities ought to have looked into the matter.

9. Presently, there is a medical emergency not only in India but across the world. Under such circumstances, to permit the same BAT equipment which could pose a risk to the ATCs, to continue to be used would be non-pragmatic and unwise. The same could also have a deleterious impact if any of the ATCs contract the COVID-19 virus after undergoing BAT. Considering that BAT equipment are stored in airports where the incidence of the virus is extremely high, use of the said equipment which would require ATCs to breathe into/out of the said equipment is likely to expose them to the COVID-19 virus.

10. It is also clear that the DGCA needs to take a decision on an urgent basis in this regard inasmuch as on the one hand BATs are necessary in order to ensure the safety of passengers, in an extra-ordinary situation as is currently prevalent due the outbreak of COVID-19 virus, the ATCs cannot be subjected to higher risk due to undergoing the BAT. The present petition

clearly raises issues of safety of ATCs. While there can be no doubt that the condition of ATCs at the time of coming into duty has to be screened, at the same time, they cannot be subjected to further risk due to undergoing BATs. Breath analysing tests is a well settled protocol which can be conducted with various other alternative mechanisms rather than the method using tubes currently used by the DGCA. Ms. Gosain submits that this is the only recognized mode currently available for the DGCA.

11. While this court is not the expert to be prescribing the kind of test that needs to be undertaken, the exploring of alternate methods of testing is imperative, especially in view of the grave apprehension expressed by the Petitioner. In fact, this Court takes judicial notice of the fact that even less invasive testing or other equipment such as use of Biometric equipment has been suspended by most organisations. The Airport Authority of India has in its letters dated 20th February 2020, 6th March 2020 and 18th March 2020 already called upon the DGCA to suspend the conduct of Breath-Analyser tests. The extracts of the said letters read as under:

“EXTRACT OF LETTER DATED 20TH FEBRUARY 2020 WRITTEN BY AAI TO DGCA”

Sub: Temporary suspension of Breath Analyzer Test in view of outbreak of Corona Virus.

Sir,

In compliance to the DGCA CAR dated 16th Sept 2019 on procedure for breath analyser examination of the staff involved in safety critical activities, BA Test has been implemented at all the licensed aerodromes of AAI.

In view of the outbreak of Corona Virus, the staff at airports is apprehensive about undergoing BA Test as

the virus spreads through air and human contact. NSCBI Airport, Kolkata and BPI Airport, Bhubaneswar have requested for temporary exemption from BA Test as a preventive measure to prevent spread of this contagious disease amongst airport staff.

In view of above, it is requested that the BA test may be suspended temporarily at NCSBI Airport, Kolkata and BPI Airport, Bhubaneswar for a period of at least one month

**EXTRACT OF LETTER DATED 6TH MARCH 2020
FROM AAI TO DGCA**

Sub: Temporary suspension of Breath Analyzer Test in view of outbreak of Corona Virus

Sir,

In compliance to the DGCA CAR dated 16th Sept 2019 on procedure for breath analyser examination of the staff involved in safety critical activities, BA Test has been implemented at Civil Enclaves and all the licensed aerodromes of AAI.

In view of the current threat of COVID-19, officers and staff working at airports who have to mandatorily undergo BA Test are raising apprehensions that while undergoing BA Test they are likely to get exposed to the danger of this disease as the same Breath Analyzer machines are used by employees undergoing the test. The affected person may possibly become the source of spreading the virus through these machines.

Hence, it is requested that the temporary suspension of BA test for employees at all the Airports may kindly be considered till the situation is normalized in the country.

EXTRACT OF LETTER DATED 18TH MARCH 2020
BEARING D.O. No. Ops./710/2020/359

“..... As per the directives of MoC, MoHFW and further instructions issued by DGCA during COVID-19 pandemic, AAI and all other Airport Operators are taking action to contain the disease by implementing universal screening of all international passengers. Since this disease is spreading through travelers coming from foreign countries, airports have become most vulnerable places from where this disease can spread.

2. The Airports are providing protective disposals such as Masks, gloves and hand sanitizers to the staff of airport operators, airlines and GHA deployed at airports as precautionary measure to keep them in good health without getting infected with COVID-19 virus for crisis management. However, the ongoing mandatory Breath Analyzer (BA) test as per DGCA CAR for Airport & ANS personnel at the Airport is a matter of grave concern during this contagious virus threat. The repetitive use of same BA machines can easily contaminate and infect the personnel undergoing the test and the machines may become source of the virus. As the COVID-19 virus cases are increasing day-by-day, the employees are scared to undergo the BA Test. The personnel are not comfortable with the instructions of DGCA vide order dated 13.03.2020 which states that only the persons having COVID-19 like symptoms shall be exempted from BA Test up to 23.03.2020. You will appreciate that in the present scenario of unprecedented crisis, their fears cannot be ruled out and temporary suspension of the BA Test is felt essential.

3. It is also pertinent to mention here that keeping in mind the seriousness of the potential risks due to COVID-19, DOPT vide Office Memorandum dated 06.03.2020 has exempted employees to mark their

attendance through Biometric Attendance System upto 31.03.2020 as a preventive measure. In line with the same, AAI has also issued similar order on 09.03.2020. Apart from above, the Governments have also taken other measures such as closing educational institutes, cancellation of meeting and events of mass gatherings etc. Many of the private corporate companies have asked their employees to work from home. Airports services being essential in nature, such facility cannot be provided to the staff deployed at airports but temporary suspension of BA Test will certainly help to make them feel safe and protected.

4. In view of above, it is requested that all officials working at the airports may be exempted from BA Test temporarily till the COVID-19 threat is over.”

From the above repeated communications it is amply clear that the AAI is clearly of the view that the BA Test ought to be temporarily suspended.

12. The Petitioner and its members have already assured and undertaken in their representation dated 17th March 2020, to the PMO, DGCA and AAI as under:

“.....Sir, you can well understand the gravity of the situation. If it is not stopped right now, it can even affect general public as well. We can assure you that our members know their critical duty and never come under the influence of alcohol...”

This Court takes the assurance and undertaking given by the ATCs as an undertaking to this Court. It is expected that ATCs are responsible officers and are conscious of the extenuating circumstances currently prevalent.

13. In the light of the above, purely as an interim measure, until further orders, the following directions are issued:

- i. The DGMS (Air), Delhi shall immediately convene a meeting of the DGCA, AAI, Ministry of Civil Aviation, including any doctors or medical specialists tomorrow i.e., 24th March 2020 or at the earliest possible convenience to draw up an alternative protocol for conducting breath analyser tests on ATCs;
- ii. The Breath Analyser Test currently being conducted shall remain suspended with immediate effect at all airports till further orders;
- iii. The Petitioner and all its members shall abide by the assurance to the effect that they appreciate the critical nature of their duty and undertake that they would not report to work under the influence of alcohol;
- iv. An undertaking and a self-declaration shall be obtained under the signature of each ATC who reports to work;
- v. Any violation of the undertaking and self-declaration given by the Petitioner and/or its members shall entail severe consequences including suspension of the licence;
- vi. The DGMS shall draw up the new protocol to be followed until the spread of COVID-19 abates;
- vii. DGCA is however permitted to conduct any other way of testing which is not invasive in nature and which does not increase the chance of spreading of COVID-19. Urine/blood testing, if opted for as the method of testing, shall be done by using disposable syringes and/or sterilised equipment, in a 2% randomised sample, until the new protocol is framed so that any violation of the self-declaration or undertaking can be detected;

viii. AAI shall provide any facilities that may be needed for the DGCA to implement the above directions.

14. Let the proposed protocol to be implemented till COVID-19 abates, be placed on record by the DGMS on the next date along with an affidavit. The above mentioned directions shall operate till further orders.

15. Copy of this order be given *Dasti* under signature of the Court master to the counsels for the parties. The same be communicated to the DGMS (Air), Delhi by the Ld. Counsel for DGCA and AAI.

16. List on 27th March, 2020.

MARCH 23, 2020

Rahul / C

**PRATHIBA M. SINGH
JUDGE**