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

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Reserved on: 03.05.2023**Pronounced on: 11.07.2023**+ **W.P.(C) 13716/2018****CAPT. AMIT KUMAR YADAV**

..... Petitioner

Through: Mr. Sanjeev Kumar and Mr. Anshul
Sehgal, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms. Anjana Gosain, Ms. Nippun
Sharma and Ms. Hetika Vadhera,
Advocates alongwith Mr. S.P.
Singh, Assistant Director, for
respondent Nos. 1 to 3.
Mr. Akshat Hansaria, Advocate for
respondent No. 4.**CORAM:****HON'BLE MR. JUSTICE GAURANG KANTH****J U D G M E N T****GAURANG KANTH, J.**

1. The present Writ Petition has been preferred under Article 226 of Constitution of India, *inter alia*, impugning the Orders dated 04.12.2017 and 18.07.2018 ('Impugned Orders') passed by Joint Director General, Director General of Civil Aviation and Director General of Civil Aviation (Respondent No. 2) (hereinafter referred to as 'DGCA') respectively. Vide the Impugned Orders, the pilot license of Petitioner was suspended for a period of three months as per Regulation 8.1 of Civil Aviation Requirement (hereinafter

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referred to as 'CAR') for testing positive for blood alcohol content in pre-flight breath analyzer test ('BA Test').

FACTS GERMANE FOR ADJUDICATION OF PRESENT WRIT PETITION

2. The exposition of facts leading to the filing of the present Writ Petition is that the Petitioner is a pilot employed with Tata SIA Airlines Ltd. (Respondent No. 4) (hereinafter referred to as 'Vistara'), which is running its Airline by the name of 'Vistara Airlines'. The Petitioner was scheduled to operate a flight bearing No. 'UK 720' on 18.11.2017 from Kolkata to New Delhi, along with his senior, Captain Gurpreet Nijjer (hereinafter referred to as 'Capt. Nijjer'). The estimate time of departure of the said flight was 07:10 am, so the reporting time of the Petitioner was scheduled at around 06:00 am on 18.11.2017 at Kolkata Airport.
3. Accordingly, the Petitioner reported at Kolkata Airport and contacted paramedic nurse at 06:11 am for pre-flight Breath Analyser Test as per the Regulations provided under CAR. The Petitioner was tested positive in the BA Test. The equipment used for conducting BA Test showed a reading of 0.004% alcohol in the blood of Petitioner.
4. It is the case of Petitioner that he had not consumed any alcohol, sedative, narcotic or any stimulant drug so, he was stunned when he got to know that his BA Test was found positive. Thereafter, he consumed few glasses of water and a cup of tea before his second BA Test. Between the first and second BA Test, a control test was conducted on Capt. Nijjer as provided in CAR. After a while, second BA Test of Petitioner was conducted which also turned out to be



positive. Again, the equipment showed a reading of 0.004% blood alcohol content in blood of Petitioner.

5. Pursuant to positive result in second BA Test, the Petitioner was asked by Vistara Airlines to submit his pilot license for necessary action and he was also removed from flying roster following the procedure provided in CAR.
6. It is the case of Petitioner that after being removed from flying roster, he immediately visited two NABL accredited laboratories to undergo blood and urine tests for detecting presence of blood alcohol as he was apprehending that the equipment used for conducting BA Tests was prone to making errors. It is his case that around 09:00 am, he underwent a urine and blood test at 'Dr. Lal Pathlabs' and at around 10:00 am, he underwent urine and blood test at 'SRL Ltd.' It is further the case of Petitioner that he got a video recorded of the tests being conducted at SRL Ltd. so as to prove that the blood tests were indeed conducted on him.
7. It is the case of Petitioner that he subsequently sent an email dated 18.11.2017 at 10:54 am to the Vistara Airlines informing them that he had undergone blood and urine tests at NABL certified laboratories to prove his innocence. It is claimed by the Petitioner that the concerned officials of Vistara Airlines replied to the said email on 18.11.2017, whereby it directed the Petitioner to forward tests result upon receipt.
8. The Petitioner received the tests results from SFL Ltd. on 20.11.2017, wherein it was stated that no alcohol was found in the Petitioner's blood and urine sample. It is further his claim that result



of second test from Dr. Pathlabs also came to be negative which meant that no alcohol was found in blood and urine of Petitioner.

9. It is the case of Petitioner that he immediately forwarded the results of these tests to the officials of Vistara Airline through an email dated 21.11.2017, whereupon they informed Petitioner through an email of the even date that an appeal against the pre-flight BA Test result dated 18.11.2017 would be filed before DGCA. It is also the case of Petitioner that an internal investigation was also carried out by Vistara Airline into the matter after analyzing the blood and urine tests of Petitioner and control test of Capt. Nijjer.
10. It is alleged by Petitioner that the concerned officials of Vistara Airline had sent letters dated 22.11.2017 to the Joint Director General and Director Air Safety of DGCA, respectively, whereby requesting them to consider the BA Test result as negative in view of the negative results of blood and urine tests of Petitioner. It was also requested in the said letter to consider the positive result as negative due to possibility of technical error in the equipment.
11. In the meanwhile, the Vistara Airline suspended the Petitioner from his official duty for a period of three months w.e.f. 18.11.2017 to 16.02.2018, vide letter dated 23.11.2017.
12. It is the case of Petitioner that no reply was received from DGCA to representations dated 22.11.2017, so an appeal by way of representation dated 30.11.2017 was preferred by the Vistara Airline on behalf of Petitioner before the Joint Director General of DGCA. In the appeal, it was pleaded that the Petitioner may be allowed to fly again and his license may not be suspended for 3 months since the



equipment manufactured by M/s Tayaltech (Respondent No. 3) which was used for conducting BA Test was prone to error and the negative results of blood and urine tests indicate that there was no alcohol in blood of Petitioner.

13. The period of suspension of Petitioner expired on 18.02.2018. Thereafter, he was again put on flying duty roster of Vistara Airlines. It is the claim of Petitioner that upon his rejoining, the Vistara Airlines issued an email dated 27.02.2018 to all its pilots conveying that there was an increase in false positive results from BA Tests conducted using equipment of Respondent No. 3. It was also conveyed through the said email that Vistara Airlines had stopped using the equipment manufactured by Respondent No. 3 from 24.02.2018 due to this reason.
14. The Petitioner was provided a personal hearing on 25.06.2018 by DGCA before deciding his appeal. Pursuant to hearing to the Petitioner, DGCA dismissed the appeal of the Petitioner vide Impugned Order dated 18.07.2018.
15. Thus, the Petitioner, being aggrieved by the Impugned Orders and endorsement on his pilot license, has preferred the present Writ Petition praying as follows:

“A) Issue a writ of certiorari or a writ of any other nature or direction declaring that the Impugned Order bearing no. AP-1/PFMC/2/2018-AS dated 18.07.2018 and the DGCA Order bearing no. AP-1/PFMC/2017-AS dated 04.12.2017 and the consequent suspension of the privileges of the Pilot License of the Petitioner being ATPL 7710 for a period of 3 months from 18.11.2017 till 18.02.2018 was is bad in law, arbitrary and illegal, and set aside the same;



B) Issue a writ of mandamus or a writ of any other nature or any other direction/order directing the Respondent No. 2 to strike off / expunge the endorsement made on the Pilot License of the Petitioner being ATPL 7710 and for any consequential measures and/or effects arising / contemplated therefrom;

C) Issue a writ of mandamus or a writ of any other nature or any other direction/order directing the Respondent No. 1 and / or 2 to change the status / records of the illegal suspension of the Pilot License of the Petitioner being ATPL 7710; and

D) Pass any such other/further writ of any nature, direction, order as this Hon'ble Court may deem fit in the facts and circumstances of the present case.”

SUBMISSIONS ADVANCED ON BEHALF OF PETITIONER

16. Mr. Sanjeev Kumar, learned counsel appearing for Petitioner submitted that the negative tests results of blood and urine tests conducted by two NABL accredited laboratories indicate that there was no alcohol in the blood and urine of Petitioner. It was his contention that the concerned time period in blood and urine tests is of 80 hours prior to the time of conducting of test. The blood and urine tests done in laboratories are more reliable in comparison to BA Test. It was the submission of learned counsel for Petitioner that since no alcohol was found in blood and urine of Petitioner as per results of these tests, his license should not have been suspended for a period of three months just on the basis of BA Tests, reliability of which is lesser in comparison to blood and urine tests. It was further asserted that DGCA has not even controverted the results of blood and urine test, neither in the Impugned Orders nor in its Counter Affidavit.



17. Another contention of Mr. Kumar was that the positive result in BA Test was a false positive which had occurred due to error in the equipment by which BA Test was conducted. It was vehemently argued that the operating manual of equipment used for conducting BA Test itself states that there is a possibility of error to the maximum extent of 5 mg/ 100 ml i.e. 0.005%. The reading in the equipment at the time of BA Test of Petitioner was 0.004% which is squarely covered under the margin of error possible. It was his submission that DGCA did not take into consideration this margin of error while passing the Impugned Orders and did not even give any finding on this issue in the Impugned Orders.
18. It was also contention of Mr. Kumar that the procedure provided in CAR was not properly followed at the time when BA Test of Petitioner was conducted on 18.11.2017. It was his argument that a control test needs to be done as per Regulation 6.5 of CAR between the first BA Test and second BA Test. It was alleged that the control test which was conducted on Capt. Nijjer was not conducted properly since it is provided in the operating manual of equipment used for conducting BA Test that minimum exhale volume for a successful test must be 1.0 litre, but in the case of Capt. Nijjer, the exhale volume was only 0.79 litre. So, the exhale volume blown in the equipment was less, but the equipment did not show any error with respect to this, which raises serious question on the working of the equipment. Thus, it was his contention that the whole procedure was vitiated by not conducting the control test properly as per the user instructions.



19. Mr. Sanjeev Kumar further submitted that the finding of DGCA in the Impugned Order dated 18.07.2018 is erroneous as far as it observed that there is no provision in CAR for undertaking blood test. It was his submission that this finding was erroneous as Clause 4.1 of CAR, which is in consonance with Rule 24 of Aircraft Rules, 1937 (hereinafter referred to as '1937 Rules'), clearly states that there should be no blood alcohol in breath, blood or urine analysis. This means that the blood and urine tests analysis can also be conducted for checking blood alcohol content. There is no bar provided for conducting blood and urine tests either in CAR or in Rule 24 of 1937 Rules. It was further submitted that earlier, before 2009, blood tests were the only method of detecting alcohol in blood. Thus, it was asserted that the finding of DGCA was erroneous and his suspension should be set aside by this Court on the basis of results of blood and urine tests.
20. It was asseverated that DGCA and Respondent No. 3 are hands in glove with each other. It is alleged that Respondent No. 3, who is also a party in the present Writ Petition, did not appear before this Court and did not file an affidavit before this Court and rather provided DGCA with a clarification on operation of equipment on its seeking for the same. This also raises suspicion upon the clarifications provided by Respondent No. 3 as the same might have been provided by Respondent No. 3 under duress from DGCA. It was further stated that in the clarifications also, out of blue moon it has been stated by Respondent No. 3 that the permissible margin of error in the equipment was masked and so any reading up to +/- 0.005%



would have been shown as zero. It was further argued that the DGCA should have sought these clarifications from Respondent No. 3 at the time of hearing the appeal and not during adjudication of this Writ Petition. Moreover, Respondent No. 3 itself has not been able to certify about the accuracy of results by its equipment and that is the reason why it has used the word 'likely' while commenting upon the results of Petitioner in its clarification.

21. It was argued by learned counsel for Petitioner that the Indian Railways also had a policy of conducting two BA Tests, but it also observed the increase in cases of false positive results so Indian Railways stopped conducting second BA Test and instead of it, they resorted to medical examination of subject person before issuing a penalty charge sheet. It was further argued that the Aviation Laws in other countries were more liberal in comparison to India. It was submitted that in UK 0.009% blood alcohol content in blood analysis is allowed, whereas in USA, 0.04% blood alcohol content is allowed. While seeking parity with Regulations in other countries, Petitioner sought that some amount of blood alcohol content should also be permissible in India.
22. Learned counsel for Petitioner stated that the Impugned Orders were passed without dealing with every issue raised by Petitioner before them. It was stated that Impugned Orders should be set aside for being passed without providing any proper reasoning and in a mechanical manner without any application of mind. He relied upon the judgment of Hon'ble Supreme Court in the case of **Kranti Associates (P) Ltd. v. Masood Ahmed Khan** reported as (2010) 9

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SCC 496, while stating that a quasi judicial authority must record reasons in support of its conclusions and Impugned Orders should be set aside for not providing any reasoning.

23. Lastly, Mr. Sanjeev Kumar submitted that the Petitioner has already undergone suspension of three months, but now, the Petitioner is pursuing the present Writ Petition as he apprehends that if, in future, such false positive again occurs and blood and urine tests results are again ignored, then his whole career as a pilot will be jeopardized, that too for not any fault of his own. Under these circumstances, he, *inter alia*, prays for setting aside of Impugned Orders and expunging of endorsement on his pilot license.

SUBMISSIONS ADVANCED ON BEHALF OF
RESPONDENTS NO. 1, 2 & 3

24. Ms. Anjana Gosain, learned counsel appearing for DGCA stated that CAR has been adopted in compliance of the International standards set for civil aviation. It was stated that ICAO is an International body which has set out some International standards and recommended practices for civil aviation. Every country, who is a signatory to Chicago Convention, is bound to follow these International standards and recommended practices. India being a signatory to the same is also bound to follow the same. It was submitted that as per these standards, it is incumbent upon DGCA to identify those pilots who report to duty for flying after consuming psychoactive substances and to remove them from their flying duty.



25. It was further submitted that norms in some other western countries with respect to reporting at an Airport after consuming psychoactive substances are comparatively relaxed than India as India does not tolerate any negligence from the pilots or other crew members. It was stated that in USA, Federal Aviation Authority (FAA) does not mandate BA Test of every pilot before every flight. FAA conducts random BA Tests at Airports and if a pilot is found to have more than 0.039% alcohol content in his blood then his license is permanently suspended. Whereas, in Europe, European Aviation Safety Agency ('EASA') governs and supervises compliance of aviation safety Regulations in European countries. EASA does not permit a pilot to fly if more than 0.02% alcohol content is found in his blood in BA Tests. It was her submission that thus, these countries allow certain level of alcohol in blood of pilots but DGCA, which is the governing body of civil aviation in India, does not allow even 0.001% alcohol in blood of pilots before flying.
26. Ms. Gosain submitted that Section 5 of the Aircraft Act, 1934 provides power to the Central Government to make Rules with respect to civil aviation and Section 5A provides power to issue directions to regulate civil aviation. Rule 24 of 1937 Rules prohibits any operating member of crew, including pilot, from consuming any psychoactive substance, whether on flight or before flight. It was submitted by Ms. Gosain that CAR has been issued by DGCA under Rule 133A of 1937 Rules so as to ensure compliance of Rule 24. It was further submitted that CAR are revised from time to time so as to update, change or modify Regulations as per the requirement of time.



It was stated that as per CAR, 2015, which was in force at the time of incident i.e. on 18.11.2017, it was mandatory for every pilot to undergo pre-flight BA Test.

27. In response to the contention of Petitioner that the results of blood and urine tests were negative, Ms. Gosain had submitted that blood and urine tests were conducted by Petitioner out of his own will from private laboratories and thus, the same cannot be trusted and cannot be relied upon.
28. Ms. Gosain further submitted that the contention of Petitioner that blood and urine tests should be mandatorily done before each flight is neither feasible nor practical. It was submitted by Ms. Gosain that as per CAR, it is not mandatory to conduct blood and urine tests of a pilot before every flight. It is usual practice that blood and urine tests of a pilot are only conducted when an accident takes place. It was stated that a lot of challenges will arise for Airlines if DGCA mandates that blood and urine tests are also have to be done before every flight. She stated that the very first challenge before the Airlines will be to create infrastructure at every Airport where such blood and urine tests will be conducted. These tests will have to be conducted by a third party and not by the staff of Airlines since, then, there could be chances of allegations or disputes against Airlines or vengeance or foul play by Airlines. The Airlines will have to make such an infrastructure so as to ensure that there is no delay in collecting samples of blood and urine as even delay of 5 minutes can affect the outcome of test. The airlines will have to create cold storage facility so as to store samples of blood of pilots, which will



later be sent to laboratories for testing/analysis. It is further stated that these tests being conducted before every flight will also impact the health of pilots and will also make them more vulnerable to diseases being spread through use of syringes. It is neither economically nor operationally feasible to have blood testing facility at each and every Airport, helipad or temporary helipad etc. Citing all these primary challenges, Ms. Gosain stated that even after creating such infrastructure, there will be chances that the result of blood and urine tests might get compromised, so due to these reasons, DGCA has not made mandatory blood and urine tests of pilots before every flight.

29. In response to the contention of Petitioner that blood and urine tests should have also been done following the procedure provided in CAR, Ms. Anjana Gosain stated it to be misconceived. It was her argument that as per CAR, it is not mandatory for the Airline to conduct blood and urine tests also. It is provided in Rule 24 of 1937 Rules that no pilot should be found in a state of intoxication or having detectable alcohol in his breath, urine or blood alcohol analysis. It was stated that so even if alcohol is detected in BA Test that would be sufficient to put the pilot off the flying roster and for initiating necessary action against him. It was further stated that results of BA Tests are also reliable. The procedure of second test to be mandatorily conducted when the first test comes to be positive and control test in between the first and second test, has been placed so as to make the BA Test completely reliable and remove any possibility of error. It was her submission that this procedure makes the BA



Tests reliable, feasible and practical and that is why they are conducted worldwide. It was contention of Ms. Gosain that on the same date, other crew members had also undergone pre-flight BA Test by the same equipment, but no other member complained of any false positive as complained by Petitioner.

30. She further stated that comments from Respondent No. 3 i.e. manufacturer of equipment used for conducting BA Tests of Petitioner were also sought. In the comments, Respondent No. 3 has stated that the possibility of error of 0.005% is automatically covered when base value starts at 0.000%. Ms. Gosain further states that every Airline has liberty to choose equipment of any make or model, for conducting BA Tests. The equipment just needs to be calibrated as per the standards set by DGCA and it should meet the specifications provided in Rule 5 of CAR. Thus, change of equipment by Vistara Airline does not support the case of Petitioner.
31. Learned counsel for DGCA relied upon the decision of Hon'ble Supreme Court in the case of ***Joint Action Committee of Air Line Pilots Association of India (ALPAI) & Ors. v. Director General of Civil Aviation & Ors.*** reported as (2011) 5 SCC 435, while stating that DGCA has ample powers under Rule 133A read with Rule 29C of 1937 Rules, to issue CAR. She also relied upon the decision of this Court in the case of ***Capt. S.K. Kapur v. Union of India & Ors.***, W.P.(C) No. 7503/2018, decided on 23.07.2018, to contend that this Court upheld the orders passed by DGCA in a similar situation.
32. Lastly, Ms. Gosain had taken an objection to the maintainability of the present Writ Petition as she stated that the Petitioner has not



exhausted all the remedies available to him. The Petitioner has a Statutory remedy of filing appeal under Rule 3B of 1937 Rules before the Secretary of Ministry of Civil Aviation challenging the order passed by DGCA, but instead of exhausting the same, the Petitioner has filed the present Writ Petition. Under these circumstances, she prays for dismissal of present Writ Petition on this ground alone.

SUBMISSIONS ADVANCED ON BEHALF OF RESPONDENT
NO. 4

33. Mr. Akshat Hansaria, learned counsel appeared on behalf of Vistara Airlines and submitted that the Airline had followed the exact procedure as provided under CAR for conducting BA Tests of pilots and other crew members. Airlines also complied with all the requirements provided under CAR.
34. Mr. Hansaria further submitted that the purpose of conducting control test between the first and second BA Test is solely to ensure that the equipment being used for BA Test is not defective. It was submitted that in the case of Petitioner also, control test was done on Capt. Nijjer between the first and second BA Tests of Petitioner, which came to be negative. It was further submitted that the same equipment was used for testing other crew members on the same day but no other result came positive on that day, which also verifies that the equipment was working effectively on that day.
35. It was contention of Mr. Hansaria that the blood and urine tests are only conducted in post-accident scenarios. The blood and urine tests



are not conducted before flight as it will be logistically complicated and a prohibitive task. It was further submitted that the results of blood and urine tests, which were got conducted by Petitioner on his own from two private laboratories, are not relevant since the alcohol content at the time of reporting at Airport for flying duty is relevant. It was argued that any test results subsequent to the BA Tests conducted at the Airport at the time of reporting for flying duty are irrelevant.

36. Lastly, Mr. Hansaria submitted that Vistara Airline used Tayal Tech T1100 equipment for conducting BA Tests of Petitioner. The Respondent No. 3 had stopped production of this model, so, as to maintain uniformity in the equipment used by Vistara Airlines across all its operating sites, Vistara discontinued use of the said model.

LEGAL ANALYSIS

37. This Court has heard the rival contentions of the parties and has also examined the documents placed on record.
38. Ms. Anjana Gosain, learned counsel for DGCA raised an objection to the maintainability of the present Petition. She submitted that under Rule 3B of 1937 Rules, an appeal lies before the Secretary, Ministry of Civil Aviation against the order passed by DGCA. She further submitted that the Petitioner has approached this Court prematurely without exhausting all the remedies available to him, in accordance with law, and thus, the present Writ Petition is not maintainable.
39. Rule 3B of 1937 Rules states that a person being aggrieved by an order passed by an officer in exercise of his power may prefer an



appeal to the next higher officer within a period of sixty days from the date of such order. Even though this Court finds strength in the objection raised by DGCA, however, the same should have been raised at the first hearing of the Petition itself. Pertinently, the present Petition was initiated in the year 2018 and almost 5 years have lapsed from the date of its initiation. Therefore, in the interest of justice, this Court deems it fit to dispose of the present Petition on merits rather than dismissing the same on technical ground of maintainability.

40. Now, in view of the peculiar facts of this case and arguments raised before this Court, firstly, it is imperative to observe the purpose why pre-flight BA Tests are conducted in the first place. Pre-flight BA Tests are conducted in compliance of the CAR, Section 5, Series F, Part III which was issued by DGCA under the provisions of Rule 24 read with Rule 133A of 1937 Rules. The purpose of introducing CAR was to ensure that no crew member or maintenance personnel or any other operating member of crew carries out his duty even under miniscule influence of alcohol or any other psychoactive substance. It is considered that even when blood alcohol levels are 'zero' in the body, there could be some effect of hangover in the body which is mainly due to congeners. These congeners may produce ill effects for up to 36 hours depending upon the amount of alcohol consumed. Even after 12 hours of consuming alcohol, when the blood alcohol level has reached zero, there is decrement in task performance. Thus, even minute quantity of alcohol in blood jeopardizes flight safety on several counts. Further, alcohol causes hypoxia and reduces individual's tolerance with increase in altitude. Even low amount of



blood alcohol content in body decreases the amount of mental capacity available to deal with many essential tasks involved in the conduct of safe flight. Thus, if any emergency occurs in-flight, the crew member under influence of alcohol will not be capable of dealing with the same. Due to these reasons, the CAR stipulates that the level of blood alcohol compatible with safe flying is 'zero'. The CAR lays down the procedure to be followed by flight operators so as to ensure that no mishap takes place due to a crew member operating in the state of intoxication.

41. Before referring to the provisions of CAR, it would be appropriate to refer to Rule 24 of 1937 Rules which is reproduced hereinbelow for the sake of convenience:

“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.

(2) No operator operating a domestic air transport service in India shall serve any alcoholic drink on board such an air transport service and no passenger traveling on such a service shall consume any alcoholic drink while on board.

(3) The holders of licences shall not exercise the privileges of their licences and related ratings while under the influence of any



psychoactive substance which might render them unable to safely and properly exercise the privileges of the licences and ratings.

(4) The holders of licences shall not engage in problematic use of substances.”

42. Now, it would be relevant to refer to the following paras of CAR which prescribe the procedure to be followed by operators:

“2. DEFINITIONS

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Pre-flight Breath-analyzer Examination- Test conducted on crew member before departure of a flight to measure alcohol in his/her exhaled air so as to determine the concentration of alcohol in the blood.

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4. SAFETY REGULATIONS

4.1 As per the provision of Rule 24 of the Aircraft Rules, 'no person acting as, or 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'.

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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.

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5. EQUIPMENT USAGE

5.1 Operators shall make available at least two serviceable breath-analyzer equipment capable of giving accurate digital value upto



three decimal places with a memory to store and recall at least last 1000 records.

5.2 The breath-analyzer equipment shall be used only in auto mode.

5.3 The breath-analyzer equipment shall be attachable to a printer. At least one serviceable printer for the breath-analyzer equipment shall be available at all times.

5.4 The breath-analyzer equipment shall be calibrated after 10,000 blows/six months/at a frequency as recommended by the equipment manufactured from an agency having ISO certification to undertake the calibration activity. The date of the last calibration shall be appended on the instrument. Record of such calibrations shall be maintained by the operator. It shall be the responsibility of the operator to ensure continued serviceability of the breath-analyzer equipment and maintain such records.

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6. PROCEDURE FOR PRE-FLIGHT AND POST-FLIGHT BREATH ANALYZER EXAMINATION

6.1 Operators shall have Doctor holding MBBS degree/trained Paramedics/Emergency Medical Technician (EMT) on full-time employment of the company to conduct pre-flight breath-analyzer examination at a designated place within the airport premises. Alternatively, operators may pool their resources or avail the pre-flight breath-analyzer examination services of Govt./Govt. licensed private hospitals located in the premises of the airport. Such facilities shall be subjected to periodic checks by the DGCA.

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6.3 Before each test, the Doctor/Paramedics/EMT shall run an 'air blank' on the instrument and obtain a reading of 0.000. The Doctor/Paramedics/EMT shall also carry out a control test on daily basis and keep a record of printout to ensure serviceability of both the breath-analyzer equipment and the printer.

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6.5 If the breath-analyzer examination result is positive, a repeat test shall be carried out after an interval of maximum 15-20 minutes. During this time, the subject crew may be permitted to wash his face and rinse his mouth, if desired. Before the second test is carried out, a control test must be taken with the same equipment to verify the serviceability and correctness of the breath-analyzer. Both the readings so obtained shall be recorded and printout taken. The second test shall be carried out in the presence of a witness either from flight dispatch or operations department of the operator, who shall countersign the test report.



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6.7 If the second test is satisfactory, the crew member may be cleared for flight. If the crew member refuses to undergo the second test, it shall be recorded and the concerned crew member shall not operate the flight. In such case, action against the crew member shall be taken in accordance with Para 8.1 of this CAR.

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6.9 All the breath-analyzer examination positive cases shall be promptly reported but not later than 24 hours of occurrence to the concerned Regional Air Safety Offices of the DGCA and Director of Air Safety (HQ).

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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.

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

43. Para 4.1 of CAR literally reiterates Rule 24 of 1937 Rules, which stipulates that no person acting as pilot, cabin crew or other operating member of crew etc. should take or consume any alcoholic drink, sedative, narcotic, or stimulant drug preparation within 12 hours of commencement of flight or in course of flight. It, *inter alia*, further states that no person shall be in a state of intoxication or have detectable blood alcohol whatsoever in his breath, urine or blood alcohol analysis or be in a state by reason of which his capacity to act



is impaired and no such person while in a state of intoxication shall enter or be in aircraft or report for duty.

44. Para 4.3 imposes a duty upon the operator, crew member and maintenance personnel to ensure that contravention of Rule 24 of 1937 Rules does not take place. For this to be ensured, Para 4.3.1 makes it mandatory for each flight crew and cabin crew to undergo pre-flight BA Test. Para 6.5 lays down the procedure to be followed in case the BA Test result is positive. Para 6.9 stipulates that the positive BA Tests should be promptly reported to concerned Regional Air Safety Offices of DGCA within 24 hours. Para 8.1 of CAR lays down the punishment to be imposed upon the crew member who tests positive in the BA Tests.
45. In the present case, the Petitioner was scheduled to operate a flight at 07:10 am from Kolkata to New Delhi. Following Para 4.3.1 of CAR, he reported to paramedic nurse at 06:11 am for pre-flight BA Test which resulted positive with a reading of 0.004% blood alcohol content. Thereafter, following the procedure laid down in Para 6.5 of CAR, a control test was conducted on Capt. Nijjer, which resulted in negative. The Petitioner was also provided a time of 15-20 minutes before conducting his second BA Test as provided in Para 6.5 of CAR. It is Petitioner's own case that he drank a few glasses of water and rinsed his mouth in those 15-20 minutes. Subsequent to that, his second BA Test was conducted, but the same also resulted in positive with the same reading i.e. 0.004%. In compliance with Para 8.1, Petitioner was removed from his flying roster and concerned officer of DGCA was informed as per Para 6.9. The Petitioner's pilot license



was suspended by DGCA vide Impugned Orders for a period of three months w.e.f. 18.11.2017 to 16.02.2018. Thus, it is not in dispute that every procedure laid down in CAR was followed.

46. The main contention of Petitioner is that the results of BA Tests were erroneous as the results of blood and urine tests proved that there was no alcohol in blood of the Petitioner. Another main contention of Petitioner is that the operating manual of equipment which was used for conducting BA Tests states that the maximum error which can be made by equipment is up to $\pm 0.005\%$, and the result of Petitioner's BA Test is 0.004% which is squarely covered under the limit of maximum error which can be made by such equipment.
47. To rebut these contentions, Ms. Anjana Gosain, learned counsel for DGCA stated that there was no error in the equipment and the said fact can be corroborated by the fact that other crew members of Vistara Airlines, who had reported at that Airport on the same day, had also undergone BA Test using the same equipment only and no other person complained of such false positive. It was her contention that if the equipment was faulty, there would have been several complaints on that day itself. She further stated that the procedure of control test and second BA Test as provided in CAR is enacted so as to rule out any possibility of error made by the equipment used for measuring blood alcohol content of crew members. Therefore, she stated that there was no error in the equipment and the Petitioner was having blood alcohol content on the day of the incident which was rightly measured by the equipment.



48. This Court first needs to adjudicate that whether the results of blood and urine tests undergone by Petitioner can be relied upon or not. It was submitted by learned counsel on behalf of Petitioner that DGCA has not controverted the results of blood and urine tests neither in its Counter Affidavit nor at the time of final arguments. It is true that the counsel for DGCA did not controvert the results of blood and urine tests during the arguments. Even Vistara has not controverted the results of blood and urine tests in its affidavit but, it has been stated in its affidavit that the same cannot be relied upon because any test results subsequent to the BA Tests conducted at Airport are irrelevant.
49. This Court is quite convinced with the averment of Vistara since the presence of blood alcohol content at the time of reporting at Airport before the flying duty, has to be checked as per CAR. So, it is mandatory that the blood alcohol content at that time must be zero as stipulated in CAR. Also, on conjoint reading of Para 4.3 and Para 6.1 of CAR, it is clear that Airlines/operators have been imposed with the duty to conduct pre-flight BA tests of pilots, crew members and maintenance personnel before each flight. Thus, since the duty of conducting pre-flight BA Tests is upon the operator, so the blood and urine tests, which were undergone by the Petitioner himself, without any direction or reference from the operator/Vistara Airlines and which were not conducted by Vistara, results of such tests cannot be considered by this Court. DGCA also rightly did not rely upon them. If these blood and urine tests would have been conducted by Vistara, then in that case, these results might have been considered by this



Court in favour of the Petitioner, but, since the Petitioner himself had undergone the same without any such reference or direction of Vistara, the same cannot be considered by this Court under any circumstance.

50. It is the claim of Petitioner that the equipment had a possible maximum margin error of $\pm 0.005\%$ and the result of Petitioner was 0.004% which is squarely covered under the maximum margin of error. In this regard, DGCA had sought comments from the manufacturer of equipment i.e. Respondent No. 3. The relevant portion of response of Respondent No. 3 is extracted as follows:

“3. Our instruments incorporates 16 mm Dart Cells, used world over for evidence use. The minimum output of the sensor current is zero for a sample containing alcohol. Under practical conditions the sensor has no difficulty reading down to 5 ug/100 ml, 0.005 BAC, which is a commonly chosen cut-off point. Under ideal conditions less than 1 ppm is possible, but the humidity of human breath and possible low-level CO in smokers give transients which become significant at low levels. The output for calibration is linear through zero so single point calibration is normal, the chosen value usually being the legal limit in the jurisdiction. (Reference: DART Sensor Literature)

4. In India for Aviation Safety the minimum alcohol Levels are ZERO. (Reference: para 1.4 CIVIL AVIATION REQUIREMENTS SECTION 5 - AIR SAFETY SERIES F PART III 4TH AUGUST 2015). It is usual to set a mask (reading up to 0.005 BAC as zero). Output is linear throughout the normal range of ethanol values. This ensures starting with the base value of .000 while keeping the Maximum Error range of ± 5 mg/100ml in mind. (Reference DART Sensors Data Sheet)

5. In view of the above the interpretation of the first and second test showing .004 is likely to be positive, subject to all processes during the tests, that have been followed, as enumerated in DGCA CAR & conditions prescribed by OEM for evidential use of the instruments.”

The above response clearly states that the linear output throughout the normal range of ethanol values ensures starting with

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the base value of 0.000 while keeping the maximum error range of $\pm 0.005\%$ in mind.

51. Be that as it may, this Court is not inclined to grant benefit of maximum margin error to the Petitioner. The reason for not granting benefit of margin of error is twofold. Firstly, it is observed that the procedure provided in Para 6.5 of CAR rules out the possibility of any error by the equipment. Para 6.5 of CAR states that in case positive result is obtained in a pre-flight BA Test, then a second test has to be conducted after an interval of 15-20 minutes. It further states that during this interval of 15-20 minutes, the crew member is allowed to wash his face and rinse his mouth, if so desired by him. It also lays down that a control test needs to be done between the first test and second test so as to verify the serviceability and correctness of the equipment. Thus, this procedure is sufficient to rule out any possibility of error by equipment. In view of the same, it is observed by this Court that the equipment cannot provide the same result after a gap of 15-20 minutes if it was faulty. The outcome of same result in the second BA Tests, after conducting a control test in between, ensures that there was no error in the equipment. If there would have been an error in the equipment then it is very unlikely that the equipment would have shown the same result i.e. 0.004% during both the BA Tests. Secondly, Ms. Gosain had rightly pointed out at the time of arguments that several tests had taken place on the same date from the same equipment and if the equipment would have been faulty or making errors, then there would have been other complaints too in this regard.



52. The Petitioner's repeated claim was that the results of BA Tests were false positives and that is why no blood alcohol content was found in his blood and urine tests. In this regard, Learned Counsel for Petitioner drew the attention of this Court to Email dated 27.02.2018 which is addressed from Vistara to all its pilots. It was claimed by learned counsel for Petitioner that in the said Email, Vistara had admitted the fact of increase in false positives by the equipment manufactured by Respondent No. 3 and due to this reason Vistara stopped using that equipment. This Court has perused the Email dated 27.02.2018. It states that false positive results were found on use of new model of Tayal Tech - Alcotruth and it was decided that use of this model of Tayal tech would be stopped completely. It has further been stated in the Email dated 27.02.2018 that Vistara had been using Respondent No. 3's manufactured equipments since the inception and the number of false positives were very few in last three years. These miniscule numbers of false positives were seen in all Airlines using equipments of different manufacturers. It was also written in the said Email that in order to cater to these false positive results, the DGCA had incorporated robust positive test confirmation procedure in CAR. Moreover, Mr. Akshat Hansaria, learned counsel for Vistara had also submitted that Vistara had used Tayal Tech T1100 equipment for conducting BA Tests of Petitioner. He had further submitted that Respondent No. 3 had stopped production of this equipment, so in order to bring uniformity in the equipment being used by Vistara pan India, Vistara stopped use of the said model. On a perusal of this Email and considering the submissions



made by learned counsel for Vistara, it is clear that Vistara was talking about some other model manufactured by Respondent No. 3 in the said Email and not about the model which was used for conducting BA Tests of Petitioner. Thus, reliance of Petitioner upon this email is futile since it does not support his case. Rather, this Email supported the contention of DGCA that CAR has a procedure to rule out false positives or any other error by the equipment being used for conducting BA Tests.

53. Another contention of Petitioner is that the Vistara Airlines should have also conducted the blood and urine tests of the Petitioner. It was further his contention that blood and urine tests should particularly be done when a crew member tests positive in BA Tests. It is his contention that the Vistara Airlines itself knew about the number of false positives which occur on use of the equipment manufactured by Respondent No. 3, so blood and urine tests of subject persons should also be conducted. On the other hand, Ms. Anjana Gosain, learned counsel for DGCA in her response submitted that as per CAR or Rule 24 of 1937 Rules, it is not mandatory for an operator/airline to conduct all three tests i.e. breath, blood and urine analysis. It was her contention that the word 'or' has been used in Rule 24 of 1937 Rules and thus, if the operator is only conducting pre-flight BA Tests, then that is also sufficient and there is no need to conduct blood or urine tests. It was further her contention that the usual practice is that the blood and urine tests would be conducted in a case of accident.
54. As observed above, CAR has been issued under Rule 133A of 1937 Rules for compliance of Rule 24 of 1937 Rules. Rule 24 clearly



states that there shall be no detectable blood alcohol in breath, blood or urine analysis of a crew member. Thus, in terms of Rule 24, blood alcohol content should not be found in any of the analysis. So, as per Rule 24, it is not mandatory to do every analysis and any one mode of analysis will suffice. The CAR imposes a duty upon the operator of only conducting BA Tests before every flight. The CAR does not lay down anywhere the duty upon the operators to conduct blood or urine tests before each flight. Rather, only Para 10.1 of CAR imposes duty upon Officer-in-Charge of Airport to conduct blood, urine tests, etc. of crew members in the case of accidents. So, the contention of Petitioner that his blood and urine tests should also have been done does not hold water. Further, this Court also does not uphold the contention of Petitioner that DGCA gave a wrong finding in Impugned Order dated 18.07.2018 that there is no provision in CAR for undertaking blood test. A perusal of CAR shows that it only imposes duty upon operator to conduct BA Test and not blood or urine tests and hence, there is no error in the finding of DGCA. Nonetheless, this Court is exercising the jurisdiction under Article 226 of the Constitution of India under the present Petition and is not exercising its jurisdiction as a Court of Appeal, so it cannot adjudicate upon every finding of DGCA in the Impugned Order and can only set aside or modify any perversity or material irregularity in the Impugned Orders.

55. As far as the other contention of Petitioner is concerned that in view of cases of false positive results, blood and urine tests of a crew member should be conducted when he or she obtains a positive result



in BA Test, it also does not hold ground in view of CAR. As stated above, the CAR only imposes duty upon the operators/ airlines to conduct pre-flight BA Tests and does not put any obligation upon the operator to conduct blood and urine tests in case of positive results in BA Tests. Further, this Court agrees with the arguments made by Ms. Gosain that conducting blood and urine tests at an Airport before every flight will not be practical and feasible. The Airlines will have to create infrastructure at every Airport from wherever they operate for conducting blood and urine tests of crew members. This will add additional cost on the operations of Airlines which will further burden them unnecessarily. Thus, in view of this Court, considering the infeasibility and impracticality of conducting blood and urine tests at Airport by operators, CAR does not anywhere put an obligation upon operator to conduct blood and urine test and that is why it only talks about BA Tests. In fact, in the incidents of accidents also, the duty is not of the operator to conduct blood and urine tests, but the duty is imposed upon the Officer-in-Charge of Airport to conduct these tests. With regard to the aspect of false positive, CAR already has laid down procedure so as to eliminate the possibility of false positives. At the cost of repetition, it is reiterated that Para 6.5 of CAR states that in case positive result is obtained in a pre-flight BA Test, then a second test has to be conducted after an interval of 15-20 minutes. It further states that during this interval of 15-20 minutes, the crew member is allowed to wash his face and rinse his mouth if so desired by him. A control test also needs to be done between the first test and second test so as to verify the serviceability



and correctness of the equipment. Thereafter, second test will be done in presence of a witness. Thus, there are sufficient precautionary measures provided in CAR so as to safeguard the crew members against the unfortunate false positive results of BA Tests. In view of this, this Court is of the opinion that this procedure rules out the possibility of false positives to the maximum extent. In the present case, each and every step laid down in CAR was followed ideally by Vistara Airlines and thus, the possibility of false positive results is ruled out. Further, the Petitioner has not challenged CAR in the present Petition, so the contention of Petitioner that blood and urine tests should be conducted when positive result is obtained in BA Test cannot be entertained in the present Petition as it will be out of scope of the present Petition when the provisions of CAR have not been challenged before this Court.

56. The Petitioner further claimed that the procedure as prescribed in CAR was not duly followed since the control test was not done properly and hence, the whole procedure got vitiated. It was the argument of Mr. Sanjeev Kumar, learned counsel for Petitioner that as per the operating manual of equipment, which was used for conducting BA Test, the minimum exhale volume should be 1.0 litre, but the exhale volume in the control test of Capt. Nijjer was only 0.79 litre. Thus, the control test was not done properly as all the instructions mentioned in operating manual of equipment were not followed. This Court is not satisfied with this argument of the Petitioner. It is the view of this Court that the whole purpose of conducting a control test was to verify the serviceability of the



equipment and the same was verified when the equipment provided a result of 0.000% in the control test even when only 0.79 litre exhale volume was input into the equipment. If the equipment would have been faulty or would have been making any error, then it would have given a positive result in the control test also. But, since the result of the control test was 0.000% only, it in turn verified the serviceability of the equipment. Thereafter, second BA Test of Petitioner was conducted, which again gave the same result as the result of first BA Test i.e. 0.004%. As pointed out earlier, if there would have been any error in the equipment then 0.000% output would not have been generated in control test and then same output of 0.004% would not have been generated in second BA Test. Thus, this miniscule default from the instructions provided in operating manual of equipment will not help the case of the Petitioner.

57. It was the argument of learned counsel appearing on behalf of Petitioner that the Indian Railways has done away with the procedure of conducting second BA Test and rather, has resorted to medical examination of subject person on a positive result of first BA Test. It was submitted that the Indian Railways also observed that there was an increase in cases of false positive results of BA Tests and that is why they shifted to the practice of medical examination before penalising the defaulting employee. It was his contention that same practice should also be adopted by DGCA and CAR should be accordingly modified. Ms. Gosain in response had submitted that no analogy can be drawn between Indian Railways and Civil Aviation.

Prima facie, this Court observes that the nature of operations and



work of a loco pilot and an aircraft pilot is different. Both the domains are different and cannot be compared with each other. The skill sets of a loco pilot and an aircraft pilot are also different, which cannot be compared. Even the governing laws for both are different, which have been enacted keeping in mind the requirements and circumstances of both the domains. Lastly, even a minor negligence from an aircraft pilot can cause threat to lives of several people, however, a minor negligence from a loco pilot may not cause immediate threat to the lives of people. Thus, an analogy which the Petitioner has tried to draw between the two is that of chalk and cheese, therefore, cannot be accepted. Nonetheless, it is reiterated that since the Petitioner has not challenged the provisions of CAR in present Petition, this argument of Petitioner cannot be entertained.

58. The Petitioner also sought parity with Regulations in other countries. It was his submission that in some countries like USA, UK, etc. some amount of blood alcohol content is permissible, whereas in India, there should be no blood alcohol content at all as per CAR. Ms. Gosain submitted that India follows the International standards and the permissible limit of blood alcohol content is set at 'zero' as per International Standards set for Civil Aviation. It was her submission that in these western countries, though they allow some level of blood alcohol content in breath, blood or urine, but, they do random checks at Airports and if the blood alcohol content is found more than permissible limit, then the defaulting crew member is permanently suspended for once at all. In India, the crew members are granted three opportunities. If a crew member is found positive



for the first time, then his license is suspended for three months. If he is found positive for the second time then his license is suspended for a period of three years. On defaulting for the third time, his license is permanently suspended. This Court observes that the permissible limit of blood alcohol content is set at zero in India in order to comply with the International standards. Anyhow, the Indian laws are liberal in their own ways since they provide three opportunities for a pilot to retract from his act of reporting at duty after consuming alcohol and does not suspend the pilot permanently at the very first default itself. But anyhow, there is no point in comparing the provisions of CAR with their counterpart acts in other countries, since CAR would anyway be applicable to the Petitioner in the present case. Further, in absence of challenge to CAR in the present Petition, this Court cannot delve upon these arguments.

59. Regarding reliance of Petitioner upon the judgment of Hon'ble Supreme Court in the case of *Kranti Associates* (*supra*), it is observed that the same is not of any help to the Petitioner as in the present case, DGCA had considered all the submissions of the Petitioner and he was also provided with a personal hearing by DGCA before passing of the Impugned Orders. If the Petitioner was aggrieved by the findings of DGCA on his submissions, then the same cannot be treated as not being considered by DGCA. This judgment would not be helpful to Petitioner when he is not satisfied with the findings of DGCA in the Impugned Orders. This Court can only interfere with the Impugned Orders when it is found that the Impugned Orders are perverse or have material irregularity.



60. It is apprehension of Petitioner that he will be prejudiced if he again becomes victim of false positive results of pre-flight BA Tests and that is why he is pursuing the present Writ Petition. As stated hereinabove, CAR stipulates a procedure which is capable of ruling out false positives. Thus, if any false positive will occur in future, then due to the procedure laid down in CAR, the same will be ruled out by way of second BA Test and control test. Further, it is also imperative to note that the present Petition is pending since almost 5 years and no such incident of false positive has occurred with the Petitioner *pendente lite*. Thus, there are meager chances that as alleged, any such incident of false positive will take place with Petitioner in future.
61. Thus, the prayers sought in the present Petition cannot be granted to the Petitioner in view of the fact that he reported for his flying duty in violation of provisions provided in CAR and 1937 Rules. This Court is of the opinion that his license was rightly suspended by DGCA for 3 months following the punishment provided in Para 8.1 of CAR. The job of a pilot is a job of responsibility. When he is on duty, he is carrying responsibility of the lives of the passengers and crew members on board of his flight. Any minute error by pilot can turn into a major accident within seconds. Due to this huge responsibility, CAR stipulates the permissible amount of blood alcohol content as 'zero'. The Petitioner should have whole heartedly followed the provisions of CAR and should not have reported for duty after consuming alcohol. In view of the observations made hereinabove,



this Courts finds no reason to interfere with the Impugned Orders, hence, the present Petition is dismissed. No order as to costs.

GAURANG KANTH, J.

JULY 11, 2023

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