

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

% **Date of decision: 5th September, 2018.**

+ **W.P.(C) 3573/2017, CM No.2127/2018 (for stay) & CM No.4951/2018 (for direction/recall of order dated 27th April, 2017).**

LT COLONEL VINEET MEHTA

..... Petitioner

Through: Mr. Mohan Kumar and Mr. Abishek Sarvaria, Advs.

Versus

THE ESTATE OFFICER AND ORS

..... Respondents

Through: Mr. Vikram Jetly, CGSC with Col. A. K. Singh, SO (Legal).

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Articles 226 and 227 of the Constitution of India impugns the order [dated 29th March, 2017 in PPA No.10/2016 of the Court of the Additional District Judge-01 (South-West) acting as Appellate Officer under Section 9 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (PP Act)] of dismissal of appeal preferred by the petitioner against the order dated [6th October, 2012 of the respondent no.1 Estate Officer, Delhi Military Station] of eviction of the petitioner under Section 5 of the PP Act from House no.4, Tigris Road, Delhi Cantt.

2. This petition came up first before this Court first on 25th April, 2017 when it was adjourned to 27th April, 2017 when the following order was passed:-

“1. Learned senior counsel for the petitioner submits on instructions that the petitioner is restricting his claim in this writ petition only to the recovery of the penal rent by the respondents.

2. *Learned standing counsel for Central Government submits on instructions from Col. Neeraj Mohey, OIC, Legal Cell, Delhi High Court (Army) present in Court that the penal rent is recoverable by Military Engineering Services and Controller of Defence Accounts and as per his information, the penal rent has not yet been calculated.*

3. *On the oral prayer on behalf of the petitioner, respondents No.1 to 4 are deleted from the array of parties and Military Engineering Services and Controller of Defence Accounts are impleaded as respondents No.1 and 2. Let the amended memo of parties be filed within one week.*

4. *Issue notice to newly added respondents No.1 and 2 on the limited issue as to whether there is any infirmity in the respondent's claim for recovery of penal rent against the petitioner. Learned standing counsel accepts notice on behalf of respondents No.1 and 2.*

5. *Let the counter affidavit along with the computation of the penal rent recoverable from the petitioner be filed within a period of 8 weeks. Rejoinder within four weeks thereafter.*

6. *List on 30th August, 2017.*

7. *The petitioner's case on merits shall be considered after the computation of the penal rent is placed on record. Since the respondents have not yet even calculated the penal rent and the respondents are likely to take about 8 weeks to calculate the amount, the respondents shall withhold any coercive action against the petitioner to recover the penal rent till the next date of hearing.*

8. *The relevant official records be kept available by the respondents on the next date of hearing.*

9. *The record of the Appellate Court be requisitioned before the next date of hearing.*

10. Copy of this order be given dasti to counsels for the parties under signature of Court Master.”

3. The petitioner filed CM No.19083/2017 for modification of the order dated 27th April, 2017 and which came up before this Court on 19th May, 2017 when notice thereof was ordered to be issued. The respondents filed a counter affidavit. The application of the petitioner to restrain the respondents from recovering penal rent from the petitioner was dismissed on 30th August, 2017 observing, that the respondent Estate Officer till then had not determined the penal rent under Section 7(3) of the PP Act; liberty was however granted to the petitioner to approach the Court after the said determination and the proceedings under Section 7 of the Act before the Estate Officer were made subject to outcome of the petition. On 8th February, 2018 it was informed that the proceedings under Section 7 of the Act before the Estate Officer were listed on 10th February, 2018; observing, that the proceedings before the Estate Officer be continued and the final order along with relevant record be produced before this Court on 3rd May, 2018, this petition was adjourned to 3rd May, 2018.

4. The petitioner preferred LPA No.242/2018 against the order dated 8th February, 2018 and which has been disposed of vide judgment dated 11th May, 2018 of the Division Bench of this Court.

5. The petitioner has filed another application, being CM No.4951/2018, for recall of the order dated 27th April, 2017.

6 Today, the counsel for the respondent Estate Officer at the outset states that this petition has to be disposed of in terms of judgment dated 11th

May, 2018 supra of the Division Bench.

7. The counsel for the petitioner opposes and contends that the judgment dated 11th May, 2018 of the Division Bench nowhere disposes of the writ petition.

8. It is appropriate to reproduce the relevant paras of the judgment dated 11th May, 2018 of the Division Bench. The same are as under:-

“1. This Letters Patent appeal challenges the order dated 08.02.2018 of a learned Single Judge in WP(C) 3573/2017. The appellant had in the writ petition assailed the judgment dated 29.03.2017 passed by the ld. ADJ-01 (South-West) on an appeal preferred under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereafter 'the Act') against the eviction order (dated 06.10.2012) by the Estate Officer under Sub-Section (1) of Section 5 of the Act in respect of the premises no.4, Tigris Road, Delhi Cantt (hereafter 'the subject premises').

2. The relevant facts are that the appellant, an Army Officer, was allotted the subject premises a regular married accommodation for residential purposes by letter dated 30.04.2008. On 19.04.2011, he was posted out to field area Mtn. Div. Ord. Unit, Tenga Valley, Arunachal Pradesh. At that time the appellant got himself registered for allotment of Field Area Family Accommodation (hereafter 'FAFA') w.e.f. 22.07.2011. During the period of his posting with 5 Mtn. Div. Ord. Unit, he met with an accident in April, 2012 and it appears on that account, he was given temporary attachment with HQ., Delhi area. In July, 2012 the appellant was transferred to Kanpur, a peace area and was to join there by 03.09.2012. On 01.09.2012, he was however given permanent posting to 57 Mtn. Div. Ord. Unit C/o 99 APO. He states that resultantly he was entitled to FAFA. Before his such joining either in the field area posting at Kanpur or 57 Mtn. Div. Ord. Unit,

J&K/Assam, the allotment of the subject premises in his favour was cancelled w.e.f. 06.07.2012, on the premise that the rules did not permit retention of regular married accommodation after allotment of FAFA which, according to the respondents, was made earlier. The order of cancellation led to issuance of the notice under Section 4(b)(ii) of the Act. The notice was resisted by the appellant, who disputed the receipt of the communication allotting FAFA to him besides, relying on his medical issue on account of accident he suffered in April, 2012. Not satisfied with the reply, proceedings were initiated by the Estate Officer under Sub-Section (1) of Section 5 of the Act which culminated into an eviction order on 06.10.2012. Against that order, the appellant preferred an appeal under Section 9 of the Act, which was dismissed on 29.03.2017. The appellant was evicted from the subject premises on 07.04.2017. The order of the District Judge was thereafter challenged by way of the writ petition out of which the present appeal arises. The appellant has challenged the order dated 08.02.2018 passed by the learned Single Judge in WP(C) 3573/2017 as well as the order dated 16.04.2018 passed by the Estate Officer under Sub-Section (1) of Section 7 of the Act.

3. The claim in the writ petition filed against the eviction order passed under Section 5(1) was restricted only to the recovery of penal rent/damages. A statement to that effect was made by the Counsel before the learned Single Judge on 27.04.2017. It appears that such a position was on the assumption that the appellant was not an unauthorized occupant. The writ petition was therefore kept alive awaiting the outcome of the proceedings under Section 7 of the Act. An order under Section 7(3) of the Act was passed by the Estate Officer on 16.04.2018. Questioning the order dated 08.02.2018 passed by the learned Single Judge, the appellant has also challenged the order of the Estate Officer under Section 7(3) of the said Act in the present appeal.”

Thereafter, the order dated 8th February, 2018 supra was reproduced and thereafter the Division Bench *inter alia* observed/held as under:-

“A bare perusal of the foregoing impugned order of the learned Single Judge shows that it merely records proceedings of the day rather than recording any finding or issuing any direction to the appellant, of which, he could feel aggrieved of and resort to an appeal. This Letters Patent Appeal to that effect is wholly misconceived and untenable. It is equally surprising to note that in the appeal, a challenge is made to an order passed by the Estate Officer under Section 7(3) of the Act.

5. Mr. Luthra, learned Senior Counsel could not dispute that a direct challenge to an order passed by the Estate Officer under Section 7(3) of the Act in an appeal of the present nature, was plainly untenable. Section 15 of the Act bars the jurisdiction of a Court to entertain any suit or proceeding inter alia in respect of the arrears of rent payable under Section 7(1) or damages payable under Section 7(2) of the Act. It is in that context only, the order under Section 7(3) of the Act was passed by the Estate Officer on 16.04.2018 and which is sought to be challenged in the instant appeal. Recourse to Article 226 ipso facto would not be tenable, as an appellate remedy is available under the statute. We have therefore no hesitation to say that the challenge to the eviction order having been urged and not pressed, any adjudication on the order passed by the Estate Officer under Section 7(3) of the Act in exercise of the extraordinary jurisdiction of this Court was not called for. Suffice to say, the legal recourse against the order dated 16.04.2018 passed by the Estate Officer under Section 7(3) of the Act would be as provided for under Section 9 of the Act.

6. Having commented on the untenability of a direct challenge to an order under Section 7(3) in this appeal or under Article 226, without seeking recourse to an appeal

under Section 9, this Court notes that undisputedly, the appellant was allottee of the subject premises and which was cancelled; an eviction was passed by the Estate Officer. The appellant came to be evicted before the filing of the writ petition. It is well settled that the owner of the public premises has the absolute right to terminate the lease or cancel the allotment.”

Thereafter certain paragraphs of ***Dr. K.R.K. Talwar Vs. Union of India*** ILR (1977) 1 Del 138 were reproduced and it was held as under:-

“7. Though, the scope of Article 226 of the Constitution of India is cast in wide terms, the interference in exercise of such jurisdiction is very limited. In the present case, the challenge to the eviction order, which was the foundation of the writ petition, having been not pressed, the Court sees no justification for awaiting an order to be made under Section 7 of the Act and then adjudicate thereupon in the exercise of such jurisdiction under Article 226 of the Constitution of India. This is particularly so, in view of Section 9 of the Act. From which date, the appellant should be treated to be an unauthorized occupant and what should be the penal rent/damages leviable is however a subject, in given facts and circumstances, we consider, should be left open to be considered by the concerned Court, in the event, the appellant challenges the order dated 16.04.2018 passed by the Estate Officer under Section 7(3) of the Act. That right and liberty is preserved and kept open. In case the appellant prefers an appeal under Section 9, all his rights and contentions including as to what ought to be the date of commencement of damages, and its quantum, are kept open.

8. The appeal stands disposed off in the foregoing terms. All the pending applications also stand disposed off.”

9. I have enquired from the counsel for the respondent Estate Officer, whether not once this petition is disposed of, the finding in

the impugned order, of the petitioner being in unauthorised occupation, will attain finality, also affecting the liability of the petitioner under Section 7.

10. The counsel for the respondent Estate Officer draws attention to para 7 of the judgment of the Division Bench reproduced above, which *inter alia* records that ‘from which date the petitioner should be treated to be in unauthorised occupation and what should be the penal rent/damages leviable is a subject to be considered in the event the petitioner challenges the order dated 16th April, 2018 passed by the Estate Officer under Section 7(3) of the Act’. It is also informed that the proceedings before the respondent Estate Officer under Section 7 of the Act have culminated in the order dated 16th April, 2018 of the respondent Estate Officer and it is further informed that the petitioner has already preferred an appeal before a District Judge under Section 9 of the Act against the said order and which is pending consideration.

11. The counsel for the petitioner has contended that the District Judge has not followed the procedure prescribed by law for decision of the appeal under Section 9 of the Act against the order under Section 5 of the Act and has sought to draw attention to certain provisions in this regard.

12. I have considered the controversy.

13. A reading of the judgment aforesaid of the Division Bench does indeed show that the Division Bench has interpreted the statement of the counsel for the petitioner/appellant on 27th April, 2017, as recorded in para

1 of that order reproduced above, as amounting to the petitioner giving up the right to challenge the finding, of the petitioner being in unauthorised occupation and being liable to be evicted. The Division Bench is also found to have limited the scope of enquiry in the appeal before the District Judge against the order under Section 7 of the Estate Officer, only to, the date from which the possession of the petitioner became unauthorised and the correctness/validity of the rate at which the respondent Estate Officer has determined the damages. The Division Bench has not only held appeal preferred before it to be not maintainable but also held resort to Article 226 of Constitution of India to be also not available before exhausting remedy of appeal under Section 9 of the PP Act against the order under Section 7 of the Act.

14. The counsel for the respondent Estate Officer is thus found to be right in the contention, that this petition is to be disposed of in terms of judgment dated 11th May, 2018 of the Division Bench. The pleas, as urged by the counsel for the petitioner, of the learned District Judge, in deciding the appeal against the order of eviction under Section 5 of the PP Act, having not followed the prescribed procedure, are now no longer open to the petitioner.

15. As far as the contention of the counsel for the petitioner, of the Division Bench having not expressly disposed of the writ petition, is concerned, merely because the Division Bench has not expressly said so cannot take away the effect of what has been said. Moreover, the petitioner also is not challenging his eviction or seeking repossession of the premises from which he has already been evicted. The only challenge now is to the

liability if any of the petitioner for damages/penal rent under Section 7 of the PP Act and rights of the petitioner in which regard have been protected by the Division Bench.

16. As far as the applications filed by the petitioner before this Court, for modification/recall of the order dated 27th April, 2017 are concerned, again, once the Division Bench in appeal arising from an order in this petition has pronounced on the premise of what is recorded in the order dated 27th April, 2017, it is not in the jurisdiction of this Bench to now modify or recall the order, on the premise of which the Division Bench pronounced. It was for the petitioner to urge before the Division Bench that its application was pending or that he intended to file application for recall of the order dated 27th April, 2017. Judicial propriety does not permit this Bench to so pull the rug on which the order of Division Bench stands.

17. The petition is thus disposed of in terms of the judgment dated 11th May, 2018 of the Division Bench.

No costs.

Dasti under signature of Court Master.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 05, 2018

‘pp’..