

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

C.R.P. (NPD) No. 1 of 2015

and

M.P. No. 1 of 2015

1. R.Raju
2. R.Soundarajan
3. R.Ponnuswamy

...Petitioners

vs

1. Maragatham
2. P.Balakrishnan
3. C.Marudakutty

...Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code to set aside the fair and decretal order dated 07.08.2014 in I.A.No.153 of 2014 in A.S.No.164 of 2013 on the file of the learned III Additional Subordinate Judge, Coimbatore.

For Petitioners

: Mr.R.Subramanian

For Respondents

: Mr.J.Pothiraj for R1

Mr. D.Veera Sekaran for R3

Notice dispensed with

vide order dated 07.08.2018 for R2

ORDER

The petitioners herein are the unsuccessful plaintiffs in a suit for recovery of possession and mesne profits. Pending the appeal against the decree, the petitioners have filed an application before the First Appellate Court seeking for appointment of an Advocate Commissioner, for the purpose of inspecting and surveying the property in Survey No.371//3 and identifying two items of property in A and B, with reference to Ex.A1.

2. The First Appellate Court had observed that, on a perusal of the description of the two items of property in Ex.A1, they are of different identity and location. As such, the petitioners herein ought to have filed an application before the Trial Court itself seeking for appointment of Advocate Commissioner. It is also seen that the petitioners herein intends to have the Advocate Commissioner to inspect and identify the properties, with reference to Ex.A1. Ex.A1 is a rough plan, which is denied by the respondents herein as a fabricated document. When the suit was pending before the Trial Court, nothing prevented the petitioners to file the application for appointment of Advocate Commissioner. When a specific finding has been given by the Trial Court that the description of the two properties shows the identity and

location of the properties to be different, the present application to locate those properties with the help of the Advocate Commissioner can only be deemed to fill up the lacuna, which the petitioners have failed to exercise in the trial Court. The petitioners having failed to succeed in the trial Court, cannot be permitted to fill up the lacuna by collecting evidences in the First Appeal stage. As such, I do not find any infirmity in the order of the Trial Court.

3. The learned counsel for the petitioners relies upon the Judgement of this Court reported in **2010 (6) CTC 612** in the case of **Sundarajan @ Pichaikaran vs Aanji** and submitted that the First Appellate Court has got ample powers to decide the issues including the appointment of an Advocate Commissioner. There is no quarrel about this legal proposition, but it is also a settled law that there should be certain compelling circumstances before the First Appellate Court, which warrants such an appointment. The Appellate Court should not exercise such a discretion in the matter of appointment of Advocate Commissioner, when there are no sufficient reason assigned to establish that inspite of due diligence, they were unable to exercise their rights before the trial Court.

M.S.RAMESH.,J

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4. In the instant case, it is the view of the Court that the present application has been made only for the purpose of collecting evidences to fill up the lacuna, which the petitioners have failed to substantiate before the trial Court and as such, the appointment of Advocate Commissioner, may not be warranted.

5. In the result, the Civil Revision Petition stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

12.12.2018

Index:Yes/No

Speaking Order: Yes/No

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