

57.

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

+ W.P.(C) 305/2008

Date of decision: 6th October, 2009

RAMESHWAR PRASAD GUPTA & ANR Petitioners
Through Mr. Sudhir Nandrajog, Sr. Advocate
with Mr.Lalit Kumar, Advocate.

versus

MCD & ORS Respondents
Through Mr. Anshum Jain, Advocate for Ms.
Suparna Srivastava, Advocate for respondent
No. 1.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

ORDER

CM No. 4705/2009

This is an application for condonation of Delay in filing of the review application. The applicant had earlier filed LPA No. 143/2008 against the order dated 11th February, 2008. The said LPA was disposed of on 6th February, 2009 with liberty to the applicant to approach this Court by way of review. Thereafter, the review application was filed on

25th March, 2009. For the reasons stated in the application, the delay in filing of the review application is condoned.

The application is disposed of.

R.A. No. 148/2009

1. This is an unfortunate case of disputes between the three brothers, who have inherited a property measuring 420 square yards located at 92, Banarasi Dass Estate, Timarpur, Delhi-110054. The two applicants had filed a writ petition for direction to the Municipal Corporation of Delhi to demolish unauthorized constructions in the portion, which is occupied by the third brother Mr. Rajendra Kumar Gupta, the respondent No. 3. One of the two applicants is not residing in the property.

2. Order dated 11th February, 2008 is a consent order. Learned counsel for the applicants, however, states that the counsel for the applicants had misunderstood the nature of the order being passed by this Court on 11th February, 2008. In this connection, I may notice that on 25th January, 2008, this Court had passed the following order:-

"As there are inter se disputes between three brothers, which are pending before the civil court. A suggestion has been given that each one of them can pay one-third compounding charges and accordingly will be entitled to additional one-third FAR in terms of the building bye laws. This will be without prejudice to the rights and contentions of the parties in the civil court and subject to final adjudication and decision in the civil suit. In case respondent No. 3 succeeds in the civil suit, he will be obviously entitled to his area including proportionate additional area which will be

sanctioned or regularized in favour of the petitioners. In case the petitioners succeed in the civil suit, they will be getting the benefit of the decree and the area including the enhanced FAR.

Learned counsel for the parties pray for some time to seek instructions from the parties.

List on 11th February, 2008.

DASTI.”

3. It is clear from the aforesaid order that the learned counsel for the parties were asked to obtain instructions on whether the present matter could be disposed of on the basis of the statement that each party would be entitled to benefit of additional 1/3rd FAR in terms of liberalized building bye-laws after enactment of Master Plan of Delhi 2021. However, it is clear that the parties had not filed any application under Order XXIII, Rule 3 of the Code of Civil Procedure, 1908 or made any statement on oath stating that they are ready and willing to compromise and settle the matter. Normally, in such circumstances I would have recalled and reviewed the order dated 11th February, 2008. However, I find that the order dated 11th February, 2008 is just and fair and equitable to all parties.

4. Order dated 11th February, 2008 states and directs that the respondent No. 3, who is in occupation of the ground floor of the property, will be entitled to file a fresh application for compounding and claim benefit of increased FAR to the extent of 1/3rd of the extended FAR after enactment of Master Plan of Delhi 2021. It is the case of the

applicants that the respondent No. 3 is entitled to only 1/3rd share in the property. Therefore, the respondent No. 3 has been given benefit of extended FAR to the extent of 1/3rd. In view of the fact that there are extensive disputes between the three brothers, it is impossible for the respondent No. 3 to have the compounding application signed from the two applicants. In fact, the two applicants are not ready and willing to sign the compounding application. Their grievance appears to be that because of the suit filed by the respondent No. 3 some portion of the property in their occupation on the ground floor was demolished by the DDA. The respondent No. 3, however, points out that a room in the setback area on the ground floor in occupation of the applicants was demolished by MCD but the MCD had also demolished one room on the first floor, which was in occupation of the respondent No. 3. Therefore, both the applicants and the respondent No. 3 have suffered as some portion in their occupation has been demolished.

5. To balance out equities, the two applicants were also given permission to apply to MCD for construction and get benefit of 1/3rd additional FAR. It may be noted that in the case of the respondent No. 3, the said respondent is not entitled and permitted to make further construction. However, in the case of the two applicants, they have been permitted to construct and take benefit of additional 1/3rd FAR that means that the two applicants would be entitled to benefit of additional

2/3rd FAR and also construct on the basis of additional FAR. Further, learned counsel appearing for the respondent No. 3 had made a statement that they do not have any objection to the applicants constructing two rooms, which were demolished by the MCD and they could construct the two rooms in case permission is granted.

6. In the present case, the applicants do not dispute that the respondent No. 3 has 1/3rd share in the property and is also residing on a portion of the ground floor measuring about 1365 square feet. One of the applicants is residing on the first floor and part of the ground floor of the property. The other applicant is not residing in the property and is presently residing at Gurgaon. In view of the inter se disputes, it is not possible to have a joint application signed by all parties for compounding. Yet it is not denied that benefit of additional FAR is available and to demolish portion of the property that can be regularized, does not merit acceptance. Harm and consequences of demolition, when on payment, construction can be regularized and saved, outweighs technical requirement of joint signatures. Keeping in view the facts and balancing equities, the respondent No. 3 was permitted to file a separate application for compounding without signatures of the two applicants. Similarly, the two applicants were permitted to file an application to MCD for construction and also claim benefit of additional 2/3rd FAR.

7. Learned counsel for the two applicants has submitted that the Will

propounded and relied by the respondent No. 3 has not been accepted in the probate case. The respondent No. 3 has preferred an appeal but notice has not been issued. Filing of the appeal and the rejection of the claim of the respondent No. 3 based upon the alleged Will is of no consequence as it is admitted case of the two applicants that the respondent No. 3 is entitled to 1/3rd share in the property and that is not disputed. By relying upon the alleged Will respondent No. 3 was claiming right to a particular portion in the property. Therefore, the order passed in the probate petition is inconsequential. In any case, the order dated 11th February, 2008 clarifies that the said order is only an interim arrangement and is subject to the final decision of the civil suit and the probate petition.

8. The applicant No. 1 has filed a civil suit for partition in the Delhi High Court. The question relating to the portion of the property which the two applicants or the respondent No. 3 will be entitled to is subject matter of the partition suit and will be decided in the said suit. Order dated 11th February, 2008 does not affect the right of the parties in that regard. It is clarified that it will be open to the civil court to decide the respective shares which the applicants or the respondent No. 3 will be entitled to and also decide the question whether the property can be partitioned by metes and bounds and all questions including the respective portions which can be allotted to the parties.

9. In view of the aforesaid, I do not see any reason to review the order dated 11th February, 2008. However, the said order will not be read as a consent order but a direction by the Court.

The review application is dismissed.

SANJIV KHANNA, J.

OCTOBER 06, 2009
VKR