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Appearance :
For the Appellant/s : Mr. Kamal Nayan Chaubey, Sr. Advocate
Mr. Ambuj Nayan Chaubey, Advocate
Mr. Ashok Kumar Garg, Advocate
Ms. Ritu Priyadarshini, Advocate
Mr. Dindeshwar Pandey, Advocate
For the Respondent/s: Mr.

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CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

CAV JUDGMENT

Date : 02-08-2022

Heard Mr. Kamal Nayan Chaubey, the learned Senior Counsel appearing on behalf of appellants.

2. The appellants have filed this second appeal against the judgment and decree of affirmation dismissing the suit for partition on the ground that in this case partial partition is not possible and there is non-joinder of necessary parties.

3. Plaintiffs filed Title Partition Suit No. 94/84 before the Court of Sub-Judge, Bagaha for partition of lands of Schedule Nos. 2 and 3 of the plaint and with prayer that their share to the extent of 5/30 be carved out from the said land claiming that land and house of Schedule-3 properties are their ancestral property and land and house of Schedule-2 property was purchased in the name of defendant no.3 alone by their common ancestor which has been coming in joint possession and there is no partition among them by metes and bounds in respect of the

properties mentioned in Schedule Nos. 2 and 3 of the plaint. Their further case is that all agricultural lands, which were in their joint possession, have been partitioned by compromise decree passed in Title Suit No. 87/53. The case of the contesting defendants is that land and house of Schedule-3 were ancestral and joint properties, but the same were partitioned among the parties as per their convenience prior to compromise decree in T.S. No. 87/53 but land and house of Schedule-2 are not joint family properties but the same are their self-acquired properties purchased after compromise decree in T.S. No. 87/53 and the same were never joint properties.

4. The Trial Court dismissed the suit on the ground that there was non-joinder of necessary parties and the plaintiffs have not Scheduled all the properties of joint family and it is not possible to determine in what manner the share of land and house be distributed between the parties, accordingly, partial partition is not possible. The Trial Court held that suit properties mentioned in Schedule-2 and 3 are joint properties.

5. The Appellate Court below on reappraisal of evidence affirmed the finding of the Trial Court that suit suffers from non-joinder of necessary parties as well as non-mentioning of all properties in plaint, the suit suffers from the defect of partial

partition and dismissed the appeal by the impugned judgment and decree. The Appellate Court, however, given finding that properties mentioned in Second Schedule is not joint properties rather it is separate property of defendant no.3/respondent no.1 and his descendant.

6. Learned Senior Counsel for the appellants has submitted that the finding of the both Court below that there was non-joinder of necessary parties and partial partition is not possible could not have been recorded. It has been submitted that partial partition is possible in law which is not appreciated by both the Courts below and the Appellate Court has wrongly given finding in favour of defendant no.3/respondent no.1 and finding in this regard was not warranted.

7. The principle that there cannot be a partial partition is not an absolute one. Ordinarily a suit for partial partition does not lie. But, a suit for partial partition will lie when the portion omitted is not in possession of Coparceners and may consequently be deemed not to be really available for partition. This case does not come under this category.

8. Order I Rule 3 C.P.C. speaks about the persons who may be made as defendants. A proper party is one whose presence is necessary for a complete and final decision on the question

involved in the proceedings. The object of the Rule is to bring on record all the persons who are parties to the disputes relating to the subject matter so that dispute may be determined in their presence at the same time without any protraction, inconvenience and the multiplicity of the proceeding may be avoided. In this case both the Courts below found that many necessary parties were not made party.

9. After considering the submission of the learned Senior Counsel for appellants and on perusal of judgment of both the Courts below it appears that on the basis of material on record both the Courts below have come to the conclusion that there is non-joinder of the parties and this is a case of partial partition and accordingly dismissed the suit and appeal respectively. The Appellate Court below on the basis of evidence recorded its finding that the properties mentioned in Schedule 2 of the plaint is not joint property rather it is separate property of defendant no.3 in whose name this property was purchased.

10. The expression “substantial question of law” has acquired a definite connotation through various judicial pronouncements. In **Hero Vinoth (Minor)** Vs. **Seshammal (2006) 5 SCC 545**, the Hon’ble Supreme Court has observed that:

> “The general rule is that High Court will not interfere with the concurrent

> findings of the courts below. But is is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

11. The Hon'ble Supreme Court in **Vijay Kumar Talwar** Vs. **Commissioner of Income Tax, Delhi** reported in **MANU/SC/1027/2010;[(2011) 1 SCC 673**] held that:

> "A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread."

12. In the present case the findings are based upon appreciation of evidence on record. There is no perversity or unreasonableness in the said finding. It need not require to restate the reasoning given by Appellate Court which are all well discussed. The first Appellate Court is a final fact finding

authority and in absence of demonstrated perversity in its finding, interference by this Court is not warranted.

13. Consequently, this Court does not find any substantial question of law arising in this appeal for consideration, which is, accordingly, dismissed.

(Sunil Dutta Mishra, J)

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AFR/NAFR	NAFR
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