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

+ **W.P.(C) 4990/2021 & CM APPL. 15297/2021**

INDIAN COMMERCIAL PILOTS ASSOCIATION..... Petitioner

Through: Mr. Adit S. Pujari and Ms. Tusharika
Mattoo, Advocates.

versus

DIRECTORATE GENERAL OF CIVIL AVIATION..... Respondent

Through: Ms. Anjana Gosain, Ms. Shalini Nair,
Advocates for DGCA with Mr.
Anand Pandey, DDRI, DGCA.

15 WITH

+ **W.P.(C) 2946/2020 & CM APPLs. 10239-40/2020**

AIR TRAFFIC CONTROLLERS GUILD (INDIA)..... Petitioner

Through: Ms. Khushbu Sahu and Mr. Piyush
Sanghi, Advocates. (M:9899699494)

versus

UNION OF INDIA & ORS Respondents

Through: Ms. Anjana Gosain, Ms. Shalini Nair,
Advocates for DGCA with Mr.
Anand Pandey, DDRI, DGCA.

16 AND

+ **W.P.(C) 5122/2021 & CM APPL. 15692/2021**

AIR TRAFFIC CONTROLLERS GUILD (INDIA)..... Petitioner

Through: Ms. Khushbu Sahu and Mr. Piyush
Sanghi, Advocates.

versus

DIRECTORATE GENERAL CIVIL AVIATION &
ANR. Respondents

Through: Ms. Anjana Gosain, Ms. Shalini Nair,
Advocates for DGCA with Mr.
Anand Pandey, DDRI, DGCA.

Mr. Digvijay Rai and Mr. Aman
Yadav, Advocates for R-2.

CORAM:
JUSTICE PRATHIBA M. SINGH

ORDER
% **05.05.2021**

1. This hearing has been done through video conferencing.
2. All these three petitions relate to the Breath Analyzer Test (*hereinafter "BAT"*) which Air Traffic Controllers (*hereinafter "ATCs"*) and commercial pilots have to undergo prior to joining duty at the airports.
3. In W.P.(C) 4990/2021, vide order dated 27th April, 2021, this Court had sought a report from the Medical Committee formed by the DGMS (Air) on the issues which were raised. Further to the said order, the report from the DGMS(Air), has been received today, wherein the Committee has commented as under:

"2. The following points were drawn at the meeting held at O/o DGMS (Air) and after examination the comments are as under-
(a) Related to continuation of Breath Analyser Test (BA Test) - Keeping in mind the safety of passengers as also the safety of the personnel including the pilots, cabin crew, air traffic controllers etc, complete suspension of BA Test may prove counterproductive and hence not advisable. As a deterrent measure, random test in a day may be conducted by the organisation concerned in alignment with international regulations. It is proposed that random testing may be conducted and the number of tests per day may be decided by DGCA depending on operational requirements both domestic as well as international, and considering the best international practices followed worldwide. The

precautions/safe guards while conducting the BA Test proposed in the DGCA Order No. DGCA-15031/4/2020-DAS dated 27 Apr 21 are appropriate and adequate.

(b) Related to Blood Alcohol Test - Conduct of Blood Alcohol Test is invasive and non-practical in view of the specific requirements of Civil Aviation. Further, protocols related to carriage of the samples and protecting the sanctity of samples is an issue which makes blood tests an unreliable method: Few of the practical problems that may be envisaged are -

(i) The results of the checks would take time and therefore cannot be done prior to a flight i.e. Pre-flight BA test.

(ii) It requires proper blood collection equipment and cold storage facility at airports, alongwith trained manpower, cold chain carriage requirements till delivery at testing laboratory. Also, failure of cold chain may lead to undesirable results of the tested individual.

(iii) Disposal of Bio-Medical Waste generated after collection of samples is itself a long process and may not be feasible at every airport.

Hence, conduct of Breath Analyser Test is the most efficient and more reliable method of detecting alcohol in breath, being used worldwide.

(c) Related to UV Sanitization - Worldwide, it is considered that UV Sanitization is an effective tool to neutralize the viruses, though there are no study reports to confirm the same. Considering the fact that UV Sanitization of various equipments is a

widely adopted practice and neutralization of the viruses by UV Sanitization is claimed by reputed manufacturers and accepted worldwide accordingly, it is considered that UV Sanitizations is effective in neutralizing the COVID-19 aerosols in the BA equipment also.”

4. Ms. Gosain, Id. Counsel, placing the above report on record submits that this document should be read along with order dated 27th April, 2021, which lays down the Compliance protocol of Civil Aviation Requirements Section-5, Series-F, Part-III and Civil Aviation Requirements Section-5, Series-F, Part-IV. As per the said order, the following are the modifications carried out by the DGCA in respect of the number of crew members, cabin crews, ATCs etc. who have to undergo BAT. The same read as:

“ Subject: Compliance protocol of CAR Section-5, Series-F, Part-III and CAR Section-5, Series-F, Part-IV

In view of rising number of COVID-19 cases, the DGCA has reviewed the conduct of B.A. Test of all Aviation personnel and after the approval of competent authority the DGCA order of even number dated 04.09.2020 & 07.09.2020, have been suitably modified and henceforth the employer/organization shall ensure that:

I. 10% of flight crew member and the cabin crew member shall be subjected to random preflight Breath-Analyzer test for entire operation of an Organization of India.

*II. ATCO shall be subject to random Breath-Analyzer test before commencement of duty at each station on daily basis. *

III. For operation of aircraft registered in private category the Pre-flight Medical requirements shall continue as per DGCA-

15011(01)/18/2020-DAS dated 03.12.2020.

The above direction/arrangement is purely a temporary measure in view of COVID-19 and shall be in force till further order and subject to final outcome of WP(C 4990 of 2021, filed before Hon'ble High Court of Delhi by Indian Commercial Pilots Association (ICPA). Till then, the relevant provisions of the CAR shall remain suspended. The restoration of provisions of respective Civil Aviation Requirements on the subject will be reviewed from time to time.

Every aviation personnel who is reporting for duty is required to submit an undertaking in respect of the fact that he/she is not under the influence of alcohol and that he/she has not consumed alcohol/psychoactive substance in last 12 hours from the time of reporting for duty. The undertaking must also contain a warning that in case of violation of the undertaking, strict enforcement action will be taken by DGCA against the individual. The process of submitting undertaking is to be done in presence of medical representative in accordance with CAR. Section 5 Series F Part III & IV respectively and the same shall be captured on CCTV/Camera.

While conducting breath-analyzer test, following precautions/measures shall be taken:

- 1. The doctor/medical personnel/paramedic etc. as authorized under CAR Section 5 Series F Part III & IV shall scan a person for symptoms of COVID-19 disease before carrying out a BA test.
 - a) If any person is detected with COVID symptoms, the person shall be exempted from BA test and be removed from duty. Such person shall**

undergo the required examination and shall return to duty only after having been declared fit. Records are to be maintained for all such cases.

b) Such cases shall not be treated as missed BA case.

2. The person carrying out the test and undergoing the test should ensure hygiene conditions including the following:

a) The person doing the test should use Personal Protective Equipment (PPE) Kit

b) The person undergoing the test should wash their hands before and after BA test or use disposable gloves for handling the BA machine.

c) BA examination room/area should not be crowded

d) Integrity and sanitary condition of BA tubes/mouth piece should be maintained.

e) Before every use, the BA equipment should be sanitized using UV sterilizers.

Further, all organizations shall ensure strict adherence to the COVID-19 protocol issued by the Government of India from time to time while complying with these requirements.

This issues with the approval of Competent Authority. ”

5. Ld. counsel submits that further to the last order the DGCA in fact, obtained data from various airlines. The said data reveals that most of the airlines are conducting testing using breath analysers, which is much higher

than 10% and in some airlines, even close to 30%. The said data, which has been placed on record, is set out below:

“(C) Status of Compliance by various airlines of DGCA order dated 27.04.2021

A single set of crew may operate 4 to 6 flights per day, however, they are tested for using the Breath Analyser Equipment for consumption of alcohol only once before the commencement of flight or series of flights. All airlines have their own set-up at different stations where the crew is based for conduct of BA Test. Data for 28th to 30th April and 1st to 2nd May 2021 is as below:

*(i) **Indigo:** M/s Indigo is the largest airline in the country and it carries out BA test at 26 stations across the country. Average testing is much more than 10% per day. Delhi station has maximum number of crew and on average 200 pilots plus cabin crew (percentage close to 30) are being tested per day (within 24 hours). At some stations, only 1 person is being tested per day.*

*(ii) **M/s Spicejet Ltd.:** M/s Spicejet is the second largest airline in the country and it carries out BA test at 15 stations across the country. Average testing is much more than 10% per day. Delhi station has maximum number of crew and on average 36 pilots plus cabin crew (percentage close to 26) are being tested per day (within 24 hours). At some stations only 1 person is being tested per day.*

*(iii) **M/s Vistara:** M/s Vistara carries out BA test at 10 stations across the country. Average testing is much more than 10% per*

day. Delhi station has maximum number of crew and on average 24 pilots plus cabin crew (percentage close to 15) are being tested per day (within 24 hours). At some stations only 1 person is being tested per day.

(iv) M/s Air Asia M/s Air Asia carries out BA test at 04 stations across the country. Average testing is more than 10% per day. Bangalore station has maximum number of crew and on average 08 pilots plus cabin crew (percentage close to 13) are being tested per day (within 24 hours). At some stations only 1 person is being tested per day.”

6. After placing this data on record, ld. counsel submits that the Committee is of the opinion that it is not feasible to conduct the Blood Alcohol Test. It is submitted that there are adequate precautions taken to clean equipment through UV radiation after every breath analyser test. The percentage of testing has been reduced considerably and the DGCA is also conscious of the well-being of its staff members, as also the passengers who board the airlines. Ms. Gosain, ld. counsel, highlights the fact that India has a zero percent tolerance for alcohol consumption for all the staff and thus, this is the best balance that the authorities can propose, considering the current COVID-19 pandemic.

7. On behalf of the ATCs, Mr. Sanghi, ld. Counsel submits that one of the major apprehensions which the ATCs express is the fact that the BAT is conducted in an enclosed space. The air which is blown into the BAT equipment is, in fact, released out into the open from the other end. Studies by various international agencies, including the WHO and LANCET are

relied upon to argue that it is now established that COVID-19 spreads through aerosols and droplets which are suspended in the air. Thus, the enclosed space makes it extremely vulnerable for the ATCs to undergo the test even if the BAT equipment itself is cleaned after every test. Reliance is also placed upon the judgment of this Court in *Saurabh Sharma v. Sub-Divisional Magistrate (East) & Ors. [W.P.(C) 6595/2020, decided on 7th April, 2021]*. Ld. counsel further submits that the alternative protocols, such as the instruments which are now available and give out test results after taking blood samples within five minutes, ought to be considered by the DGMS (Air).

8. Mr. Pujari, ld. counsel appearing for the commercial pilots, submits that insofar as the ATCs are concerned, the ATCs role is much more important and crucial as they monitor 25 to 50 aircrafts. It is submitted that insofar as ATCs are concerned, the testing is random but for pilots, the testing is 10% and this is discriminatory and violative of Article 14 of the Constitution of India. He further submits that the recommendation of the Medical Committee itself is that random testing should be considered, keeping in mind the best international practices followed worldwide. Ld. counsel submits that in most countries like in the U.S. Australia and U.K., the BAT is not compulsory. The airlines have complete freedom to conduct the testing in the manner they deem fit as the safety of the passengers is upon the airlines. It is only if the pilot or any other crew member is found visibly drunk that the BAT is conducted.

9. Ld. counsel further submits that in most small airports in the country, all airlines use the same room for conducting the BAT and therefore, the density of staff who are tested in the room is quite high. Considering that the

aerosols remain static, there is a great apprehension of persons being contaminated with the Covid-19 virus. He urges the Court that insofar as the airline's data is concerned, the same shows that a large number of pilots and other staff members are being tested and it is not just 10% of the staff which is being tested. Reliance is placed on Rule 24 of the Aircraft Rules, 1937 to argue that the said Rule itself contemplates blood testing.

10. Heard ld. counsel for the parties and perused the report placed on record by Ms. Gosain, ld. counsel, today. A perusal of the comments of the Medical Committee constituted by the DGMS (Air) clearly shows that the said committee itself is of the view that random testing may be conducted, *'in alignment with international regulations'*. In fact, the *'international best practices'* and international regulations which are considered by the Committee and may have been in the Committee's mind have not been spelt out in the report. Insofar as the safeguards are concerned, as mentioned in the document dated 27th April, 2021, the same have been approved by the Committee. However, the percentages mentioned in the said document have been left to the DGCA. The Committee has also commented that a blood alcohol test is not feasible at this point of time in case of ATCs, crew and the pilots. Insofar as UV sanitation is concerned, the Committee has expressed its satisfaction.

11. After hearing the counsel for the parties and considering the data, it is seen that most of the airlines are not currently abiding by the order dated 27th April, 2021. The first direction that this Court thus issues is that all the airlines should strictly abide by the percentage of testing which are mentioned in the 27th April, 2021 order issued by the DGCA. No airline should go beyond the said percentages for the safety of its own cabin crew,

ATCs and pilots. Secondly, the DGMS (Air) has opined that the blood alcohol testing is not possible at this point. On this issue, this Court would not like to substitute its own wisdom as the DGMS (Air) would be the appropriate body who would be aware of the kind of facilities available at the various airports for conduct of testing. Since the same is not found feasible, due to reasons which have been clearly spelt out, this Court accepts the said opinion of the Committee.

12. Coming to the question of international best practices, international regulations and the percentages mentioned in the order dated 27th April, 2021, as also the apprehensions and submissions made today on behalf of the Petitioners, this Court is of the opinion that while directing complete compliance with the order dated 27th April, 2021 till the next date, the DGMS (Air) ought to also consider the following issues:-

- i) Whether the BAT can be conducted in an open area with mobile electrical connectivity so that the spread of Covid-19 through the suspended particles/aerosols in a confined room can be avoided for the safety of the cabin crew, ATCs and pilots?
- ii) Whether the DGMS (Air) approves the percentages mentioned in the order dated 27th April, 2021 or should the same be random for all categories of employees – i.e., ATCs, pilots and cabin crew?
- iii) Whether the cabin crew, ATCs and other personnel who have to undergo the BAT could be first subjected to a rapid antigen test and thereafter be made to undergo the BAT?
- iv) Whether the percentages need to be changed and if so, to what extent.

13. Let a further report be submitted by the DGMS (Air) at least one day

before the next date of hearing.

14. In the meantime, the percentage of testing and other directions as contained in the order dated 27th April, 2021 shall be adhered to by the airlines. It is again emphasised that all staff of the Airlines, including ATCs, cabin crew and the pilots, would be bound to give the undertakings and the declarations, in respect of having not consumed alcohol in terms of the applicable regulations, failing which, they could be re-rostered and strict action would be liable to be taken against them.

15. Let the report be circulated by 10th May, 2021.

16. List on 11th May, 2021.

PRATHIBA M. SINGH, J.

MAY 5, 2021/dk/T