

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER

Review No.2845/2014/TA/Jaipur :

Dayalram S/o Shri Kishna, by caste Jat,
R/o Village Tibariya, Tehsil Phulera, District Jaipur.

... Petitioner.

Versus

1. Hanuman S/o Shri Kanaram
 2. Lalaram S/o Shri Kanaram
 3. Sitaram S/o Shri Lalaram
 4. Prahlad S/o Shri Lalaram
- All are by caste Jat, residents of Village Tibariya,
Tehsil Phulera, District Jaipur.

... Non-petitioners.

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| <ol style="list-style-type: none">5. Gangaram6. Prabhu Dayal7. Manguram8. Bhairuram | } | sons of Shri Kishna |
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All are by caste Jat, residents of Village Tibariya,
Tehsil Phulera, District Jaipur.

... Proforma-Non-petitioners.

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S.B.

Shri Satish Chand Kaushik, Member

Present :

Shri S.P. Ojha : counsel for the petitioner.
Shri Satish Pareek : counsel for non-petitioners.

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Dated : 21.7.2016

J U D G M E N T

This review petition has been preferred under section 229 of the Rajasthan Tenancy Act, 1955 (in short to be referred "the Act") against the order of the Single Bench of this Board dated 17.02.2014 in Revision No. 7058/2012.

2. In this matter, an order passed by learned Assistant Collector, Sambhar Lake (District Jaipur) was challenged by which he had accepted the application under Order 26 Rule 9 of the Code of Civil Procedure. The order was challenged before this Board by way of revision. After hearing the matter, this Board dismissed the revision petition filed by the petitioner vide its order dated 17.02.2014. Being aggrieved with that order dated 17.02.2014, this review petition has been filed before the Board again inter alia on the ground that the Hon'ble Member of the Board has not considered the petition in its real sense.

3. I have heard the learned counsel for the parties and perused the file.

4. The learned counsel for the petitioner argued that the order of the learned Assistant Collector was a non-speaking order and passed without reasoning. Though this fact was accepted by the Hon'ble Member as he envisaged in para 5 of his judgment that generally it is the duty of the concerned party to prove its averments made and the court should not work for a party to collect evidence. The court is under obligation to give reasons to appoint commissioner in larger interest of justice, but as failed to consider that the order under challenge was neither a reasoned order nor a correct order. No reason whatsoever was given for appointment of commissioner. The Hon'ble Member of the bench dismissed the revision petition on the ground that in this case the report has already been submitted before the court. In these circumstances, there is no legal or jurisdictional error in the impugned order as the court has exercised its jurisdiction looking to the circumstances of the case. Therefore, this court is not inclined to interfere with the independent functioning of the trial court and its discretion. As such, the order of the Hon'ble Board was erroneous and this fact was mentioned by filing this review petition and the Hon'ble presiding officer while hearing the matter admitted the review petition and stayed further proceedings in the matter because he admitted that the order was non-reasoned and non-speaking order and which was liable to be quashed and as such issued notice for hearing on merit. As such, it was requested that the review petition to be admitted and the order

passed on 17.2.2014 by this Board as well as the order passed by the Assistant Collector, Sambhar Lake to be quashed.

5. On the other hand, the learned counsel for the non-petitioners argued that there is no need to interfere with the order of this Board as well as with the order of learned Assistant Collector, Sambhar Lake. The Board has passed the reasoned and legal order because it is purely the discretion of the trial court to allow or disallow the application for appointment of commissioner as is clear from Order 26 Rule 9 CPC itself which is envisaged as under :-

"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."

The Hon'ble Courts in a catena of judgments specifically upheld that allowing or disallowing the application under Order 26 Rule 9 CPC is purely the discretion of the trial court. No revision is maintainable against such an order because it is interlocutory order. In AIR 2004 Guwahati page 162 Ashok Paper Mills Vs. Sanghi Textiles Ltd., AIR 1991 Patna NOC page 100 Bijendra Mishra Vs. Jagdish Mishra, AIR 1994 Kerala NOC 287 Mytheen Kunju Ahammed Kunju Vs. P.A. Azeez Kunju, 1984 RRD page 725 Narain Singh Vs. Chhoti Devi, it was held that the order for appointment of Commissioner under Order 26 Rule 9 or rejection of the application for appointment of Commissioner under Order 26 Rule 9 are not revisable order under section 115 CPC because this is the interlocutory order and it is the pure discretion of the trial court. It was also argued that in the matter of Rajendra and Co. Vs. Union of India 2000 Law Suit (SC) page 709, the Hon'ble Supreme Court of India upheld that the order passed by trial court appointing a commission for inspecting the site and to file a report and to measure the work done by respondent, it was not necessary

for High Court to alter the trial court's order. The Hon'ble Supreme Court specifically mentioned that we cannot appreciate why High Court had interfered with the part of the order passed by the trial court appointing a commission for inspecting the site and file a report. As such, the Hon'ble Supreme Court held that it is the discretion of the trial court and if it deems fit, it may appoint a commission for its satisfaction. The High Court of Uttaranchal in the matter of Rajesh Kumar Gautam Vs. Mahamandeshwar Vedvyasanand Geeta Ashram 2003 Law Suit (UTT) 16 held that the court will be at liberty to exercise the powers under Order 26 Rule 9 CPC. Further, it may be pointed out that it is the discretion of the court as contained in Order 26 Rule 9 CPC and the revision under section 115 CPC is not maintainable challenging the discretion of the court below. The Hon'ble court referred the judgment of Hon'ble Supreme Court in the matter of Shivshakti Co-operative Housing Society, Nagpur Vs. Swaraj Developers 2003(4) JT (SC) 255 wherein it was upheld that there are certain positive restrictions to be on the High Court's power to deal with the revision under section 115. Until and unless there is total failure of justice and where irreparable loss would have caused to the parties against whom it was made, no interference to be made. The Hon'ble High Court of Punjab and Haryana in the matter of Harvinder Kaur Vs. Godha Ram 1987 Law Suit (P & H) 71 held that a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. Accepting or rejecting the application under Order 26 Rule 9 CPC is not an order deciding the controversy between the parties and as such it is not revisable. The learned counsel also argued by referring the judgment of the Hon'ble Board RRD 2009 page 485 Chain Das Vs. LR of Chandi Dan. In that matter, the court has rejected the application of appointment of commissioner. It was held that there is no factual or legal error in the order and as such, the revision was not maintainable. The learned counsel argued that in this case also, the order appointing the commissioner has not decided any controversy between the parties. After all, if the petitioner is not agreed with the report of the commissioner, he is having right to challenge it. The Hon'ble bench found no legal or jurisdictional error in the impugned order and as such the

revision was rightly dismissed by it. Now, this review petition is also liable to be dismissed.

6. I have gone through the contentions advanced by learned counsel for the parties. After hearing both the parties, I am of the considered opinion that to appoint the commissioner in a particular case is the discretion of the trial court. It is for the trial court to see whether appointment of commissioner is necessary or not. Until and unless there is total failure of justice and where irreparable loss would have caused to the parties against whom it was made, no interference to be made. In this case, the learned counsel for the petitioner could not explain how the order is affecting adversely to the rights of the petitioner. In such a circumstance, I find no illegality in the order made by the Board or the order made by the Assistant Collector. Only on the ground that the order is non-speaking order, it cannot be said that the revision is acceptable in all circumstances. Though, it is the general principle that an order passed by court should be speaking order, but if a non-speaking order has been passed, this cannot be the only ground for interference, the prejudice caused also must be proved. The Hon'ble Board while deciding the matter appreciated the fact of the matter and concluded that "In this case, the report has already been submitted before the court. In these circumstances, there is no legal or jurisdictional error in the impugned order, as the court has exercised its jurisdiction looking to the circumstances of the case." That is why, the revision petition was dismissed. As such, there is no illegality in the impugned order itself. If the party is having any objection to the report submitted before the court, he may file its objection as per law. In the result thereof, the present review petition is hereby dismissed.

Pronounced in open court.

(SATISH CHAND KAUSHIK)
Member

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