

## **POWER OF COURTS TO ISSUE COMMISSIONS**

Sections 75 to 78 of the Code deal with Powers of a Court to issue Commissions for the purposes specified therein. Order 26 lays down procedure relating to issue of commissions and allied matters.

### **OBJECT:**

Sec. 75 of the Court enables a Court to issue Commissions for the following purposes

- i. To examine witness;
- ii. To make local investigation;
- iii. To adjust accounts;
- iv. To make partition;
- v. To hold scientific investigation;
- vi. To conduct sale; or
- vii. To perform a ministerial act.

The General Powers of Courts in regard to commissions have been summarized in the above section. The detailed provisions are set forth in Order 26. This Section having set out the purposes for which a commission can be issued, there is no question of the Court invoking its inherent jurisdiction to issue a commission for any other purpose.

In a Title suit for Specific Performance of Contract, the plaintiff can adduce the evidence relating to claim of delivery of possession of suit land and damages before trial court, deputation of survey knowing Commissioner would amount to collecting evidence on behalf of plaintiff, therefore, the order rejecting application of the plaintiff for deputing said Commissioner was found proper, as held in the decision in the case of ***Madhu Sudan Pradan Vs. Santhosh Kumar Das*** reported in ***AIR 2004 Ori 86***.

**Whether appointment of Second Commissioner is permissible, if so, when?**

Where the report of the Commissioner for local investigation substantially complied with the warrant of Commission, then, there is no question of appointing Second Commissioner. In such case, the objections raised by the parties, if tenable, then to that extent Court can refer back the Commission for the purpose of revisit and further report.

Sec.76 deals with commission to another Court in case it is necessary to examine any person who is residing in jurisdiction of another Court, out of the State.

The issue of commission is in the discretion of the Court. The report submitted by the Commissioner constitutes an important piece of evidence. It cannot be said that such report has no evidentiary

value since the statements made therein are not tested by the Cross-examination of Commissioner.

Under Order 26 Rules 1 to 9, the Court can issue commission for different purposes.

Under Order 26 Rule 1 CPC, Court may issue commission to examine witness who is unable to attend the Court owing to sickness or infirmity etc. Court shall assign reasons for appointment of Commissioner. The provisions relating to issue of commission for examination of witnesses apply not only to Civil suits but to other proceedings also (Refer the decision in the case of ***United India Insurance Company Ltd. Vs. Seno (1998) 1 RCR 692***).

If a woman by her custom and social manners does not appear in public, being a pardanashin lady makes such a claim in a case before the Civil Court, which is not disputed and in case of a dispute, if it is proved to be so as of right, the parties entitled to claim benefit of Sec.132 CPC. She cannot be compelled to appear in a Civil Court either as a party or as a witness. If she is to be examined her statement to be taken on commission. Refer the decision in the case of ***T.P.Beepathumma Vs. Harry Martin D'Souza reported in ILR 1980 Kar 725 = 1980 SCC Online Kar 97***.

A Court appointing the Commissioner at the request of the party can direct such party to deposit the amount towards the expenses to

be borne by the either side. Refer the decision ***ILR 1981 Kar 842 – Aryavaidyan S. Ramantha Iyer Vs. T.L. Devaraj.***

Regarding examination of the Commissioner, refer the decision in the case of ***Ms. Josephine D’Souza Vs. Sri.M.Narayana Rao reported in (2000)1 SCCR 331.***

General rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open Court and tested by Cross-examination. Examination of witness by commission is an exception to the said rule. At the same time, however, inability to attend the Court on grounds of sickness or infirmity or detriment to public interest may justify issue of commission. The Court may also relax the normal rule of attendance of a witness in Court in its discretion in appropriate cases.

### **When Court may issue commission for examination of a witness?**

- i. If he is residing out of India,
- ii. If he is residing beyond the territorial jurisdiction of the Court,
- iii. He is about to leave the jurisdiction of the Court,
- iv. If he is exempted under the Code from attending the Court,
- v. If he is unable to attend the Court due to sickness or infirmity,
- vi. If he is a Government servant and cannot attend the Court without detriment to public service,
- vii. If it is necessary in the interest of justice or for expeditious disposal of the case or for any other reason.

A Court may issue Commission for examination of witness under Rule 1 on “Interrogatories or otherwise”. An order for examination of a witness on interrogatories is sometimes issued when examination of such witness should really be compliance. A commission can also be issued with the consent of the parties.

In Execution proceedings, Court can issue commission for the purpose of delivery of possession through a Commissioner.

A Commissioner has no power to disallow a question even if he considers such question as irrelevant. He also, in such case cannot exercise power under Sec.151 of CPC. In case of any objection to questions which requires to be decided by the Court, then, the same has to be referred to the Court for its decision. However, the commissioner is entitled to make note as to the demeanor of witness examined by him.

Before appointment of Commissioner / granting the prayer, an opportunity should be given to other side in view of principles of natural justice.

#### **PLACE OF EXAMINATION:**

The Code does not provide for the place to examine a witness on commission. It is in the discretion of the Commissioner, keeping in

mind the convenience of the parties. In case of irrelevant questions, the Commissioner can follow the procedure prescribed by Rule 16(A).

The evidence taken on commission forms part of the record. But it cannot be read as evidence nor Commissioner can record a finding as to its admissibility. Only a Court can take an appropriate decision.

### **PRACTICE AND PROCEDURE:**

Examination of a witness on commission is primarily in the discretion of the Court. The grounds upon which commission can be issued should not be relaxed because the witness is a man of rank or having a social status and it will be derogatory for him to appear in Court. Again the mere fact that the, witness is very busy of oldage, or examination of witness in Court would be expensive or the trial would be delayed are not sufficient grounds for issuing commissions. The commission may also not be granted when the prayer is made to avoid cross-examination before the Court.

An Order for appointment of Commissioner is a step in the direction of adjudication of *lis* between the parties and such decision does not operate as *res-judicata*. A Court may alter, modify, re-call or cancel its earlier order. Such action can be taken even *suo-moto*.

An Order granting or refusing the prayer for appointment of Commissioner for examine a witness is neither a decree under Sec.2(2)

nor an appealable order under Sec.104 r/w O.43. No appeal lies against that said order. However revision lies under Sec.115 of CPC.

Order 26 Rule 8, declares that the evidence taken on commission cannot be read as evidence in the suit without the consent of the opposite party unless one of the circumstances mentioned in Clause A is present or a Specific Order is passed by the Court under Clause B of Rule 8.

The deposition on commission can be read as evidence if the following conditions are satisfied;

- i. The opposite party consents
- ii. The witness is dead
- iii. The witness is residing beyond the jurisdiction of the Court
- iv. The witness is unable from sickness or infirmity to depose in Court;
- v. The witness is exempted from personal appearance in Court;
- vi. The witness is a Government servant and cannot attend the Court without detriment to the public service;
- vii. The Court makes a specific order.

When no objection was raised before the Commissioner at the time of recording evidence, same shall not be allowed to be raised before the Court after return of the commission.

Rule 9, provides for commission to make local investigations for the purpose of elucidating any matter in dispute, or ascertaining

market value of any property or amount of mesne profits, or damages or annual net profits.

The object of local investigation is not to collect evidence which can be adduced in Court but to obtain material which for its very peculiar nature can best be had only the spot. Refer the decision in the case of ***Padam Sen Vs. State of UP, AIR 1961 SC 218, Amrish Kilachand Vs. Indian Commercial Co. (1997) 10 SCC 95.*** The purpose of Order 26 Rule 9 is not to assist a party to get the evidence which the party itself is supposed to collect.

The expression 'elucidate' means to make lucid or clear, throw light upon explain, enlighten. Hence, where the Court is satisfied on the materials available on record that a party is not able to produce required evidence due to certain circumstances, it may assist the litigant to appoint a Commissioner to get such material which neither can be add from records nor can be produced by the parties leading oral or document evidence. Refer the decision in case of ***Annappa Mhesta Vs. Muttaya Achary reported in (2002) 3 Kar LJ 650.***

No Court can prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of request of the party to appoint a Commissioner to make local investigation in an appropriate case may amount to failure to exercise jurisdiction vested in the Court. Such evidence enables the Court to properly and correctly understand the issue, assess the evidence on record and clarify any point which is of doubtful nature.

It also helps the Court in deciding the question in controversy before it relating to identification, location, measurement, encroachment etc. of the property in dispute. Refer the decision in the case of ***Southern Command Mes Employees Co-Op. Credit Society Vs. V.K.K.Nambiar (1988) 2 SCC 292 = AIR 1988 SC 2126.***

The decision of a material issue cannot be left to the Commissioner, as such issues decided by the Court. The report of the Commissioner on such issue is not binding on the Court, as the Court is free to arrive at its own conclusion. Refer ***AIR 1970 Mys 314 Rangayyakanantha Vs. Govinda Chatra and others.***

When either party files an application for appointment of Commissioner, the Court cannot dispose of the main matter without deciding the application for issue of commission.

When boundaries are in dispute the Survey Officer may be directed to make spot inspection and report. **(2001) AIHC 4610 (Kant).**

When plaint allegations are clear and specific about the extent of encroachment, there is no need to appoint a Commissioner. Local Commissioner can only report on existing facts and it cannot report as to how the facts came into being. Refer the decision reported in **(2001) 2 SCC 762 - Lekh Raj Vs. Muni Lal.**

In the case of ***Bommiseti Subba Rao Vs. M.S.R. Prasad reported in (1996) 10 SCC 49***, it is held about when the benefit of Commissioner's report is not available.

The power to appoint the Commissioner is discretionary and depends on facts of each case, ***AIR 1971 SC 61***.

It is open to the parties to disprove the accuracy of the report by leading independent evidence or by cross-examining the Commissioner in regard to his report instead of calling for fresh report, in the light of objection raised. Refer decision reported in ***(1989) 2 Kar LJ 499***.

Belated application for appointment of Commissioner i.e., after the closure of evidence would not be allowed as held in, in the case ***B.S. Nazir Hassan Khan Vs. Ashwathanaryana Rao***

#### **CONDITIONS:**

In order that Rule 9 to apply, it is necessary that the Court deems local investigations to be requisite or proper for one or more of the purposes specified in the said rule.

Whenever an application for appointment for Commissioner is made, the Court must be satisfied that the application is bonafide and has not been made to achieve ulterior object. The order should be passed by recording reasons. In the decision in the case of ***H.V.Nagendrappa Vs. H.M.Hanumanthappa reported in (2005)5***

**Kar LJ 331**, it is held that while considering the prayer for appointment of Commissioner, the Court must apply its mind to the facts and circumstances of the case on hand and taken appropriate decision granting or refusing the prayer. No hard and fast rule of universal application can be laid down.

Even the Court suo-moto can exercise its power to appoint Commissioner if it deems fit.

The Apex Court in the case of **Rajinder and Company Vs. Union of India** reported in **(2000) 6 SCC 506** has held that, the order passed by the Trial Court appointing a commission for inspecting the site and to file a report and to measure the work done by the Respondent. Question whether the Commissioner's report is finally acceptable or not would be decided by the Court *dehors* the order passed by the authority concerned.

In the decision in the case of **Praga Tools Corporation Limited Vs. Mehaboobunissa Begum and Others (2001) 6 SCC 238**, wherein, it is held that the report of the Commissioner is in aid of other evidence to arrive at findings relating to the controversy between the parties.

In the case of **Subhaga Vs. Shoba** reported in **(2006) 5 SCC 466**, it is held that, a property can be identified either by boundary or by an other specific description. Here the attempt had been to identify the suit property with the reference to the boundaries and the Commissioner has identified that the property with reference to such

boundaries. Even if there was any discrepancy normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in the suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff. Consequently, the order of the High Court interfering with the decision of the first Appellate Court regarding finding on identification was set-aside.

### **STAGE FOR SEEKING APPOINTMENT OF COMMISSIONER:**

A prayer for appointment of Commissioner may be made at any time during the pendency of the suit as held in various decisions of various High Courts and one such decision is in the case of ***John Vs. Kamarunnissa AIR 1989 Ker 78***. A commission can also be issued at appellate stage if necessary grounds are made out.

### **LOCAL INSPECTION BY JUDGE:**

There is divergence of opinion on the question whether a Court or a Judge has power to make local inspection in one of the views of the earlier Court verdicts, a Judge has such power and he can conduct the inspection if he thinks appropriate. Though there is divergent view, if Order 26 Rule 9 is read along with Order 18 Rule 18 which empowers a Court to inspect any property or thing and also prepare a Memorandum of any relevant facts observed at such inspection. It enables a Court to understand the controversy between the parties. However when there is a report of local inspection made by a Judge,

how the report has to be viewed has been enumerated under Order 18 Rule 18 of CPC. The Do's and Don'ts are provided under Order 18 Rule 18 of CPC.

The Commissioner shall issue prior notice of his visit to the parties or counsels appearing for the parties. The Commissioner can also be cross-examined regarding the report and the observation made therein.

Rule 10 provides for procedure to be followed by the Commissioner before his visit and file the report before the Court. The report and deposition to be evidenced in the suit and commission may be examined in person.

The party to the suit can file objection to the commission report though there is no provision for the same. It is the duty of the Court to consider such objection and if necessary can direct for revisit and further report.

The commission report is just like any other evidence in the suit and is no way binding on the Court. Acceptance or rejection of the report is to be considered by the Court at the stage of trial of the suit. A report of the Commissioner should not be made the sole basis and foundation of the final order in disregard of other evidence on record. Court can partly accept the report and partly reject it.

Refer the decision **(2001) 2 SCC 762 - Lekh Raj Vs. Muni Lal.**

Under Rule 10 (2) of Order 26 CPC, the report of the Commissioner and the evidence taken by him shall be the evidence in the suit and shall form part of the record. But, nonetheless the report remains only as a piece of evidence. Therefore, it is for the Court of fact to ascertain and find out as to how reliance can be placed on such evidence keeping in view the other evidence in the case, the status of the person is not always a good ground for attributing credibility. The assessment of evidence as to be made by taking into account the totality of the circumstances and material evidence on record as held in the decision reported in ***ILR 1995 Kar 1127*** in the case of ***Alex D'Souza Vs. Dinoysius Mohan Pinto and Others*** also refer ***ILR 1995 Kar 3286 in the case of Vokkaligara Sanappa Vs. Vokkaligara Annaiah and Another.***

Rule 10A provides for commission for scientific investigation and it deals with question which must have arisen in a suit involving scientific investigation, and in the opinion of the Court it cannot be conveniently conducted before the Court and issuance of the commission may be necessary or expedient in the interest of justice. When there is a dispute regarding handwriting, it requires a scientific investigation.

Application was filed by the Defendant seeking appointment of Court Commissioner to examine the signature on certain documents marked in evidence to examine and give opinion as to genuineness. The Court below was right in dismissing the application as the signatures were admitted by the Defendant refer the decision in the

case of ***Indian Institute of Computer Science Ltd. Vs. Calisys Technology Private Ltd., Bangalore*** reported in (1999)4 KCCR SN 533.

In the case of ***Chikkanna Vs. Sri. Lokesh and Others*** reported in (2001) 1 KCCR SN 52 = ILR 2001 Kar 2681, it is held that rejection of application for, appointment of handwriting expert when there is dispute regarding genuineness of signature of testator, is held to be incorrect.

In the decision in the case of ***Sharada Vs. Dharma Lal*** reported in (2003) 4 SCC 493, the Apex Court has held that the Court can order or direct party to undergo medical test and that such a direction would not violate the Right under Article 21 of the Constitution. In the subsequent decision in the case of ***Kamalanatha Vs. State of Tamilnadu*** reported in (2005) 5 SCC 194 the decision relating to DNA reports are accepted as proper evidence. In view of the above, the decisions in ***Gowtham Kandu and Banarasi Das*** were held to be not a good law.

Rule 10B provides for commission for performance of ministerial act and Court must assign reasons for appointing commission for performance of ministerial act.

The word ministerial means, acting at the command of another, or as an agent for another or under superior authority; clerical, or pertaining to ministry or service. It is an act dictated by law and about

which a person performing it as no power to exercise authority, judgment or discretion.

Rule 10C provides for sale of moveable property which is in the custody of Court. Rule 11 provides for commission to adjust or commission to examine or adjust accounts. Rarely such applications are moved before the Court.

Rule 12 provides that the Court shall give necessary instruction to the Commissioner to carry out the work. Generally, even in a final decree proceeding the Court has to appoint the Commissioner for the division of the properties and file the report and then divide the properties by metes and bounds.

The power of the Commissioners is provided under Rule 16 of Order 26.

### **INSPECTION UNDER ORDER 39 RULE 7 CPC**

Further, under Order 39 Rule 7, the Court may on the application of any party to a suit, and on such terms as it thinks fit 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 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.

A stranger to a suit cannot be compelled to allow a Commissioner appointed by the Court at the instance of a party to enter upon his land for the purpose of inspection of the property or for an inventory. Refer the decision reported in **(1957) Mys LJ 29**.

A Commissioner cannot be directed to enter upon a land of a stranger and inspect the property unless it is clear that the property is a subject matter of the suit. Refer **AIR 1961 SC 218**.

Normally, such order can be made at any stage and it would be appropriate to issue notice to the other side unless it appears that the object of making such order would be defeated by the delay. Refer the decision reported in **AIR 1987 Kar 40**.

In a suit by 'A' against 'B' for damages for injury alleged to have been caused to A's house by the erection of B's house, the Court may make an order on B's application for inspection of A's house, to determine the alleged injury, A's house been in such a case, the

‘subject matter of the suit’. In a case where question arose as to the age of huts on a *raiya* holding, it was held that the matter should have been dealt with under this rule. When there are boundary pillars between two properties, then it is not a matter of inspection under this rule but for local investigation under Order 26 Rule 9 CPC.

Provision for inspection in Rule 7 has been enacted mostly for the purpose of keeping on record the existing condition of the property so that if the same is subjected later on to any change, deterioration or mischief by any of the parties or by any other agency or reason, that can be known by the Court if and when required.

A dispute in relation to quantum of the goods which have become damaged cannot be determined in interlocutory proceedings.

