

**IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**

**Revision /TA/ 0267/2012/Jaipur**

- 1- Mahendra Singh s/o Hanuman Singh
  - 2- Bhawani Singh s/o Hanuman Singh
  - 3- Aditya Singh s/o Hanuman Singh
- Caste Rajput, r/o Manoharpur Dyodi, Tehsil Phulera, Dist. Jaipur.

**----- Petitioners**

**Versus**

- 1- Manohar Singh s/o Kishan Singh
  - 2- Dolat Singh s/o Kishan Singh
  - 3- Hari Singh s/o Kishan Singh
  - 4- Nand Singh s/o Sumer Singh
- Caste Rajput, r/o Manoharpur Dyodi, Tehsil Phulera, Dist. Jaipur.
- 5- Chainkanwar alias Maji Champawat w/o Thakur Narpat Singh Rajput r/o Mandha Bhimsingh, Tehsil Phulera.
  - 6- Smt. Birju Singh w/o Colonel Vikram Singh Rajput r/o Plot No.65, RAC Colony, Sirsi Road, Vaishali Nagar, Jaipur.
  - 7- Rajasthan Government.

**----- Defendants/Non-petitioners**

- 8- Puran Singh s/o Bhanwar Singh
  - 9- Ladu Singh s/o Nahar Singh
  - 10- Chhotu Singh s/o nahar Singh
  - 11- Govind Singh s/o Bagh Singh
  - 12- Hari Singh s/o Bagh Singh
  - 13- Dhan Singh s/o Bhanwar Singh
  - 14- Bhanwarkanwar w/o Hanuman Singh
  - 15- Uchhav Kanwar w/o Sumer Singh
  - 16- Dashrath Singh s/o Sumer Singh
  - 17- Gulab Kanwar w/o Mohan Singh
  - 18- Sohan Singh s/o Mohan Singh
  - 19- Ajit Singh s/o Mohan Singh
  - 20- Padam Kanwar w/o Kishan Singh
  - 21- Prem Singh s/o Kishan Singh
  - 22- Moti Singh s/o Hem Singh
- Caste Rajput r/o Manoharpur Dyodi, Tehsil Phulera, Dist. Jaipur.

**----- Plaintiffs/ Performa Non-petitioners.**

**Single Bench**  
**Shri Moolchand Meena, Member**

**Present:-**

Shri S.P. Ojha, Advocate for the petitioner.

Shri Virendra Singh, Advocate for Non-petitioner.

Shri Mohd. Iqbal, Advocate for the application under order 1 Rule 10 of CPC.

Decision

Dated 26-11-2013

This revision under section 230 of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as 'the Act') has been filed by the applicants aggrieved by order dated 20-11-2011 passed by Sub Divisional Officer, Sambharlake.

2- Brief facts of the case leading to this revision are that petitioners/plaintiffs and performa non-petitioners have filed a suit under section 88 and 188 of the Act of 1955 in the Court of the Sub Divisional Officer, Sambharlake (the Trial Court) and an application for temporary injunction has also been filed under section 212 of the Act, with averments that petitioners are Khatedar tenants of the disputed land and they are in the cultivatory possession of the same since the time of their forefathers. After death of forefathers, the petitioners and non-petitioners are in actual possession of the land of their share. But the land was wrongly recorded in the name of non-petitioner No.5 Chainkanwar in the Revenue Record, in which petitioners and performa non-petitioners remained in cultivatory possession of 5/6<sup>th</sup> of the disputed land. The non-petitioner No.5, taking advantage of wrong entry in the Revenue Record sold 1/6<sup>th</sup> share of the land to defendant No.6, but without possession. The possession of the land is with the petitioners and the performa non-petitioners. The petitioners file an application for appointment of Commissioner to bring the site-inspection report of the disputed land. The Trial Court, vide its order dated 20-12-2011 rejected the application. This revision petition has been filed by the petitioners against order dated 20-11-2011 passed by the Trial Court.

3- The non-petitioners through their counsel submitted an application dated 16-04-2012 raising preliminary objections against maintainability of the revision in hand.

4- During the pendency of the revision, one application under Order 1 Rule 10 read with section 151 of the Civil Procedure Code, 1908 was filed by Smt. Chandraprabha w/o Dashrath Singh on the pretext that she is daughter of late Shri Hanuman Singh and therefore having interest in the disputed land, is necessary party to the litigation. It was requested that she should be impleaded as party in the suit pending before the Trial Court and also in the present revision.

5- I have heard arguments of the learned counsels for both the parties. The learned counsel for the applicant under order 1 rule 10 of the Civil Procedure Code, 1908 was also heard.

6- The learned counsel for Smt. Chandraprabha, who has applied for impleadment, submitted that the applicant is daughter of Shri Hanuman Singh, who was joint Khatedar of the disputed land. But the plaintiff did not implead her as party to the suit, whereas she, being legal representative of the deceased Hanuman Singh and having interest in the disputed land, is the necessary party to the suit.

7- The learned counsel for the petitioners, repeating averments of their revision petition, has submitted that disputed land remained in joint khatedari and joint possession of the petitioners. The non-petitioner No.5, on the basis of wrong entry in the Revenue Record has sold the land for which she was not authorized. This sale was without possession and despite of the said sale, the petitioners are still in possession of the land. Therefor, appointment of commissioner and getting status report regarding possession was justified for the Trial Court for reaching on correct conclusion. The possession of the land cannot be proved by adducing documentary evidence, so it was required that status report regarding possession be asked through the commissioner. But the Trial Court, without appreciating the circumstances of the case, has wrongly and illegally rejected the application for appointment of the commissioner. Relying upon

the authorities reported under AIR 1986 Madras 33, AIR 1989 ORISSA 21 and 2012 (2) RRT 1210, the learned counsel for the petitioners has requested that impugned order dated 20-11-2011 passed by the Trial Court be quashed and application for appointment of the Commissioner be allowed.

8- The learned counsel for non-petitioners vehemently argued against the revision petition and submitted that impugned order dated 20-11-2011 passed by the Trial Court is an interim order and the application under section 212 of the Act is still pending in the Trial Court. The impugned order is not a case decided and a revision against the interim order is not maintainable under section 230 of the Act. On the merits of the case, the learned counsel has submitted that Commissioner cannot be appointed in a case of temporary injunction under section 212 of the Act. The applicant requesting for temporary injunction, has to prove his case by adducing proper evidence himself. The Court cannot be requested to collect evidence through its agency. The learned counsel has relied upon authorities reported under 2004 RRD 669, 2007 RRT 943, 2007 RRT 374, 2009 RRD 108, 2009 RRT 1035, 2010 RRT 70, 2011 RRT 1304 and 2011 RRT 91.

9- I have given a thoughtful consideration to the rival contentions made by both the learned counsels for the parties and have also gone through the record and the impugned order available in the file.

10- So far as application under order 1 rule 10 of the Civil Procedure Code, 1908 filed by Smt. Chandraprabha for impleadment is concerned, the present revision is limited to the issue of appointment of the Commissioner in a case of section 212 of the Act. I have gone through the application under Order 1 Rule 10 of the CPC is for impleadment, wherein it has been requested that the applicant be impleaded as defendant in suit No.81/2011 pending before the Trial Court. In view of this matter of fact, I am of the opinion that applicant Smt. Chandraprabha should apply to the Trial Court for impleading her as defendant in the suit. She is not necessary party to the present revision. So her application for impleading in the present revision is rejected,

however she is free to apply for impleading in the suit in the Trial Court, and if she submits such an application, the same shall be decided by the Trial Court on merits without referring to this court's decision in the present revision.

11- Now I come to the revision in hand in the matter of appointment of Commissioner. I have perused the petitioners' application dated 18-10-2011 filed in the Trial Court. Mere perusal of that application reveals that it has been moved with request to bring on record the fact that which party is in possession of the land in question. For ready reference, I would like to reproduce here relevant paras of the petitioners' application date 18-10-2011, as under:-

*"... विवादग्रस्त भूमि पर वादीगण एवं प्रतिवादी संख्या 1 लगायत 4 संयुक्त रुप से काबिज चले आ रहे हैं। वर्तमान में फसल सावणू में वादीगण एवं प्रतिवादी संख्या 1 लगायत 4 ने उपरोक्त तमाम विवादग्रस्त भूमि 58 बीघा 11 बिस्वा में मूंग, बाजरा, चोला काशत किया था और काटा है। मौके पर बाजरा खड़ा है।" (पेरा-1)*

*"..... प्रतिवादीगण/ अप्रार्थी संख्या 6 ने उपरोक्त विवादग्रस्त भूमि में 1/6 हिस्से पर उसका कब्जा होना बताया है जो गलत है। सम्पूर्ण भूमि पर वादीगण एवं प्रतिवादी सं. 1 लगायत 4 का संयुक्त कब्जा रहा है जो मौके पर फसल काटने के पश्चात भी स्पष्ट रुप से दृष्टि गोचर होता है।" (पेरा-2)*

*"..... ऐसी स्थिति में विवादग्रस्त भूमि का मौका निरीक्षण किया जाना न्यायहित में आवश्यक है ताकि सही स्थिति मान्य न्यायालय के समक्ष आ सके।" (पेरा-3)*

Thus, main dispute between the parties is that which party is in actual possession of the land. The only purpose of the application dated 18-10-2011 was to collect evidence regarding possession on the disputed land, and barring a few exceptions on account of compulsions of peculiar circumstances of individual cases, **the general principle is well settled in this regard, through a long chain of judicial pronouncements, that Court's Commissioner cannot be appointed to collect evidence regarding possession on the suit land.** The Trial Court in its impugned decision dated 20-12-2011 has given reasons to reject the application as under:-

*"हमने पत्रावली का अवलोकन किया एवं बहस पर मनन किया। प्रार्थीगण ने विवादित ..... सम्पूर्ण आराजी पर वादीगण अपना कब्जा काशत होना बताते हुये दावा घोषणा, स्थायी निषेधाज्ञा व T.I. प्रार्थनापत्र पेश किया है।*

जबकि जमाबन्दी सम्वत 2067-2070 के अनुसार प्रतिवादी संख्या-5 विवादित आराजी में 1/6 हिस्से की रिकॉर्डेड खातदार है। वादीगण को सम्पूर्ण आराजी पर अपना कब्जा काश्त स्वयं द्वारा दस्तावेजी सबूत से सिद्ध करना चाहिये। हम वकील प्रतिवादी से सहमत हैं कि *evidence collect* करने के लिये मौका कमिश्नर नियुक्त करना न्यायसंगत नहीं है। ...”

This opinion of the learned Trial Court is in accordance with the constant view of this Board as well as higher level Courts that Commissioner should not be appointed for the purpose of collecting evidence with regard to possession on the disputed land.

(1) It has been held in the case of Kesharam (2004 RRD 669) that commissioner cannot be appointed to collect the evidence to prove possession on the disputed land.

(2) In the case of Municipality, Jalore versus Barda & ors (2009 RRD 109) it has been held that:-

*“the provisions of Order 26 Rule 9 and Order 39 Rule 7 of C.P.C. are altogether different from provisions of Section 212 of the Act which is by and large self-sufficient in this regard. The report of site inspection or appointment of any Commissioner to ascertain possession on the disputed land is not warranted under the provisions Section 212 of the Act. Concerned parties have to prove their prima facie case themselves.”*

(3) A coordinate bench of this Board, in the case of Bheekhrum and others (2012 RRD 6 = 2012 (1) RRT 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. Order commissioner’s appointment was quashed.”*

(4) The Hon’ble High Court in the case of Union of India & ors versus M/S Kripal Industries (AIR 1998 Rajasthan 224 = 1998 DNJ (Raj.) 245) has held that appointment of Commissioner for collecting evidence of possession is misuse of Court’s jurisdiction. Para 17 & 18 of the decision dated 06-03-1998 by the Hon’ble High Court in this case is as under:-

*“.....that the Trial Court is vested with the discretion to appoint Commissioner but such discretion should not be*

*exercised where the point which is required to be referred to the commissioner can conveniently be sustained by the parties by evidence at the trial. ...” (para 17)*

*“ ... I hold that power of appointment of commissioner for local investigation cannot be exercised by the court to assist party to collect evidence where it can get evidence itself. In the case on hand the written statement has already been filed, therefore, the disputed question of fact can be adjudicated upon by the court after framing the issues and recording the evidence of the parties. For such purpose assistance of Commissioner is neither necessary nor justified.” (para 18)*

12- The same view, as discussed in para 11 hereinabove, has also been held in 2007 (2) RRT 943, 2007(1) RRT 374, 2009(2) RRT 1035, 2010(1) RRT 70, 2011 (2) RRT 1304 as relied upon by the learned counsel for the non-petitioners.

13- The learned counsel for the non-petitioners has kept reliance on AIR 1986 Madras 33, AIR 1989 ORISSA 21 and 2012(2) RRT 1210 in support of his arguments to justify the appointment of commissioner for site inspection.

- (1) In the case of Ponnusamy Pandaram (AIR 1986 Madras 33), it has been held that order declining to appoint Commissioner under Order 26 Rule 9 of the Civil Procedure Code, 1908 to make local investigation is “case decided” and such an order is revisable. Thus this pronouncement establishes that revision against the order declining appointment of Commissioner is maintainable. But this pronouncement does not advocate for appointment of Commissioner to investigate about the fact that who is in possession of the suit land. So it does not help the cause of the non-petitioners in the present case.
- (2) In case of Sanku Ranga Rao (AIR 1989 ORISSA 21), it has been held that appointment of Commissioner for local investigation is discretion of the Court. In this case, the suit was based on report of private Commissioner whose contradictory affidavit was filed in the Court by the defendant. Plaintiff applied for appointment of Court Commissioner for ascertaining facts. The application was rejected and the Court advised survey again by a private

Commissioner. It was held by the Hon'ble High Court that since private Commissioner had once filed an affidavit contrary to his previous report, appointing a private Commissioner again would serve little purpose. Hence appointment of Court Commissioner was necessary. Thus circumstances and facts in this case being entirely different from the case in our hand, this authority cannot be applied to the present case.

- (3) In case of Shanu Baheti versus Municipal Council, Pali & Anr (2012 (2) RRT 1210), the Commissioner was appointed by the Court to ascertain the situation of the disputed land. The Hon'ble High Court had held that the Court has power to appoint the Commissioner under Order 26 Rule 9 or Order 39 Rule 7 of the Civil Procedure Code, 1908, and there is no illegality and jurisdictional error in appointing the Commissioner.

14- I do, respectfully, agree with the opinion of the Hon'ble High Court expressed in 2012 (2) RRT 1210 and AIR 1989 Orissa 21 cited hereinabove, that appointment of Commissioner for local investigation under Order 26 Rule 9 of the Civil Procedure Code, 1908, is entirely discretionary powers of the Court. The said Order 26 Rule 9 is reproduced 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.”*

From mere perusal of the Rule 9 as above, it is evident that appointment of the commissioner is entirely a discretionary power of the Court. As provided for in the said Rule 9 of Order 26, if the Court is of the opinion that it is necessary to appoint a Commissioner 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. But if the Court does not deem it necessary to appoint the Commissioner, no party to the litigation can claim the Commissioner's appointment as a matter of right. One has to prove his case by adducing necessary documentary as well oral evidence. He should not look towards the Court to help him in collecting the evidence.

16- The Court, under its discretionary powers, can appoint Commissioner for bringing physical factuality of the disputed land on record as to whether the land is being used for agricultural purpose or non-agricultural purpose, or are there are some structures on the land like house, well, tube-well etc., or which crop is presently standing on the disputed land, or how many trees of which species are there on the disputed land. But the Commissioner cannot be appointed to give report as to which party is in possession of the land, or who has constructed or who is using structures like house, well, tube well etc., or who has sown the crop on the land, or who is owner of the trees standing on the land. Justification for it is that the Commissioner cannot ascertain ownership of the house or well or trees or crop at his own level without making enquiry from the persons at site, and such an enquiry by the Commissioner amounts to recording of statements of witness for which he is not authorized, unless in specific cases under Order 26 Rule 1 and 2, he is authorized for this purpose by the Court.

17- It is also clear from perusal of Rule 9 above, that it is applicable for suits only. This rule does not provide for appointment of Commissioner in proceedings other than suit, like case under section 212 of the Act, as in present case. The law in section 212 of the Act is a not only substantive law but also a procedural for granting temporary injunction or appointment of receiver. So, provisions of Order 26 Rule 9 of the C.P.C. are not applicable in proceedings under the said section 212 of the Act.

18- Discussions held in foregoing paragraphs may be summarized as under, namely.-

- (1) That appointment of Commissioner under Order 26 Rule 9 of the Civil Procedure Code, 1908 for local investigation is entirely a discretionary power of the Court and no party can claim appointment of the Commissioner as a matter of right.
- (2) That the courts are authorized to order a Commission only for limited purposes as enumerated in said order 26 Rule 9 of the Civil Procedure Code, 1908.
- (3) That provisions of Order 26 Rule 9 of the Civil Procedure Code, 1908 are applicable only to suit, and not to miscellaneous proceedings like a case of temporary injunction under Section 212 of the Act.
- (4) That the Court's agency or the Court Commissioner should not be used for collection of evidence regarding possession on the disputed land.
- (5) That the plaintiff/applicant in a proceeding under section 212 of the Act for temporary injunction is supposed to prove his case by necessary documentary as well oral evidence. He is not supposed to look towards the Court to help him in collecting the evidence.
- (6) If there are any contradictory or contrary reports already on record, then also the Court can order a Commission to find out the truth.

19- In view of the discussions hereinabove, I am of a considered opinion that impugned order dated 20-12-2011 passed by the Sub Divisional Officer, Sambharlake, vide which appointment of Commissioner has been refused, is a perfect, well within the jurisdiction and legal order and it does not warrant any interference at revision level. The revision in hand, being devoid of force, deserves to be rejected.

20- Consequently, the revision in hand is hereby rejected.

Pronounced in the open Court.

(Moolchand Meena)  
Member