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

+ **LPA 785/2017**

HEMANT KUMAR

..... Appellant

Through: Mr.Anirudh Sharma, Mr.Abhaid
Parikh and Mr.Girish Kumar,
Advocates.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr.Sangita Rai, SCGC for R-1/UOI.
Mr.Sandeep Mahapatra, Advocate for
R-2 to R-5.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

03.12.2018

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Dr. S. Muralidhar, J.:

1. This is an appeal directed against the order dated 12th October, 2017 passed by the learned Single Judge dismissing the writ petition (C) 8942/2017.

2. The background of the writ petition before the learned Single Judge was that the Appellant, an employee of the Respondent No.2 Oil and Natural Gas Corporation Ltd. (ONGC), had been allotted a flat in terms of such employment at NOIDA. While he was still under occupation of the said flat, a matrimonial dispute arose between him and his wife. While those proceedings were pending, on 22nd May, 2015 the Appellant was transferred

to Mumbai where he is presently posted.

3. The Appellant's wife, however, continued to remain in the premises at NOIDA. According to the Appellant, after receiving the relieving order from ONGC, he surrendered the afore-mentioned flat, which however continued to be occupied by his wife.

4. In a civil suit filed by his wife against the ONGC seeking to restrain the ONGC from evicting her from the premises, his wife gave an undertaking on 6th June, 2015 that she would vacate the premises on or before 29th June, 2015 on the condition that the Appellant should deposit Rs.30,000/- in her account and further should agree to pay her Rs.10,000/- per month as rent. According to the Appellant, despite his complying with the aforementioned consent order, his wife did not vacate the flat.

5. On 23rd March, 2016, an interim order was passed by the Mahila Court in the proceedings which were instituted by the wife of the Appellant under the provisions of Domestic Violence Act directing the Appellant to pay a sum of Rs.10,000/- per month as interim measure. The said order also restrained him from visiting his wife in the said premises.

6. At this point, ONGC issued a letter dated 18th May, 2016 to the Appellant pointing out that vacant possession of the premises had still not been handed over and as such penal rent at twice the admissible HRA plus 15% would be payable. The Appellant first filed Writ Petition (C) 4683/2016 in this Court, which was dismissed on 20th May, 2016 on the ground that he had already

filed a civil suit seeking a mandatory injunction against his wife to hand over the vacant physical possession of the flat in question to the ONGC. A separate Writ Petition (C) No.6357/2016 was then filed by the Appellant questioning the letter dated 18th May, 2016 and seeking an order to restrain ONGC from recovering any penal rent from him.

7. Writ Petition (C) No.6357/2016 was disposed of by the learned Single Judge of this Court by order dated 2nd February 2017 holding that there was no law or rule of the employer by which the license fee would cease to be payable merely on handing over the nominal possession without handing over the actual vacant physical possession of the said flat. A direction was issued to ONGC to issue a notice to the Appellant's wife to vacate the licensed premises and then take possession if necessary with police assistance. In effect, the Appellant's plea that he should not be charged penal rent was rejected by the learned Single Judge.

8. Aggrieved by the order of the learned Single Judge, the Appellant filed LPA No.160/2017. During the pendency of this LPA, an order was passed on 1st March, 2017 in a separate LPA filed by the wife of the Appellant challenging the same order dated 2nd February, 2017 of the learned Single Judge. In the wife's LPA No.147/2017, the Division Bench (DB) of this Court, though reluctant, granted her time to vacate the premises as "last indulgence". This was for a period of 15 days and subject to her filing a written undertaking within two days agreeing to hand over vacant physical possession of the premises to the ONGC.

9. Thereafter, on 15th March, 2017, pursuant to the above undertaking given by her, the Appellant's wife handed over the vacant possession of the premises to ONGC.

10. The Appellant's LPA No.160/2017 thereafter came up for hearing before the DB of this Court. On 22nd March, 2017 the following order was passed in the said appeal:

“After some hearing, learned counsel for the appellant seeks permission to withdraw the present Letters. Patent Appeal and states that he would like to challenge the Rule relating to the penal rent and rate of penal rent.

In view of the statement made, the appeal is dismissed-as withdrawn with liberty to the appellant to file appropriate proceedings challenging the clause relating to penal rent and the quantum of penal rent as specified in the office order dated 5th December, 2011 relating to allotment of residence/instructions”.

11. Thereafter, an application being C.M.No.17526/2017 was filed by the Appellant for clarification of the above order dated 22nd March, 2017 to the effect that the said order would not preclude the Appellant from “challenging any other rule of the ONGC” other than those concerning penal rent/quantum of penal rent. By an order dated 16th May, 2017, the DB dismissed the application by observing that the Appellant was “merely seeking to re-argue the appeal even after withdrawing the same on 22nd March, 2017” and that the said order “is absolutely clear and does not call for modification or clarification”.

12. Thereafter, the Appellant filed writ petition (C) 8942/2017 which was

dismissed by the learned Single Judge by the impugned order dated 12th October, 2017, basically on two grounds:

(i) The dismissal of the earlier writ petition of the Appellant by the learned Single Judge had attained finality. It was held that the DB in its order dated 1st March, 2017 in the wife's LPA No.147/2017 had observed that ONGC would be entitled to charge rental for the 15 day period. Therefore, according to the learned Single Judge, "even the asking of payment of license fees as per rules had been settled by the Court and the issue cannot be reopened on the ground that the vires of the rule had been challenged".

(ii) The writ petition filed by the Appellant had been dismissed which has put stamp of approval on the issue of recovery of penal rent by the ONGC, the challenge to vires of the rules shall be mere academic.

13. This Court has heard the submissions of learned counsel for the parties.

14. In the light of the facts set out hereinbefore, it appears to the Court that the observations by the learned Single Judge in the impugned order that the earlier order of the learned Single Judge disposing of the Writ Petition (C) No.6357/2016 filed by the Appellant had attained "finality" is not based on a correct understanding of the subsequent order dated 22nd March, 2017 of the DB. A perusal of the said order dated 22nd March, 2017 of the DB would reveal that no opinion was expressed by the DB on the merits of the matter in view of the fact that the Appellant sought leave to withdraw the appeal reserving liberty to challenge the rules on the basis of which the penal

rent/license fees was being charged from him. Liberty was granted by the DB to the Appellant to challenge both the vires of the rules which formed the basis for the penal rent and also the quantum of the penal rent. In the considered view of the Court, the challenge by the Appellant to the earlier order of the learned Single Judge was, therefore, kept alive by the DB and it was not rendered 'academic'.

15. Since the penal rent itself was based on the rules of the ONGC and a challenge was permitted to those rules, the logical consequence would be that if the Appellant succeeded in the challenge to the vires of the rules, then obviously the penal rent itself will have to be struck down as the very basis for challenging the penal rent would vanish. However, conversely, if the Appellant fails in such a challenge, then the ONGC's order for recovering the penal rent from the Appellant would stand affirmed. Therefore, the entire question of the justification for ONGC to levy penal rent was in a sense kept open and was required to be re-examined in light of the challenge by the Appellant to the vires of the very rules on the basis of which the penal rent was being levied. Therefore, on both counts that the earlier judgment of the learned Single Judge had attained finality and that the challenge to the rules would be merely academic, this Court is unable to agree with the learned Single Judge.

16. Learned counsel for the ONGC repeatedly urged that the earlier judgment of the learned Single Judge upholding the order issued by the ONGC for recovery of penal rent would preclude the Appellant from re-opening that challenge. He referred to the judgment of the Supreme Court in

Secretary ONGC Ltd. v. V.U. Warriar (2005)5 SCC 245 where the Supreme Court was looking into the validity of an order passed by the ONGC, seeking to recover penal rent from the gratuity paid to an employee.

17. For the reasons already explained, this Court is unable to accept the plea of the ONGC that the earlier judgment of the Single Judge dated 2nd February, 2017 disposing of the Appellant's Writ Petition (C) No.6357/2016 has attained finality and cannot be reopened. If such a plea was to be accepted, the DB's order dated 22nd March, 2017 would be rendered otiose. The DB by that order expressly permitted the Appellant to raise a challenge to ONGC Rules that permitted the charging of penal rent.

18. On the other hand, the Appellant has placed reliance on the decision in ***Nand Kishore vs. State of Punjab (1995)6 SCC 614*** where the Supreme Court explained the principle of constructive *res judicata* and how that would not come into play when a question is raised to the constitutionality of a provision of law notwithstanding that the challenge to the orders based on such law had attained finality. The Supreme Court explained that "raising the question of constitutionality of a provision of law, as it appears to us, stands on a different footing than raising a matter on a bare question of law, or mixed question of law and fact, or on fact."

19. This principle would apply in the facts of the present case where in view of the liberty granted by the DB in LPA 160/2017 by order dated 22nd March, 2017, the right of the Appellant to challenge the vires of the very rules of ONGC on the basis of which the penal rent was sought to be

collected from him was kept alive.

20. Consequently, this Court sets aside the impugned order dated 12th October, 2017 passed by the learned Single Judge and restores the Writ Petition (C) No.8942/2017 filed by the Appellant before the learned Single Judge. Pleadings in the said writ petition will be completed within the next six weeks. Writ Petition (C) 8942/2017 will be placed before the learned Single Judge for disposal on merits on 6th February, 2019. The appeal is disposed of in the above terms.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

DECEMBER 03, 2018 /‘dc’