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

Date of Decision: 10th May, 2022

+ **RSA 52/2020**

PHOOL WATI (DECEASED) THR LRS Appellant

Through: Mr. Sharvan Dev, Advocate.
(M:7703894232)

versus

OM PRAKASH (DECEASED) THR LRS & ANR Respondents

Through: Mr. Nilesch Sawhney with Mr.
Shivam, Advocates (M: 9873176033)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode.

REVIEW PET. 58/2022

2. The present petition seeks review of order dated 30th November, 2021 on the ground that there are substantial questions of law that have been raised in the second appeal and the same could have been dismissed only for non-prosecution and not on merits, due to non-appearance of Id. Counsel for the Appellant. Reliance is placed on the judgment of the Supreme Court in *Prabodh Ch. Das & Ors. v. Mahamaya Das & Ors. [AIR 2020 SC 178]*.

3. Id. Counsel for the Appellant submits that the substantial questions of law were set out in the memorandum of appeal and the same deserves to be considered and decided on merits.

4. On the other hand, Id. Counsel for the Respondents submits that there is no error apparent on the face of the record which has been shown by the



Appellant. Hence, the present review petition is not maintainable.

5. A perusal of the present second appeal would show that the appeal arises out of a preliminary decree of partition dated 28th February, 2018 passed by the ASCJ, Rohini Courts, in respect of property bearing Plot No.101-A, Malik Pur Village, Near Model Town-I, Delhi-110009. The operative portion of the said preliminary decree reads as under:

“A) A preliminary decree for Partition is passed whereby the LRs of plaintiff as well as LRs of defendant no. 1 are entitled to the extent of 1/ 2 share each in the undivided suit property i.e. plot bearing No. 101-A, Malikpur Village, Near Model Town-I, Delhi-110009.

(B) A preliminary decree for rendition of account of the income of the,suit property i.e. plot bearing No. 101-A, Malikpur Village, Near, Model Town- I, Delhi-110009 is passed in favour of LRs of plaintiff.

(C) A decree of mandatory injunction is passed in favour of LRs of the plaintiff against the defendant no. 2 whereby defendant no. 2 is directed to show plaintiff along with the defendant as the assessee for the house-tax of the property/plot bearing no. 101-A, Malikpur Village, Near Model Town-I, Delhi-110009 in its records.

D) LRs of defendant no, 1 are permanently restrained from creating any third party interest in the suit property or even otherwise from ---- with the possession of the suit property.”

6. As per the above decree, the Plaintiff and Defendant No.1 through LRs have been held to be entitled to ½ share each of the suit property. The above decree dated 28th February, 2018 was assailed in first appeal which was also rejected by the first Appellate Court on 8th November, 2019. The operative portion of the said order dated 8th November, 2019, reads as



under:

“17. Now coming to the argument of Ld.Counsel for the appellant that the Ld. Civil Judge has passed the decree of rendition of accounts without any evidence being lead on behalf of plaintiff. It is clarified that the Ld. Civil Judge has only passed the preliminary decree for rendition of accounts on the basis of admission qua the receipt of rent by defendant no.1. The Ld. Civil Judge has rightly listed the matter for rendition of accounts for further enquiry.

18. There is no infirmity in the judgment and decree dated 28.02.2018. The judgment and decree dated 28.02.2018 and findings on all the issues given vide said judgment is upheld. The appeal being devoid of any merits is dismissed.”

7. The present second appeal was filed by the Appellant on 4th March, 2020. The matter was listed for the first time on 11th March, 2020. On the said date, the following order was passed:

“CM APPL. 9368/2020 (for exemption)

*Allowed, subject to all just exceptions.
Application is disposed of.*

CM APPL. 9369/2020 (for delay)

The delay of 19 days in re-filing the appeal is condoned. Application is disposed of.

RSA 52/2020 & CM APPL. 9367/2020 (for stay)

The Caveator is present.

Let the trial court record of Suit No.59892/2016 titled Om Prakash Through LRs & Anr. v. Smt. Phoolwati Through Her Legal Heirs & Anr. and RCA No. 38/2018 titled Smt. Phoolwati Through LRs v. Om Prakash Through LRs & Anr. be summoned.

In the meantime, the restraint order restraining the Appellant from alienating or parting with possession of the property shall continue to operate. The said order would also apply qua Respondent No.



1/Plaintiff.

The Trial Court proceedings shall remain stayed as the present appeal is against the preliminary decree of partition.

List on 24th August, 2020.”

8. Thereafter, the Trial Court record was received by this Court. On 17th August, 2021 none appeared for the Appellant. On 30th November, 2021 again none appeared for the Appellant. The Court was also informed that by the time the present second appeal was listed before this Court, a final decree had already been passed on 26th February, 2020. In the said final decree, the Trial Court had considered the Local Commissioner's report on the issue of partitioning the property by metes and bounds. On the said issue, the Defendants themselves suggested certain modifications. Since the Defendants had themselves suggested modifications and the Court was not informed of all these facts on the date when the matter was listed for the first time, this Court was of the opinion that no substantial question of law would arise in the present second appeal. Once the final decree of partition was passed and the Appellant was suggesting modes of partition, the second appeal challenging the preliminary decree was itself rendered infructuous.

9. Accordingly, the second appeal was rejected on both grounds i.e., that the subsequent developments showed that the Defendants had partly agreed to the Local Commissioner's reports and suggested modifications, and secondly, that there were no substantial questions of law arising out of the present second appeal.

10. In the judgment in ***Prabodh Ch. Das (supra)***, the matter had been listed for hearing on several dates and High Court had decided to hear the appeal on merits. The relevant portion of the said judgment is extracted



hereinbelow:

“It is evident from the materials on record that the appeal was listed for hearing several times. When the matter was taken up for hearing on 21.01.2015, learned counsel for the appellants/defendants was not present to argue the matter and no request was made on his behalf. Therefore, the High Court proceeded to decide the appeal on merits itself. After consideration of the materials on record, the High Court dismissed the appeal on merits.”

11. In **Kirpa Ram (Deceased) through Legal Representatives & Ors. V. Surendra Deo Gaur & Ors. [AIR 2021 SC 57]**, the Supreme Court has held as under:

“23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the Appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame



substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

12. In the present case, the substantial questions of law were yet to be even framed in the matter. The second appeal was not yet admitted. The dismissal of the second appeal took place prior to the framing of the substantial questions of law.

13. Under such circumstances, this Court does not find any reason to entertain the present review petition. The same is, accordingly, dismissed.

14. The present order, however, shall not affect the Appellant's rights in the appeal against the final decree of partition dated 26th February, 2020, which is stated to have been filed by the Appellant.

**PRATHIBA M. SINGH
JUDGE**

MAY 10, 2022

dj/ad

(corrected & released on 12th May, 2022)