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

Date of Decision: 11th May, 2021

+ **W.P.(C) 2946/2020 & CM APPLs. 10239/2020, 10240/2020**

AIR TRAFFIC CONTROLLERS GUILD (INDIA) Petitioner

Through: Ms. Khushbhu Sahu & Mr. Piyush Sanghi, Advocates. (M- 9899699494).

versus

UNION OF INDIA & ORS Respondents

Through: Ms. Anjana Gosain & Ms. Shalini Nair, Advocates with Mr. Anand Pandey, DDRI (DGCA) & Mr. Manish Kumar, Deputy Director General (DGCA).

Mr. Sonal Kumar Singh and Mr. Rajat Dasgupta, Advocate for R-3.

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WITH

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

AIR TRAFFIC CONTROLLERS GUILD (INDIA) Petitioner

Through: Ms. Khushbhu Sahu & Mr. Piyush Sanghi, Advocates.

versus

DIRECTORATE GENERAL CIVIL AVIATION & ANR.

..... Respondents

Through: Ms. Anjana Gosain & Ms. Shalini Nair, Advocates with Mr. Anand Pandey, DDRI (DGCA) & Mr. Manish Kumar, Deputy Director General (DGCA).

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

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AND

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

INDIAN COMMERCIAL PILOTS ASSOCIATION Petitioner

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

versus

DIRECTORATE GENERAL OF CIVIL AVIATION Respondent

Through: Ms. Anjana Gosain & Ms. Shalini
Nair, Advocates with Mr. Anand
Pandey, DDRI (DGCA) & Mr.
Manish Kumar, Deputy Director
General (DGCA).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

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 *WP(C) 2946/2020* the case of the Petitioner, which is the representative association of the ATCs working under the Airport Authority of India (*hereinafter*, "AAI"), is that on a random basis 10% of the ATCs are subjected to the BAT which uses equipment that could result in the spread of the COVID-19 virus. It was thus submitted that the use of the current equipment for conducting the BAT is prejudicial to the interests of the ATCs, especially during the COVID-19 outbreak. In the said petition, vide order dated 23rd March 2020, this court had, as an interim measure, suspended the use of BATs until further orders, and had also tendered an

assurance from all ATCs that they would provide a self-declaration that they would not report to duty under the influence of alcohol, as per the prevalent regulations. The court had also directed the constitution of a technical committee under the DGMS(Air) and had sought a report. The interim order was thereafter modified vide order dated 3rd September 2020, after considering the report of the Committee. The writ petition was however pending.

4. **WP(C) 4990/2021** was recently filed by the Indian Commercial Pilots Association owing to the recent spurt of Covid-19 infections that have been witnessed in India. The Petitioner sought exemption for commercial pilots, from undergoing the BATs as mandated under Section 5- Air Safety, Series F Part III Issue III- 4th August 2015 (as modified vide Order bearing No. DGCA 15031/4/2020- DAS dated 04.09.2020) of the Civil Aviation Requirements Regulation identified as F. No. AV 1501I/2I/2010-AS, issued by the Director General of Civil Aviation (*hereinafter, "DGCA "*) The petition also prayed for reinstatement of the interim order dated 23rd March 2020 in **WP(C) 2946/2020**.

5. **WP(C) 5122/2021** is the third petition filed by Air Traffic Controllers guild, seeking immediate halt on the administration of the BAT, which could increase their chance of contracting COVID-19. On 3rd May, 2021, when this matter was listed for the first time, the court reiterated its interim order dated 23rd March 2020 in **WP(C) 2946/2020** in which directions were given when the pandemic had broken out in 2020, and DGMS(Air) was asked to explore alternatives to BAT. Since then, all three petitions are being taken up together.

6. 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 in the petition. Further to the said order, the report from the DGMS (Air), was received, 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.”

7. On 5th May, 2021, after perusing the report of the DGMS (Air) and the Committee, the following directions were issued by this court, and a further report was called for:

“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.”

8. Pursuant to the said directions, the DGMS (Air) has, today, submitted a report. As per the said report, the queries put to the DGMS (Air) have been answered as under:

“In compliance to directions issued by Hon’ble Delhi High Court dated 05 May 2021, the following issues were framed with regard to Breath Analyzer Test of Aviation Personnel such as Pilots, Cabin Crew, ATCOs etc. by the Medical Committee taking into consideration various relevant Government of India Guidelines issued from time to time:-

(i) Whether the BAT can be conducted in 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?

Conducting the BA test in a well-ventilated environment will reduce the risk of spread of COVID-19. However, BA testing has to be conducted as per the procedure laid down in the DGCA regulations issued from time to time. DGCA regulations mandates that the Breath-analyzer examination shall be recorded on camera and the same shall be preserved for six months. Open areas, satisfying this requirement as well as other requirements like ensuring adequate privacy may be utilised as far as possible at all the airports. If the same is not possible, then, the BA testing room should be well ventilated and sanitised after every test. DGCA may consider issuing appropriate directions on this issue in consultation with the airport operator and airlines.

(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?*

As has been mentioned in the previous report of the Medical Committee, only random BA testing may be conducted. This random BA testing should be conducted for pilots, cabin crew, ATCOs and other stakeholders. The quantum of random testing or the percentage of BA test may be decided by the DGCA, being in full knowledge of the operational requirements.

(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?*

The use of Rapid Antigen Test is subject to the guidelines issued by the ICMR and respective State Governments. RAT before BA Testing for the crew would lead to longer wait times and consequent overcrowding at the BA testing area, defeating its very purpose of preventing the spread of COVID-19 infection. Moreover, the negative RAT does not always confirm that the tested individual is not infected. Hence, pre-screening of the crew with RAT is not a practical proposition.

(iv) *Whether the percentages need to be changed and if so, to what extent.*

As mentioned in para "ii" above, quantum or the percentage of BA test may be decided by the DGCA being aware of the operational requirements of the airlines. However, keeping in view the present

COVID-19 pandemic, the number of BA tests conducted per day may be kept at a level that ensures balance between passengers' safety and safety of the crew undergoing BA test."

9. Ms. Gosain, Id. Counsel appearing for the DGCA, submits that as per the said report, an attempt shall be made in all the airports, to conduct the Breath Analyzer test in an open area, as far as possible. Even in places where testing in the open area is not possible, it shall be ensured that the room where the testing is done, shall be sanitized after each test is undertaken. She submits that in addition, the DGCA has taken a decision, to the effect that not more than 6 persons shall be tested in one hour. She further submits that insofar as the percentages are concerned, that for ATCOs - the testing would be random, for pilots and cabin crew - the testing would be random, with a maximum of 8 to 10% of the personnel being tested.

10. Insofar as the Rapid Antigen Testing is concerned, she submits that the DGMS (Air) is of the opinion that it may create a longer waiting time and hence could create overcrowding. Therefore, the same may not be required. In accordance with the report of the DGMS (Air), she further submits that the DGCA itself is conscious of the interest of its personnel, as also the passengers. Subject to the undertaking given by all the personnel, the testing shall be only as much as is required and in terms of the DGCA protocols as submitted above.

11. Mr. Sanghi, Id. Counsel appearing for the Petitioners in the two writ petitions, submits that the Breath Analyser test ought to be conducted in an open area so that the safety of the ATCOs is taken care of.

12. Mr. Pujari, Id. Counsel appearing for the commercial pilots submits

that the cap on the personnel to be tested should be reduced to 5% instead of 8%. He also refers to the testing rooms in some airports. A photograph of Surat airport is shown to the Court today, to show that the space available is very congested and hence, there is a chance of overcrowding. He accordingly submits that the DGCA should publish the revised protocol in a comprehensive manner, so that it is duly adhered to in all the airports across the country.

13. After hearing all the Petitioners and the DGCA, it is clear that the two reports of the DGMS (Air) also do not recommend heavy testing through Breath Analyser method, owing to the prevalent circumstances. The blood alcohol test has been rejected by the Committee and this court would not like to substitute its judgement over the same. There is however no doubt that testing for alcohol cannot be completely exempted in as much as the same could be detrimental to passenger safety. While maintaining a balance between the interest of the personnel as also passengers, directions would have to be issued. Keeping in mind both the reports of the DGMS (Air) and the submissions of the parties, the following directions are accordingly issued.:

- (1) All the personnel shall be bound to give an undertaking and a declaration that they have not been exposed to alcohol consumption in the last 12 hours before duty, in terms of the DGCA's applicable regulations. The said undertakings and declarations would be compulsory for all personnel.
- (2) After the undertakings are given, insofar as the administration of the Breath Analyser test is concerned, the doctor and any other paramedic/nursing personnel on duty, would take a Rapid

Antigen Test prior to joining the duty, in the testing area, to ensure, as far as possible, that they do not have COVID-19 and they are also not likely to transmit it, being asymptomatic.

- (3) The DGCA shall direct that the Breath Analyser test at all airports would to the extent feasible be conducted in a much bigger and an open area, which has CCTV coverage and not in a small enclosed space, as shown in the photograph today. This would ensure that the exposure of aerosoles is also reduced for the personnel, who are tested.
- (4) The testing shall be random for all personnel i.e. ATCs, pilots, cabin crews and other personnel. However, insofar as the pilots and cabin crew are concerned, there will be a 5% cap on the number of personnel who are tested, for a period of 3 months. The same can be revised by the end of 3 months, depending upon the prevalence of COVID-19 pandemic.
- (5) Insofar as the testing area is concerned, as submitted by Id. Counsel for DGCA, not more than 6 personnel shall be tested within the duration of one hour.
- (6) The testing equipment shall be subjected to UVCA radiation, as per the protocols already prescribed by the DGCA, which were considered by the Committee appointed by DGMS (Air).

14. Keeping in mind the above directions, the DGCA shall issue a comprehensive guideline/order urgently, which contains all the requirements and the protocols to be followed for administration of Breath Analyser Test, in one document. The said order shall be communicated to all the airports and the airlines, across the country to be adhered to uniformly.

15. It is again emphasised that the staff of airlines, including ATCs, pilots and cabin crew, would be bound to give undertakings and declarations. in respect of not having consumed alcohol, in terms of the applicable regulations, failing which strict action would be taken including off-rostering and suspension, in accordance with the applicable rules.

16. The report by the DGMS (Air) which has been filed today with the Court Master shall be placed on record by Ms. Gosain by filing it in the Registry.

17. With these observations, all the three petitions, along with all pending applications, are disposed of.

18. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigant.

MAY 11, 2021/dk/Ak

**PRATHIBA M. SINGH
JUDGE**

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