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

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Reserved on: March 20, 2024**Decided on: July 05, 2024**+ **W.P.(C) 8826/2020****CAPT. KARAN MEHTA****..... Petitioner****Through: Ms. Neha Jain, Advocate****V****DIRECTORATE GENERAL OF
CIVIL AVIATION AND OTHERS****..... Respondents****Through: Ms. Anjana Gosain and
Ms. Nippun Sharma,
Advocates for R-1 & 2
Mr. Manu Beri and
Mr. Prateek Kasliwal,
Advocates for R-3****CORAM****HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN****J U D G M E N T**

1. The petitioner filed the present writ petition under Article 226 of the Constitution of India to set aside the suspension order no. AP1/PFMC/2020-AS dated 21.02.2020 (hereinafter referred to as **“the impugned order dated 21.02.2020”**) whereby the respondent no.2 suspended the license of the petitioner for a period of three years



and the order dated 24.09.2020 (hereinafter referred to as “**the impugned order dated 24.09.2020**”) whereby the respondent no.1/Directorate General of Civil Aviation (DGCA) dismissed the appeal of the petitioner and confirmed the suspension of the license of the petitioner.

2. The factual background of the case as stated by the petitioner is that the petitioner is a commercial pilot having Airline Transport Pilot License (ATPL) bearing no. 5120 and in past had served as commercial pilot with Jet Airways and was serving as Captain with respondent no. 3/Air Asia (India) Ltd. (hereinafter referred to as “**the respondent no.3**”). The petitioner has joined the respondent no. 3 on 01.02.2019 as Senior First Officer and was posted at Delhi. The petitioner got upgraded to Command (Captain) on 04.09.2019 due to his performance and after proper training and checks as per DGCA standards.

2.1 The petitioner was rostered to operate the flight bearing no. I5 578 from Delhi to Kolkata (DEL-CCU) on 26.01.2020 due to unforeseen exigency and shortage of crew. The petitioner before operating flight claimed to have been suffering from an ailment and



had reported sick on 19.01.2020 for which he was taking medication prescribed by doctor. The petitioner was requested to operate the flight due to unforeseen exigency and shortage of crew and despite medical condition reported for last minute duties on request from the respondent no.3 with no other option in hand. The petitioner was neither under influence of Alcohol, sedative, narcotic nor had consumed any psychotropic substance before the flight. The flight crew had undergone a pre-flight Breath Analyzer examination at Delhi pursuant to the provisions given in the Civil Aviation Requirements Section-5, Series-F, Part-III, Issue-III, Rev 01 dated 01.08.2018 (hereinafter also referred as “CAR”) wherein the petitioner was tested BA positive with his BA (Breath Analyzer) readings as 0.030% BAC at 11:30 am and 0.028% BAC at 11:45 am respectively. The petitioner was previously also found BA positive for alcohol during pre-flight Breath Analyzer examination on 22.05.2011 at Delhi when he was serving as commercial pilot with Jet Airways and was scheduled to operate flight bearing no. 9W 2645. The petitioner was de-rostered on 26.01.2020 and was directed to deposit his license and follow up with the Regulator vide an email



dated 26.01.2020 received from the respondent no.3. The petitioner vide email dated 27.01.2020 addressed to the respondent no 3 stated that he had taken medication namely Atrovastatin Tb IP 20mg, Dr Johns J2 tooth ache drops along with Codeine phosphate syrup on the night of 25.01.2020 before the flight as he had fallen sick on 19.01.2020. The petitioner also mentioned that during second test, the machine was not changed and witness was not called. The petitioner requested the respondent no 3 for waiving off the suspension and endorsement on licence. The petitioner also submitted his licence to the respondent no 3. The respondent no 3 again vide email dated 27.01.2020 through Chief of Safety disagreed with medical condition of the petitioner and stated in email dated 27.01.2020 that the medicines consumed by the petitioner were not advised by the company doctor and any intake of cough syrup would not result in a reading of BA positive as generated by the pre-flight Breath Analyzer test of the petitioner. The relevant portion of the email dated 27.01.2020 sent by the respondent no.3 is reproduced as under:

We are accessing the CCTV footage and will revert, your statements yesterday are in variance with what has been submitted now. The drugs that you have mentioned, have



not been advised or communicated to the company doctor nor have you submitted in your initial statement.

Any intake of cough syrup mentioned will not result in a reading as generated. In view of this we are unable to use it as a mitigation. You are advised to submit a final statement by 1800 hrs today on account of the above.

2.2 The respondent no. 3 vide email dated 17.02.2020 assigned ground duties for three months to the petitioner due to his BA positive reading. The respondent no 3 without affording any opportunity to the petitioner to show-cause sent a letter to Director of Air Safety, DGCA vide ref. number AAI/FSD/2020/DGCA/03 appeared to be dated 26.01.2020 through Deputy Chief of Safety wherein stated that the petitioner was detailed to operate I5 578 (DEL-CCU) on 26.01.2020 but he was tested BA positive at the time of reporting at 11.30 Hrs with a reading of 0.030%. The second test was carried out after the control test and indicated a reading of 0.028% at 11.45 Hrs. It was further reported that the control test was normal with a reading of 0.00% at 11.35 Hrs and the petitioner was de-restored immediately.

2.3 The respondent no 2 without giving opportunity of being heard to the petitioner passed the impugned order dated 21.02.2020 suspending the license for period of 03 years on the ground of repeat



violation of CAR provisions. The respondent no.2 conducted no independent enquiry to assess the veracity of the circumstances narrated by the petitioner and only relied only on version of the respondent no.3. The relevant portion of the impugned order dated 21.02.2020 is reproduced as under:

- 1. Whereas the flight crew is required to undergo pre-flight medical examination for detection of consumption of alcohol as per the provision given in CAR Section-5, Series-F, Part-III, Issue-III, Rev 01 dated 01.08.2018.**
- 2. Whereas Capt. Karan Mehta, ATPL No. 5120 belonging to M/s Air Asia was scheduled to operate flight no. 15-578 (DEL-CCU) tested positive for alcohol during BA (Breath Analyzer) examination on 26.1.2020 at Delhi, which is in contravention to the provision contained in the aforesaid CAR.**
- 3. Whereas, Capt. Karan Mehta, had earlier tested positive for alcohol during preflight BA examination on 22.3.2011 at Delhi while scheduled to operate M/s Jet Airways flight no. 9W-2645. The present case of BA positive coupled with his previous case of BA positive falls within the provision of para 8.1(b) of CAR, Section 5, Series-F, Part-III, Issue-III, Rev-01 dated 01.08.2018**
- 4. Now, therefore in exercise of the powers designated under Clause (a) of Sub-Rule (3) of Rule 19 of the Aircraft rules, 1937, read with Ministry of Tourism and Civil Aviation Notification No. S.O. 727 of October, 1994 the undersigned hereby suspends in public interest, the license held by Capt. Karan Mehta, ATPL No. 5120 for a period of three years from 26.01.2020 i.e. the date on which he was tested BA positive and shall be endorsed on his pilot license.**



2.4 The respondent no 3 through Chief of Safety on 26.02.2020 through email asked the petitioner to make a fresh statement with respect to alleged incident and to mention about any such past incident. The petitioner informed about past incident which happened in 2011 on his CPL license in Jet Airways but there was no past incidence on his ATPL license and there was no endorsement of any past incident on ATPL license. The petitioner received an email on 01.04.2020 regarding termination of his service with the respondent no.3 despite the fact that he was assigned ground duties by the respondent no.3. It was further intimated that the petitioner has breached the agreement and is hence liable to pay Rs. 22,00,000/- as liquidated damages. The petitioner received another email dated 06.04.2020 from the respondent no.3 stating the termination of the petitioner and mentioning the details of the bank account wherein the petitioner was required to transfer the fund/liquidated damages by 15.04.2020. The petitioner submitted a representation dated 08.04.2020 to the respondent no.3 detailing the facts and grounds of his illegal suspension. The respondent no.3 replied to the



representation of the petitioner on 21.05.2020 and rejected the claim of the petitioner to be reinstated into service and first time mentioned about the illegal suspension of license of the petitioner for a period of 03 years.

2.5 The petitioner preferred RTI application dated 22.05.2020 seeking information regarding the status of his license but he has not received any reply. Thereafter, the petitioner preferred a statutory appeal on 15.06.2020 under section 3B, Part I of the Aircraft Rules, 1937 before the respondent no.1/DGCA challenging the impugned order dated 21.02.2020 passed by the respondent no.2 whereby the license of the petitioner was suspended. The respondent no.1/DGCA vide the impugned order dated 24.09.2020 refused to interfere with the impugned order dated 21.02.2020 passed by the respondent no.2 and dismissed the appeal of the petitioner being devoid of any merit.

2.6 The petitioner being aggrieved challenged impugned orders dated 21.02.2020 and 24.09.2020 on various grounds and filed the present writ petition with the following prayers:

(i) issue an appropriate writ, order or direction thereby setting aside the impugned Order dated 24.09.2020 passed by Respondent No.1, dismissing the appeal of the Petitioner



and confirming the suspension of the license of the Petitioner for three years; and

(ii) issue an appropriate writ, order or direction thereby setting aside impugned order dated 21.02.2020 passed by Respondent No.2 whereby the Respondent no.2 has unilaterally, arbitrarily and illegally suspended the license of the Petitioner for a period of three years;

(iii) issue an appropriate writ, order or direction thereby revoking the suspension of the ATPL license of the Petitioner; and

(iv) issue an appropriate writ, order or direction thereby restoring the privileges, status of a Commercial Pilot to the Petitioner from date of suspension i.e. 21.2.2020; and

(v) Pass any such other or further orders as this Hon'ble Court may deem fit and proper in the interest of justice and in favour of the Petitioner.

3. The respondents no 1 and 2 filed counter affidavit in response to the present petition. The respondents no 1 and 2 in preliminary objection stated that the petitioner had not availed alternate remedy as provided under Rule 3B of Aircraft Rules 1937 by filing further Appeal to the Secretary of the Ministry of Civil Aviation against the order of the Director General of Civil Aviation/the respondent no 1. The respondents no 1 and 2 in preliminary submissions stated that the International Civil Aviation Organization (ICAO) is the international body which lays down regulations and recommendations relating to



civil aviation that every contracting state (including India) is bound to follow. ICAO lays down Standards and Recommended Practices (SARPs) which covers a wide range of subjects relating to civil aviation. Para 1.2.7 of Annex 1 of SARPs prohibits the use of psychoactive substances by license holders. India being one of the contracting States is required to frame legislations for enforcement of these standards as laid down by the ICAO. Rule 24 of the Aircraft Rules 1937 was enacted which is in tandem with the ICAO recommendation.

3.1 The respondent no 1 being a regulatory body for overlooking operations carried out by Airline operators and to ensure compliance to Rule 24 of Aircraft Rules, 1937 issued the Civil Aviation Requirements Section-5, Series-F Part-III in exercise of powers delegated under Rule 133A of Aircraft Rules, 1937. The respondent no 1/DGCA has prescribed a zero tolerance policy with regard to blood alcohol content as there shall be no detectable blood alcohol in breath, urine or blood alcohol analysis of the crew, therefore the permissible limit of blood alcohol has been laid down as 0.000 in the CAR. Section-5, Series-F Part-III of



CAR lay down the procedure for conduct of pre/post flight breath-analyzer test for consumption of alcohol. Each Airline Operator has a dedicated Medical Room equipped with the breath-analyzer testing facility and medical staff comprising of Doctor, Paramedics or Nurse for conducting breath-analyzer test. The breath-analyzer testing is recorded on camera. The abovementioned CAR section states that the permissible limit of blood alcohol is laid down as 0.000%. It further states that only in the case of accident, the samples of blood, urine, etc. are collected for a detailed chemical analysis. The specifications of the breath-analyzer equipment are also laid and it is further mentioned in CAR that the Airlines are required to get their breath-analyzer equipment calibrated from an agency having ISO certification to undertake the calibration activity. It also lays duty of the operator/crew member/maintenance personnel to 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.



3.2 The respondents no 1 and 2 in para-wise reply in the counter affidavit stated that there is no infirmity in the impugned order dated 21.02.2020 as the appeal of the petitioner was disposed of after giving him an opportunity of personal hearing on 29.07.2020. It is submitted that the respondent no.1/DGCA is not an autonomous body but is an attached office of the Ministry of Civil Aviation and is responsible for regulation of Air Transport services to, from and within India and for enforcement of CAR. The provision of CAR dated 01.08.2018 is mandatory and has to be followed without any exception even during unforeseen exigencies as the safety of the passengers is the topmost priority. The petitioner was bound to consult the company doctor regarding his medication as stipulated under Para 4.3.9 of CAR dated 01.08.2018 which prohibits any crew member from consuming any drug/formulation or use any substance like mouthwash or tooth gel which has an alcoholic content and further stipulates that if any crew member is undergoing such medication, he is required to consult the company doctor before undertaking any flying assignment. It is submitted that according to the respondent no.3,



the petitioner did not consult the company doctor before undertaking flying assignment in terms of the CAR. The petitioner allegedly ingested the following medicines namely, Atorvastatin Tb IP 20 mg, Dr. Johns J-2 tooth ache drops along with Codeine Phosphate syrup. It is further stated that as per the Breath Analyzer report of the respondent no. 3, the first BA reading of the petitioner was recorded as 0.030% BAC at 11:31 hrs followed by the control test was conducted to verify the correctness of the reading of the breath analyzer equipment at 11:36 hrs whereby it was established that the breath analyzer equipment was in perfect working condition. Thereafter, the second BA reading was recorded as 0.028 % BAC at 11:46 hrs. The contention of the petitioner that the procedure of the breath analyzer examination was not followed is wrong as the conduct of the control test was verified by a witness, namely, Ms. Aanchal Sharma, which clearly establishes that the instrument was in perfect working condition. The process of the BA test of the petitioner was carried out on 26.01.2020 at Delhi and the same was recorded on CCTV camera and according to procedure, the impugned order dated 21.02.2020



was sent to Chief of Flight Safety of the respondent no.3 by email dated 26.02.2020.

3.3 It is further stated in the counter affidavit that it was the petitioner's second offence, the first being when he tested BA positive during pre-flight BA examination on 22.05.2011 at Delhi while scheduled to operate Jet Airways flight bearing no. 9W 2645 and the license of the petitioner was rightly suspended by the respondent no.1/DGCA for a period of 03 years. CAR stipulates that if a crew member tests positive in breath analyzer test on two different occasions it amounts to a repeat violation irrespective of the type of license the petitioner is holding at the time of BA test. The respondent no.1/DGCA has rightly fulfilled its duty and passed orders in due compliance of CAR and the petitioner's claim is frivolous and devoid of merit.

4. The respondent no. 3 also filed a counter affidavit wherein stated that the petitioner on 26.01.2020 was tested positive for the pre-flight Breath Analyzer test (BA test) before operating the respondent no.3 flight bearing no I5 578 (DEL-CCU). It was the second occasion when the petitioner tested positive for pre-flight



BA test. Accordingly, under such circumstances, the applicable provisions mandate that the petitioner's license shall be terminated/suspended for a period of 03 years and such suspension was effected vide impugned order dated 21.02.2020 issued by the respondent no. 2. The petitioner challenged the impugned order dated 21.02.2020 through an appeal before the respondent no. 1/DGCA which was dismissed vide the impugned order dated 24.09.2020.

4.1 It is further stated that none of the grievances raised by the petitioner pertain to the respondent no. 3 and no relief has been sought by the petitioner against the respondent no. 3. The petitioner has failed to establish a valid cause of action against the respondent no. 3. The petitioner had submitted a representation dated 08.04.2020 to the respondent no. 3 on basis of facts as stated in the present writ petition. The respondent no. 3 had responded by a letter/communication dated 21.05.2020 wherein refuted the assertions made by the petitioner.

4.2 The respondent no. 3, operating as Air Asia (India) Ltd. provides scheduled passenger and cargo services across the



country and the respondent no. 3 lacks the authority to issue or revoke statutory permits/licenses required by pilots, including the petitioner. It is stated that the present petition be dismissed.

5. The counsel for the petitioner advanced oral arguments and argued that the impugned order dated 24.09.2020 passed by the respondent no.1 dismissing the appeal of the petitioner is illegal, arbitrary, unreasonable and unconstitutional being in violation of Articles 14, 16 and 21 of the Constitution of India and the principles of natural justice. The impugned order dated 24.09.2020 was passed in mechanical manner and without application of mind. The impugned order dated 21.02.2020 passed by the respondent no 2 is also in violation of the principles of natural justice as the petitioner was not given reasonable opportunity of being heard. The respondents have not followed procedure as laid down in Civil Aviation Requirements, Section 5, Series F, Part III. It was further argued that CAR provides for conducting a repeat/second test immediately after 15 minutes of the first test which was not conducted in the presence of a witness. In the present case, CCTV footage was not procured or perused to determine the questionability of the presence of witness.



5.1 It was further argued that no control test was conducted to verify the serviceability of the machine which put a question on the credibility of the equipment and the report made by the doctor on duty as mandated under the Civil Aviation Requirement Section 5 Series F Part III. The breath analyzer instrument was not calibrated and results of the said test cannot be relied upon in the prevailing health condition and medicine consumed by the petitioner on account of ill health before the Scheduled flight which led to erroneous findings on the breath analyzer instrument. The Petitioner was tested BA positive for first time nearly a decade ago in the year 2011 on his CPL (Commercial Pilot License) and the case of the petitioner was not a case of repeat violation and his ATPL license does not bear any endorsement/stamp of the past violation. The petitioner was not communicated with the impugned order dated 21.2.2020 was communicated by the respondents. It was argued that the present petition be allowed.

6. The counsel for the respondent no. 1/DGCA advanced oral arguments and submitted written synopsis. It was argued that submitted that the petitioner did not avail remedy of second appeal to



the Secretary under Rule 3B of the Aircraft Rules of 1937. It is further argued that as per the BA report of respondent no. 3, the first reading was recorded as 0.030% BAC at 11:31 hrs and thereafter, the control test was conducted to verify the correctness of the reading of the breath analyzer equipment at 11:36 hrs which established that the breath analyzer equipment was in perfect working condition and thereafter, the second BA test was recorded as 0.028 % BAC at 11:46 hrs. The counsel for the respondents no 1 and 2 countered contention of the petitioner that the procedure of the breath analyzer examination was not followed by arguing that the conduct of the control test was verified by the witness, Ms. Aanchal Sharma which clearly established that the instrument was properly functioning without any malfunction. It was also argued that as per Clause 4.3.9 of the Procedure for Medical Examination of Aircraft Personnel for Alcohol Consumption vide circular dated 04.08.2015, issued by the respondent no. 1/DGCA, the petitioner has not consulted the company doctor if he was unwell and was under medication.

6.1 The counsel for the respondents no 1 and 2 further argued that it was the petitioner's second offence as the first offence was



committed on 22.05.2011 when the petitioner was employed with Jet Airways. Accordingly the petitioner's license was suspended for a period of 03 years, being the petitioner's second offence as per Clause 8.1(b). The counsel for the respondents no 1 and 2 also refuted petitioner's contention that his first offence occurred when he was holding a CPL license and now he holds an ATPL license by arguing that the suspension order is against the individual and does not depend on the type of license. The counsel for the respondent no.1/DGCA placed reliance upon **Capt. S K Kapur V Union of India & others**, (W.P. (C) 7503/2018) and **Capt. Amit Kumar Yadav V Union of India & others**, (W.P. (C) 13716/2018) and argued that the petition be dismissed.

7. The counsel for the respondent no. 3 advanced oral arguments and submitted written submissions. The counsel for the respondent no 3 stated that the respondent no. 3 is an Airline company offering scheduled cargo and passenger services to many destinations around the country and the respondent no. 3 does not have authority to issue or withdraw the statutory permits or licenses required by the pilots. It was argued that the subject matter of the present petition concerns the



issuance, withdrawal, or restoration of the petitioner's ATPL license, which is beyond the purview of the authority of the respondent no. 3.

7.1 The counsel for the respondent no 3 further argued that the condition relating to the medical ailment stated by the petitioner was neither apparent from the conduct of the petitioner nor any kind of intimation or request was sent by him to the respondent no. 3. The Clause 4.3.9 of the Procedure for Medical Examination of Aircraft Personnel for Alcohol Consumption, the circular dated 04.08.2015 issued by the respondent no.1/DGCA makes it mandatory for the crew members to consult the company doctor about the intake of any alcoholic formulation or drug before undertaking the flying assignment but the petitioner did not initiate such consultation. The readings generated by the breath analyzer tests were done by equipment that was perfectly fit for usage and the report of the same also bears the signature of the petitioner. The petitioner's BA readings were 0.030% BAC and 0.028% BAC respectively and it is evident that the petitioner has violated the applicable norms. The petitioner did not intimate about his alleged sickness or medication



which was an afterthought and to mislead this court. It was argued that the present petition be dismissed.

8. Before averting to facts of the case, it is necessary to mention the relevant provisions dealing with situation subject matter of present petition. Rule 24 of Aircraft Rules, 1937 deals with prohibition of consumption of intoxicating and psychoactive substances. It reads 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.

(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.

8.1 The respondent no 1 has prescribed a zero tolerance policy with regard to blood alcohol content as there shall be no detectable blood alcohol in breath, urine or blood alcohol analysis of the crew, therefore, the permissible limit of blood alcohol has been laid down as 0.000. The respondent no 1 issued Civil Aviation Requirements Section-5, Series-F Part-III ensure compliance to Rule 24 of Aircraft Rules, 1937 in exercise of powers delegated under Rule 133A of Aircraft Rules, 1937. The CIVIL AVIATION REQUIREMENTS SECTION 5 - AIR SAFETY SERIES F PART III ISSUE III dated 01.08.2018 deals with procedure to be followed for the breath analyser examination for crew members and aircraft maintenance personnel for consumption of alcohol and actions to be taken by the operators. Para 4.3 provides that the operators/crew members/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. Para 4.3.1 provides that each flight crew member and cabin crew member shall be subjected to pre-flight breath-analyzer examination at first departure airport during flight duty period. Para 4.3.9 provides that no crew member shall consume any drug/formulation or use any substance mouthwash/tooth gel which has alcoholic content. It further provides that any crew member who is undergoing such medication shall consult the company doctor before undertaking flying assignment. Para 5.4 provides that the breath-analyzer equipment shall be calibrated after 10,000 blows/six months from an agency having ISO certification to undertake the calibration activity. It further provides that it shall be the responsibility of the operator to ensure continued serviceability of the breath-analyzer equipment and maintain such record. Para 6.3 provides that before such test, the Doctor/Paramedics/Emergency Medical Technicians (EMT) shall obtain a reading of 0.00 on the instrument and the Doctor/Paramedics/EMT shall also carry out a control test on daily basis. Para 8 deals with enforcement action if pre-flight breath-analyzer tested positive/missed test. Para 8.1(b)



provides 03 years suspension of licence in case of second time breath analyser test is positive.

9. The Coordinate Bench of this court in **Capt. Rahul Panchal V Air India Ltd and another**, W.P.(C) 6604/2021 decided on 15.07.2021 had occasion to deal with the termination letter wherein it was mentioned that the petitioner was found BA positive on the conduct of breath analyzer test on April 22, 2021 and as such the petitioner has consumed alcohol on the said date when the petitioner was scheduled to operate Flight No AI-401. The petition was dismissed with observation that the petitioner being a pilot was operating the plane carrying passengers, who place their trust on the pilot, the conduct being serious, in the facts of this case, the impugned order terminating the contract /employment of the petitioner cannot be interfered with.

9.1 The Madras High Court in **Capt. Monish Chandran V The Government of India and others**, W.P.(C) 7128/2018 in situation where the petitioner possessing ATPL license was found BA positive and was suspended observed as under:-

9. A perusal of the aforesaid would go to show that a person is not supposed to be in the influence of alcoholic drink,



sedative, narcotic or stimulant drug or preparation while conducting himself as a Pilot, Commander, Navigator, Engineer, Cabin Crew or other acting member of the Crew in an aircraft inasmuch as the same is prejudicial for the safety of the persons traveling in an Aircraft. To prevent such person operating the Aircraft a pre flight breath analyser test and also a post flight breath analyser tests are conducted as per the requirement of the CAR. Hence, a person is supposed to undergo pre-flight analyzer test before boarding. If any of the aforesaid persons test positive in pre-flight breath analyser test he is prevented from discharging his duty and thereby the dangers that may occur to the passengers for discharge of such duty in the influence of alcohol and the intoxicant drugs is avoided. The punishment therefore provided for aforesaid persons on being test positive during pre-flight test is lenient than a person who test positive on post flight medical examination. However for 1st and 2nd repeat violation found in pre flight breath analyser more severe punishment are provided as a crew member person appears to have repeated the violation of Requirements of rule 24 (1) of the rules in spite of earlier being tested positive. So far as the pre-flight analyser is concerned on the first occasion, if some one tested positive, his license/approval is required to be suspended for three months as provided in para 8.1 of the CAR and for first repeat violation of the same his license is to be suspended for three years and for second repeat violation, even though, it is preflight positive test his license has to be cancelled.

9.2 The Coordinate Bench of this court in **Capt. S. K. Kapur V Union of India & others**, W.P.(C) 7503/2018 decided on 23.07.2018 and also referred by the counsel for the respondents no 1 and 2 dismissed the petition filed to impugn suspension for a period



of three years in terms of Paragraph 8.2 of the Civil Aviation Requirements issued on 04.08.2015 as the petitioner had tested positive for alcohol in a Pre-flight Breath Analyzer Test conducted on 07.04.2017 at the Delhi Airport.

10. Ms. Anjana Gosain, Counsel for the respondents no 1 and 2 argued that the petitioner did not avail remedy i.e. second appeal to the Secretary under Rule 3B of the Aircraft Rules, 1937. The respondents no 1 and 2 in counter affidavit also stated that the petition is liable to be dismissed as the petitioner has not availed the statutory alternate remedy of second appeal as provided under Rule 3B of the Aircraft Rules, 1937 to challenge the impugned order dated 21.02.2020 passed by the respondent no 2. The availability of an adequate and efficacious alternative legal remedy may be a ground to decline to exercise its writ jurisdiction but the said principle does not apply to the enforcement of fundamental rights. The Supreme Court in **K.K. Kochuni V Sate of Madras**, AIR 1959 SC 725 observed that mere existence of an adequate alternative legal remedy cannot be a good and sufficient ground for throwing out a petition for judicial review. The remedy provided in Article 226 of the Constitution is a



discretionary relief. The Supreme Court in **Union of India V T.R. Verma**, AIR 1957 SC 882 observed that when an alternative and equally efficacious remedy is open to the litigant, he is required to pursue that remedy and not to invoke special jurisdiction of the High Court to issue a prerogative writ. It was further observed that mere existence of another remedy does not affect the jurisdiction of the court to issue a writ.

10.1 The rule of exhaustion of alternative remedy is not absolute and flexibility is practised by the court depending upon facts and circumstances of the case. The existence of an alternative remedy is not regarded as a bar to issue a writ and this is only a self-imposed restriction by the courts on themselves. The petitioner in the present case pleaded violation of his fundamental rights. If the petitioner did not avail statutory remedy by filing the second appeal under Rule 3B of the Aircraft Rules, 1937, it doesn't mean that the present writ is not maintainable. The argument advanced by Ms. Anjana Gosain is without much legal force.

11. The arguments advanced by the respective counsels for the petitioner and the respondents are considered in right perspective.



The counsel for the petitioner argued that CAR provides for conducting a repeat/second test immediately after 15 minutes of First Test which was not conducted in the presence of a witness and in the present case, CCTV footage was not procured or perused to determine the questionability of the presence of witness. The respective counsels for the respondents argued that the first reading was recorded as 0.030% BAC at 11:31 hrs followed by control test which was conducted at 11:36 hrs to verify the correctness of the reading of the breath analyzer equipment which established that the breath analyzer equipment was in perfect working condition and thereafter, the second BA test was recorded as 0.028 % BAC at 11:46 hrs. It was also argued that the conduct of the control test was verified by the witness Ms. Aanchal Sharma reflecting proper functioning of the instrument. It is apparent that the petitioner had undergone a pre-flight Breath Analyzer test as per Civil Aviation Requirements and he was tested BA positive with readings as 0.030% BAC at 11:30 am and second test was carried out after the control test with a reading of 0.00% at 11.35 Hrs and indicated a reading of 0.028% BAC at 11.45 Hrs. It is also apparent that the breath



analyzer equipment was in perfect working condition as reflected from Calibration Certificate dated 09.10.2019 issued by Indu's Creations which is submitted by the respondent no 3 along with counter affidavit and the control test was also verified by a witness namely, Ms. Aanchal Sharma as reflected from Incident Report (BA Positive). The respondent no 3 also submitted CCTV footage of breath-analyzer test of the petitioner along with counter affidavit. Accordingly, arguments advanced by the counsel for petitioner that a repeat/second test was not conducted immediately after 15 minutes of First Test in the presence of a witness and CCTV footage was not procured or perused to determine the questionability of the presence of witness are without any legal and factual force.

11.1 The counsel for the petitioner argued that the case of the petitioner was not a case of repeat violation as the petitioner was tested BA positive for the first time nearly a decade ago in the year 2011 on his CPL (Commercial Pilot License) while ATPL license of the petitioner does not bear any endorsement/stamp of the past violation. The respective counsels for the respondents argued that the petitioner has committed first offence on



22.05.2011 when the petitioner was employed with Jet Airways and offence subject matter of the present petition is second offence committed by the petitioner and accordingly the petitioner's license was suspended for a period of 03 years being the second offence committed by the him as per Para 8.1(b) of the CAR. The respective counsels for the respondents further argued that the suspension order is against the individual and does not dependent on the type of license. There is no force in argument advanced on behalf of the petitioner that the petitioner has not committed repeated violation of CAR as the petitioner was holding Commercial Pilot Licence at time of first default i.e. 22.03.2011 while the petitioner was holding ATPL on 26.01.2020. It is safe to hold that contravention of CAR in testing BA positive during Breath Analyzer is against the individual and is not related to the category of licence and accordingly, the arguments advanced by the counsel for the petitioner is meritless rather arguments advanced by the counsel for the respondents no 1 and 2 deserve to be accepted.



11.2 The counsel for the petitioner also argued that the respondent no 2 passed the impugned order dated 21.02.2020 and the respondent no 1 passed the impugned order dated 24.09.2020 in violation of the principles of natural justice as the petitioner was not given reasonable opportunity of being heard. It was also argued that the impugned orders dated 21.02.2020 and 24.09.2020 are illegal, arbitrary, unreasonable, unconstitutional and are in violation of Articles 14, 16 and 21 of the Constitution of India and the principles of natural justice.

11.2.1 The principles of natural justice involve a procedural requirement of fairness and have become an essential part of any system of administrative justice. Natural Justice is considered to be part of rule of law. The Supreme Court in **Sangram Singh V Election Tribunal Kotah**, AIR 1955 SC 425 observed that none should not be condemned unheard and decision should not be reached behind the back. The Supreme Court in **Maneka Gandhi V Union of India**, AIR 1978 SC 597 emphasized that natural justice is an essential element of the procedure established by law and state action must be right, just and fair and not arbitrary, fanciful and



oppressive. It was held that Article 14 of the Constitution strikes at arbitrariness of state action and ensures fairness and equality of treatment. It was also observed in **Union of India V Tulsi Ram Patel**, AIR 1985 SC 1416 that Article 14 is not creator of principles of natural justice but it is constitutional guardian of Article 14. The Supreme Court in **Mohinder Singh V Chief Election Commission**, AIR 1978 SC 851 observed that the principles of natural justice are bones of a healthy government. The Supreme Court in **Indian Oil Corporation Limited and others V Shashi Prabha Shukla and another**, (2018) 12 SCC 85 observed as under:-

33. (a) public authority in its dealings has to be fair, objective, non arbitrary, transparent and non discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non negotiable prescriptions and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts, etc. Such outrages would clearly be unconstitutional and extinctive of the rule of law which forms the bedrock of the constitutional order.



11.2.2 The petitioner was rostered to operate the flight bearing no I5 578 from Delhi to Kolkata (DEL-CCU) on 26.01.2020. The petitioner had undergone a pre-flight Breath Analyzer test as per Civil Aviation Requirements and was tested BA positive with readings as 0.030% BAC at 11:30 Hrs and second test was carried out after the control test with a reading of 0.00% at 11.35 Hrs and indicated a reading of 0.028% at 11.45 Hrs. Thereafter, the petitioner informed the respondent no 3 vide email dated 27.01.2020 about consumption of medication namely Atrovastatin Tb IP 20mg, Dr Johns J2 tooth ache drops along with Codeine phosphate syrup on the night of 25.01.2020 as fallen sick on 19.01.2020. The respondent no 3 vide email dated 27.01.2020 disagreed with medical condition of the petitioner and stated that the medicines consumed by the petitioner were not advised by the company doctor rather the petitioner also did not plead that he took medicines as per advice of company doctor in compliance of Para 4.3.9 of CAR and this is also argued on behalf of the counsel for the respondents no 1 and 2. The petitioner before passing order dated 21.02.2020 as such has availed a fair and reasonable



opportunity to explain the cause of his BA positive test to the respondent no 3 and also submitted medical prescription. The respondent no 2 vide the impugned order dated 21.02.2020 suspended the license in public interest for a period of 03 years on the ground of repeat violation of CAR. The perusal of the impugned order dated 21.02.2020 reflects that the respondent no 2 while passing impugned order dated 21.02.2020 had taken note that the petitioner who was scheduled to operate flight no. I5-578 (DEL-CCU) on 26.01.2020 was tested positive for alcohol during BA (Breath Analyzer) examination in contravention of CAR and also about past history of the petitioner being tested positive during BA test on 22.03.2011. The respondent no 2 has passed the impugned order dated 21.02.2020 on basis of relevant facts including past history of the petitioner. The respondent no 2 sent the impugned order dated 21.02.2020 to Chief of Flight Safety of the respondent no.3 by email dated 26.02.2020 and the respondent no 3 vide email dated 01.04.2020 terminated services of the petitioner. The petitioner, thereafter, submitted a representation dated 08.04.2020 to the respondent no.3 about his suspension



which was replied by the respondent no 3 rejecting claim of the petitioner. The petitioner preferred a statutory appeal on 15.06.2020 under section 3B, Part I of the Aircraft Rules, 1937 before the respondent no.1/DGCA to challenge the impugned order dated 21.02.2020 passed by the respondent no.2 which was dismissed by the respondent no.1/DGCA vide the impugned order dated 24.09.2020. The perusal of the impugned order dated 24.09.2020 reflects that the petitioner was given personal hearing on 29.07.2020 and the respondent no 1 while passing the impugned order dated 24.09.2020 has considered all relevant facts pertaining to the petitioner. The respondent no 1 at time of passing impugned order dated 24.09.2020 has taken into consideration that the case of the petitioner falls within provision of Para 8.1 (b) of the CAR Section 5, Series-F, Part III, Issue III, Rev 01 dated 01.08.2018; the control test to verify the serviceability and correctness of the breath-analyzer was carried out at 11.36 Hrs and reading was 0.000 which established that breath-analyzer equipment was serviceable and working normal and process of breath-analyzer test of the petitioner was recorded on CCTV



camera; and Para 4.3.9 of CAR Section 5, Series-F, Part-III, Rev 01 dated 01.08.2018 prohibits crew member from consuming any drug/formulation or use any substance mouthwash/tooth gel which has alcoholic content and if any crew member is undergoing such medication, the crew is required to consult the company doctor before undertaking flying assignment. It is established that the respondent no 2 passed the impugned order dated 21.02.2020 and the respondent no 1 passed the impugned order dated 24.09.2020 on relevant consideration and principles of natural justice were fairly followed. The arguments advanced by the counsel for the petitioner are meritless.

12. It is well apparent that the petitioner was rostered to operate the flight bearing no. I5 578 from Delhi to Kolkata (DEL-CCU) on 26.01.2020. The petitioner tested BA positive during pre-flight Breath Analyzer test as per Civil Aviation Requirements Section-5, Series-F, Part-III, Issue-III, Rev 01 with readings of 0.030% BAC at 11:30 am and second test was carried out after the control test with a reading of 0.00% at 11.35 Hrs and indicated a reading of 0.028% at 11.45 Hrs. The breath analyzer equipment was in



perfect working condition as reflected from Calibration Certificate dated 09.10.2019 and the control test was verified by a witness Ms. Aanchal Sharma. The petitioner on previous occasion when serving with Jet Airways was also found BA positive for alcohol during pre-flight Breath Analyzer examination on 22.05.2011. The petitioner informed the respondent no 3 vide email dated 27.01.2020 about consumption of medication namely Atrovastatin Tb IP 20mg, Dr Johns J2 tooth ache drops along with Codeine phosphate syrup in night of 25.01.2020 as fallen sick on 19.01.2020 but the respondent no 3 vide email dated 27.01.2020 informed the petitioner that the medicines consumed by the petitioner were not advised by the company doctor as per Para 4.3.9 of CAR. The respondent no 2 vide the impugned order dated 21.02.2020 suspended license for a period of 3 years on the ground of repeat violation of CAR provisions and has also taken note about past history of the petitioner being tested positive during BA test on 22.03.2011. The petitioner has availed fair opportunity to represent his case before the respondent no 3 to explain cause of being BA positive. The respondent no 2 sent the



impugned order dated 21.02.2020 to Chief of Flight Safety of the respondent no.3 by email dated 26.02.2020. The respondent no 3 vide email dated 01.04.2020 terminated the services of the petitioner. The petitioner submitted a representation dated 08.04.2020 to the respondent no.3 about his suspension which was replied by the respondent no 3 whereby claim of the petitioner was rejected. The petitioner preferred a statutory appeal on 15.06.2020 under section 3B, Part I of the Aircraft Rules, 1937 before the respondent no.1/DGCA to challenge the impugned order dated 21.02.2020 passed by the respondent no.2 which was dismissed by the respondent no.1/DGCA vide the impugned order dated 24.09.2020. The petitioner was given personal hearing on 29.07.2020 by the respondent no 1. The respondents have followed procedure as laid down in Civil Aviation Requirements, Section 5, Series F, Part III.

12.1 International Civil Aviation Organization (ICAO) which is an international body lays down regulations and recommendations relating to civil aviation that every contracting state (including India) is bound to follow. ICAO lays down Standards and Recommended



Practices (SARPs) and Para 1.2.7 of Annex 1 of SARPs prohibits the use of psychoactive substances by license holders. India enacted Rule 24 of the Aircraft Rules, 1937 in tandem with the ICAO recommendation. The respondent no 1 is duty bound to ensure compliance to Rule 24 of Aircraft Rules, 1937 and Civil Aviation Requirements Section-5, Series-F Part-III. The respondent no 1/DGCA has mandated zero tolerance policy with regard to blood alcohol content as there should not be detectable blood alcohol in breath, urine or blood alcohol analysis of the crew and the permissible limit of blood alcohol has been laid down as 0.000 in the CAR. The petitioner at time of flight operation as a pilot was not supposed to be under the influence of alcoholic drink, sedative or stimulant drug which may pose serious threat to the safety of the passengers traveling in an Aircraft. Due to this reason pre-flight breath analyzer test is conducted as per CAR. The petitioner also underwent pre-flight breath analyzer test and tested positive and it was second occasion when the petitioner tested positive. The respondent no 2 acted as per Para 8.1(b) of CAR. The safety of the passengers can never be compromised or diluted and unnecessary



leniency to erring pilot shall be prejudicial to the safety of the passengers.

13. The petitioner is not entitled for relief as prayed for and there is no merit in the present petition. The present petition is accordingly dismissed along with pending application, if any.

DR. SUDHIR KUMAR JAIN
(JUDGE)

JULY 05, 2024
N/AK/ABK