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

+ CM(M) 239/2016

RADHEY SHYAM & ANR Petitioners

Through Mr. Mahmood Hasan, Adv.

versus

PREM WATI & ORS Respondents

Through Ms. Mrinalini Sen and Mr.M.

Chatterjee, Adv.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER

% **11.03.2016**

C.M. No.9037/2016 (Exemption)

Exemption is allowed subject to all just exceptions.

Application disposed of.

CM(M) 239/2016 & C.M. No.9036/2016 (stay)

The petitioners are aggrieved by the order dated 20.02.2016 wherein the application filed by them seeking setting aside of a preliminary decree dated 26.11.2010 was declined and rightly so.

Record shows that a suit for partition had been filed inter-se the parties in which a preliminary decree was passed on 26.11.2010. The share of each party was determined 1/8th. Later on an application filed under Section 152 of the CPC, the share was determined 1/9th. This was on 19.04.2012. The petitioners before the Trial Court who had filed the application (upon which the impugned order was passed) were contesting the proceedings. This had been noted by the Trial Court. The Trial Court had correctly noted that the application under Section 151 of the CPC seeking a dismissal of the case on the ground that the Supreme Court *Prakash Vs. Phulawati* C.A. No.7217/2013 (decided on 16.10.2015) had granted a right to the daughters also to be incorporated

as coparceners would not make the preliminary decree redundant and this submission was thus rightly repelled by the Trial Judge.

The defendants were contesting the suit pending in the Trial Court. The petitioners before this Court were duly represented. They were defendants No. 1 & 2 in the Trial Court. They had agreed for a 1/8th share and thereafter having got it modified to a 1/9th share.

Record discloses that these petitioners (defendants No. 1 & 2) are on one side and other siblings were on the other side. Mode of partition could not be effected and that is why the preliminary decree has not been followed up with a final decree. The contention of the petitioners that in view of the judgment of Prakash (supra), the preliminary decree should be set aside as this judgment is effective from 09.09.2005 was considered by the Trial Judge and repelled on the ground that this judgment would have its effect if on that date (09.09.2005), both the daughter and the father were alive. The father of the parties had admittedly expired much prior to 09.09.2005. Even otherwise, an application under Section 151 of the CPC seeking setting aside of the preliminary decree dated 26.11.2010 passed in the presence of the parties who were all along contesting the proceedings is an application hopelessly un-maintainable; it was malafide. The petition before this Court is also nothing short of a malafide exercise.

Petition is without any merit. Dismissed with costs quantified at Rs.10,000/-.

INDERMEET KAUR, J

MARCH 11, 2016

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