



C.R.P.(NPD).No.2702 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P.(NPD).No.2702 of 2021

and

C.M.P.No.19851 of 2021

1.Muthusamy

2.Sengodan

3.Periyasamy

Ganesan (Died)

4.Atthayammal

5.Sudha

6.Sree Nisha

.. Petitioners

Vs.

1.K.R.Rajkumar

Lakshmanan (Died)

2.Kasthuri

3.Karuppannan

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the

1/6



C.R.P.(NPD).No.2702 of 2021

Constitution of India, praying to set aside the order dated 22.10.2021 in I.A.No.6 of 2021 in A.S.No.108 of 2008 on the file of the Sub Court, Rasipuram.

For Petitioners : Mr.K.Karthikeyan

ORDER

Challenge in this Revision is to the order dismissing the application for appointment of Commissioner filed in I.A.No.6 of 2021 in A.S.No.108 of 2008.

2. The appeal in A.S.No.108 of 2008 has been filed by the petitioners herein challenging the decree in O.S.No.69 of 2001 granting permanent injunction in favour of the respondents herein, restraining the petitioners herein from interfering with the user of the pathway by the respondents.

3. Even, pending suit, the petitioners have filed an application for appointment of Commissioner, the same came to be dismissed by the trial Court. No steps were taken to challenge the same. Now, after the decree



C.R.P.(NPD).No.2702 of 2021

and after about 13 years from the date of filing of the appeal, the petitioners have come up with the instant application for appointment of Commissioner.

4. A perusal of the affidavit filed in support of the petition, before the appellate Court, shows that it is in the nature of challenge to the order of the trial Court dismissing the application for appointment of commissioner. Of course, Section 105 of the Code of Civil Procedure gives liberty to the parties to challenge interlocutory orders also in the main appeal. But, the parties cannot by an interlocutory application challenge the interlocutory order made in the suit.

5. It is open to the petitioners to question the dismissal of the application for appointment of Commissioner before the appellate Court while arguing the main appeal. If the appellate Court comes to a conclusion that such dismissal was erroneous, it can always appoint a Commissioner. That stage is yet to come.



C.R.P.(NPD).No.2702 of 2021

6. Even otherwise, the suit is one for permanent and mandatory injunctions. The trial Court has granted a decree for permanent injunction, while dismissing the suit for mandatory injunction. It is open to the petitioners to establish that the respondents are not entitled to permanent injunction also in the appeal.

7. This Court has held that an application for appointment of Commissioner filed in appellate Court would have to satisfy the requirements of the Order XLI Rule 27 of the Code of Civil Procedure also. A reading of the affidavit would show that the requirements of order XLI Rule 27 of the Code of Civil Procedure has not been satisfied. There is no reason adduced justifying introduction of additional evidence in the form of Commissioner's report in the appeal.

8. I am therefore unable to fault the appellate Court for having dismissed the application. Revision fails and it is accordingly **dismissed**. No costs. Consequently, the connected miscellaneous petition is closed.



C.R.P.(NPD).No.2702 of 2021

9. Considering the fact that the appeal is of the year 2008, the appellate Court is directed to dispose of the appeal within a period of six (6) months from the date of receipt of either a web copy or a certified copy of this order.

13.12.2021

dsa

Internet :Yes

Index : No

Speaking order

To

The Subordinate Judge, Rasipuram.



WEB COPY



C.R.P.(NPD).No.2702 of 2021

R.SUBRAMANIAN, J.

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C.R.P.(NPD).No.2702 of 2021

13.12.2021