

THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**Revision/TA/6627/2010/Jaipur**

- 1- Babulal
- 2- Suja
Sons of Suwa Caste Mali, r/o Village Khejroli, Tehsil
Chomu, District Jaipur.

----- petitioners**Versus**

- 1- Kalya
- 2- Banwari
- 3- Jagdish
- 4- Sundari
Sons/Daughter of Suwa Caste Mali, r/o Village
Khejroli, Tehsil Chomu, District Jaipur.
- 5- Lada daughter of Suwa w/o Laxman Caste Mali, r/o
village Chop, Tehsil Amer, District Jaipur.
- 6- Koyali daughter of Suwa w/o Ramnarain Caste Mali,
r/o village Dulhasingh Ki Dhani, Ward No.7, Chomu,
District Jaipur.
- 7- Sub-Registrar, Tehsil Chomu.
- 8- Rajasthan Government.

----- non-petitioners**Single Bench****Shri Moolchand Meena,****Member**

Present:-

Shri Yogendra Singh, Advocate for the Petitioners:

Shri Bhinyaram Chaudhary, Advocate for non-
petitioners:**Order****02-03-2012**

- 1- This revision under section 230 of the Rajasthan
Tenancy Act, 1955 (hereinafter referred to as 'the Act of
1955') has been filed by the petitioners against order dated
5th March 2010 passed by the Assistant Collector, Chomu in

case No.29/569/08, whereby application filed by the petitioners/ defendants for appointment of commissioner has been rejected.

2- Brief facts of the case leading to this revision are that plaintiff /non-petitioner-1 filed a suit under section 53 and 188 of the Act of 1955 against defendants/ petitioners and non-petitioner No.2 to 8 with averments that disputed land bearing khasra No.4348 and 4347/2008 area 0.17 hectare is situated in village Khejroli Tehsil Chomu, which has been under joint tenancy and joint possession of plaintiffs and defendants. Late Shri Suwa, father/husband of defendants had 1/2 share in the disputed land, but after his death mutation was not recorded. Amongst these disputed khasra numbers, there is a piece of land bearing khasra number 4347 area 0.04 hectare, on which the plaintiff is has built up a house and he is residing in that house for last 30-40 years. There is no dispute about this khasra number 4347. The plaintiff had been in peaceful cultivatory possession of his 1/2 share in the disputed land, but after the death of father/husband of defendants, they are creating hurdles and interfering in plaintiff's possession and use of his 1/2 share of the land in dispute. Therefore, the plaintiff was forced to file the said suit in the Trial Court. An application for temporary injunction was filed by the plaintiff under section 212 of the Act of 1955. During the pendency of the case, the petitioners/ defendants submitted an application with request to appoint a commissioner for inspection of the site of the disputed land. The Trial Court, after hearing both the parties has rejected the

application; vide its order dated 5th March 2010 without recording any reason thereof. So this revision has been filed before the Board with request to set aside the impugned order and accept the petitioner/defendant's application for appointment of commissioner.

3- Learned counsels for both the parties were heard and record and impugned order available in Trial Court's file was perused minutely.

4- The learned counsel for the petitioners, while repeating facts mentioned in the their revision application, has argued that application for appointment of commissioner has been rejected by the Trial Court by a non-speaking order, for which no reasons have been assigned. The application was aimed to get on record the physical position of the disputed land which would have been helpful for deciding the controversy between the parties. It has also been argued that there is provision under Order 39 Rule 7 and Order 26 Rule 9 of the Civil Procedure Code, 1908 for appointment of commissioner; and Order 39 Rule 7 of Civil Procedure Code, 1908 is applicable to application under Section 212 of the Act of 1955. Therefore the Trial Court has committed jurisdictional irregularity in rejecting the petitioner's application. The learned counsel has kept reliance on authority under 2008 (1) RRT page 234 to get support in favour of his arguments.

5- The learned counsel for non-petitioners has contended that the suit filed in the Trial Court is simply a partition suit between co-tenants. There is no need for

appointment of the commissioner to get the site report. The petitioners do not want to argue on application under Section 212 of the Act of 1955 and they have filed the application for the commissioner only for delaying the matter. Relying upon authority under 2011 (2) RRT page 792, the learned counsel has argued that the commissioner cannot be appointed for collecting evidence.

6. I have gone through the impugned order and have considered the arguments advanced by the learned Counsel for both the parties. Before filing reply to the application under Section 212 of the Act of 1955, the petitioners/defendants filed an application under order 11 rule 14 of the Civil Procedure Code, 1908 with an averment that a partition of the disputed land was made by the parties as early as 42 years ago, about which a written deed (लिखावट) was inked and signed by the parties in a Bahi, which is in the custody of the plaintiff. It was requested that the said deed (लिखावट) be summoned. Thereafter the petitioners/defendants filed regular reply to the application under section 212 of the Act of 1955 on 26-08-2008. Arguments were heard by the Trial Court on application under order 11 rule 14 and it was rejected on 25-06-2009. The case was listed for final arguments on stay application. Meanwhile, on 04-3-2010, the petitioners/defendants again filed an application for appointment of commissioner, which was heard and rejected on 05-03-2010. Therefore the present revision has been filed.

7- In the application for appointment of commissioner, the petitioners have averred that the plaintiff has never remained in the possession of the land in dispute and defendants are residing in Pucca house as well as khamghar (kuchcha house) built on the disputed land. The plaintiff never cultivated the land and for bringing the actual physical status of the land in dispute, it is necessary to appoint the commissioner and get the report. The Trial Court vide its impugned order dated 05-03-2010; rejected the application with a simple observation that the application deserves to be rejected. It is a discretionary jurisdiction of the court to appoint or deny appointing a commissioner. The question is whether the Board should interfere in such an order passed by the Court under its discretionary powers.

8. There is a series of pronouncements by the Board or even by higher level courts that the Court should not use its agency to collect evidence in favour or in against of any party to the litigation. A coordinate bench of this Board, recently, in 2012 (1) RRT 2012 43, after having reliance on 2011 (1) RRT 91 and 2007 (2) RRT 943, has held that when there is a dispute regarding possession on the suit land, it is for the parties to prove their rival claims of possession; agency of Court cannot be used to collect evidence of possession by appointment of a commissioner. I have also gone through the authority under 2011(2) RRT 792 cited by the learned counsel for the non-petitioners, wherein also it has been held that inspection of the site or appointment of Commissioner is a matter which lies in the discretion of the

Court and site inspection cannot be permitted for the purpose of collection of the evidence. The party has to prove his case on the basis of the evidence adduced by them.

9. So far as legal provisions are concerned, Order 26 Rule 9 of the Civil Procedure Code, 1908 provides for appointment of commissioner in suits, whereas Order 39 Rule 7 of the Code provides for appointment of commissioner in cases of application for temporary injunctions. Order 39 Rule 7 is applicable in cases under Section 212 of the Act of 1955.

The Order 26 Rule 9 is as under:-

“Rule 9: Commissions to make local investigations:

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

Similarly, Order 39 Rule 7 (1) of the Civil Procedure Code, 1908 is as under:-

“7. Detention, preservation, inspection, etc., of subject-matter of suit.- (1) *the Court may, on the application of any party to a suit, and on such terms as it thinks fit,-*

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or, as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

From mere perusal of the Order 26 Rule 9 or Order 39 Rule 7 as above, it is evident that **appointment of the commissioner is entirely a discretionary power of the Court, and if the Court does not deem it necessary to appoint the commissioner, no party to the litigation can claim such appointment as a matter of right. The petitioners or the non-petitioners, themselves have to prove their case by adducing necessary documentary as well oral evidence. Litigants should not look towards the Court to help them in collecting the evidence.**

10. This is a revision under section 230 of the Rajasthan Tenancy Act, 1955, which has very limited scope for interference. The Section 230 of the Act of 1955 reads as under:-

“230. Power of the Board to call for cases.- The Board may call for the record of any case decided by any subordinate court in which no appeal lies either to the Board or to a civil court under section 239 and if such court appears-

- (a) to have exercised jurisdiction not vested in it by law; or*
- (b) to have failed to exercise jurisdiction so vested; or*
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,*

the Board may pass such orders in the case as it thinks fit.

In view of the provisions cited above, the Board can interfere in the impugned order by way of revision under Section 230 of Rajasthan Tenancy Act, 1955 only when-

- (a) the lower Court has exercised such jurisdiction which is not vested in such Court by law; or
- (b) the lower Court has failed to exercise jurisdiction vested in the Court by law; or
- (c) while exercising jurisdiction vested in it, the lower Court has acted illegally or has committed some

material irregularity in exercising jurisdiction vested in it.

If the present revision petition is examined on the parameters laid down in Section 230 of the Act of 1955, as discussed hereinabove, I am unable to find a single line with acceptable ground in the petition in hand, as to what jurisdictional irregularity has been committed by the lower Court in rejecting petitioner's application for appointment of the commissioner.

11- I have also gone through the authority under 2008 (1) RRT 234 cited by the learned counsel for the petitioner, wherein it has been held that the commissioner may be appointed to get report regarding physical position and status of construction on the disputed land. In that case the Board has allowed application for appointment of commissioner with a reservation that report shall not be used for the purpose of possession. There are number of authorities containing diverse views on appointment of the commissioner, which are applicable case to case depending on the facts and circumstances of the case. Here in the present case, the petitioners/defendants firstly requested the court for summoning the said partition deed inked in some Bahi. When that application was rejected, they filed another application for appointment of commissioner. Therefore there is sufficient ground to draw an inference that petitioners, instead of trying to prove their case themselves, are looking towards the court for collecting evidence. **It is not expected from a court to help a particular party in collecting its**

favourable evidence, and therefore such applications should generally be discouraged.

12. In view of the facts of the case, and observations hereinabove, I am of the view that the revision is forceless and does not deserve to be allowed. It deserves to be rejected.

13- Consequently, the revision petition is hereby rejected.

Pronounced in the open Court.

(Moolchand Meena)
Member