

THE LAW ON APPOINTMENT OF RECEIVERS

Presented By:

**Sri. G. Lenin Babu,
Judicial Magistrate of I Class,
Special Mobile Court, Srikakulam.**

Receiver

The term receiver has not been defined in the Code of Civil Procedure 1908. Receiver is an important person appointed by Court to collect, receive pending the proceedings, the rents, issue and profit of land or personal estate, which it dose not seem reasonable to the Court that either party should collect or receive, or for enabling the same to be disbursed among the person entitled.

Duties and liabilities of a receiver

In other words, the receiver is an indifferent person between the parties to a case, appointed by the Court to receive and preserve the property or fund in litigation pendente lite, when it dose seem reasonable to the Court that either party should hold.

So, receiver is an officer of the Court to whom is given possession or custody and management of property. He has no power except those which has been conferred of him expressly or impliedly by the Court. The property dose not vests in the receiver; the receiver is not the representative or agent of the parties. His holding of property is holding of the Court. He is also a public officer within the meaning of Clause 17 of Section 2 of the Code of Civil Procedure.

Appointment of Receiver :-

Relief by way of appointment of a receiver is discretionary with the Court. According to Section 44 of the Specific Relief Act, 1877, "The appointment of a receiver in pending Suit is a matter resting in the discretion of the Court.

The mode and effect of his appointment, and his rights, powers, duties and liabilities are regulated by the Code of Civil Procedure."

In a suit for a declaration and permanent injunction, a civil court is competent to appoint a receiver. But this power should be used only in exception cases. A receiver can be appointed of any movable or immovable [e.g., Share in companies, lands, stock in trade etc.].

The Court is competent to appoint a receiver for a disputed property only when the conditions laid down in Order XL Rule-1 of the Code is fulfilled. According to Order XL Rule-1 of the Code of Civil Procedure 1908, "Where it appears to the Court to be just and convenient, the Court may by Order-

- a) appointment a receiver of any property, whether before or after decree;
- b) remove any person from the possession or custody of the property;
- c) commit the same to the possession, custody or management of the receiver; and
- d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such those powers as the Court thinks fit."

Remuneration

The Code of Civil Procedure **Order XL Rule-2** deals with the Remuneration of a Receiver.

- Remuneration of the Receiver is in the discretion of the Court.
- A party is not to get any remuneration.
- If a person appointed receiver accepts to keep account in a partnership without remuneration he does not thereby forego his right to remuneration for managing the business.
- Any agreement between the receiver and a party regarding in remuneration is a gross contempt and void.

- Remuneration is to be fixed having regard to the nature of the work and the responsibility to be shouldered by the receiver. It may be fixed a fixed sum or on the percentage basis.

Duties

The Code of Civil Procedure **Order XL Rule-3** deals with the Duties of a Receiver.

Receiver cannot delegate his duties to other.

- The Court has discretion to appoint receiver without securities, but it should be done in most exception cases.
- Where a receiver is appointed, the property does not vest in him free of the encumbrance to which it is already subject.
- Duty to receiver in regard to monies receive.
- Receiver is not cable to account for any period other than for which he was appointed.
- Purchase of property by a receiver in an execution of sale without the leave of the Court is void.
- Receiver must furnish details of expenditure.
- **Appeal:** – See (rule 1) ante. An Order refusing to accept security offered by an interim receiver is not appealed.

Enforcement of receiver's duties :-

The Code of Civil Procedure **Order XL Rule 4** deals with the Enforcement of receiver's duties.

- If the receiver is to be found guilty of gross negligence, it must be first shown by those who so allege that it would have been profitable to the estate if the debtor's property has been attached.
- Where a receiver is found guilty, the only provision for taking action against him apart from proceeding against the security, is that his property can be attached and that is the only way of enforcement of the Order and arrest and imprisonment are not the methods.
- The Court can in the course of passing the accounts of the receiver, make an Order to make good the loss caused by the

receiver through his willful negligence, no separate suit against him is necessary.

- Receiver may be removed for failure to submit accounts
- A receiver who has once been appointed should be discharged only on the ground of proved incapacity.
- A receiver appointed by consent of the decree-holder can be discharged only for malfeasance or for futility of the administration.
- **Appeal** :- Rule 4 is appealable but Order making the receiver liable for a certain sum or to pay a certain amount into Court is not appealable unless accompanied by an Order of attachment and sale which is the operative part of the Rule.

When Collector may be appointed as receiver :-

The Code of Civil Procedure **Order XL Rule-5** deals with when the Collector may be appointed as receiver. Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector appoint him to be receiver of such property.

Conclusion :-

Appointment of Receiver is the discretionary power of the Court. It must be made pending a suit and it is only be way of specific Relief. A receiver appointment by the High Court, Who has under its Order taken possession of property, cannot be prosecuted for criminal branch of trust in respect thereof without first obtaining the leave of the Court.

----- XXX -----

THE LAW ON APPOINTMENT OF ADVOCATE COMMISSIONER

Presented By:

**G. Lenin Babu,
Judicial Magistrate of I Class,
Special Mobile Court, Srikakulam.**

Introductory:

The object of Order XXVI Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate-Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 inter alia for elucidating any matter in dispute. There is some confusion as to in what circumstances an Advocate-Commissioner is to be appointed in a Civil Suit. To answer this question, we have to understand the expression of “elucidating any matter in dispute” in Order XXVI Rule 9 of C.P.C.

There are thousands of case-law as to this issue. Most of us are under the impression that no Advocate-Commissioner is to be appointed in a Suit for Injunction. For example, the claim for injunction made by the Plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using the said way. Any amount of evidence in this regard may not help the Court to render a correct finding on this aspect. So, a situation such as this would definitely fall within the expression of “elucidating any matter in dispute. Similarly, there are several issues regarding appointment of Advocate-Commissioner.

Appointment of Commissioner in terms of part III i.e. matter “Incidental proceedings” of C.P.C. is a provided by Section 75 of the Code. In as much as this article is concerned with the appointment of Commissioner Section 75 of C.P.C. being the provision relevant, empowering the Court, it would be appropriate to refer the provisions.

Section 75. Power of court to issue commissions. – Subject to such conditions and limitations as may be prescribed, the court may issue a commission –

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition;
- (e) to hold a scientific, technical, or expert investigation;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- (g) to perform any ministerial act.”

As per Section 75(b), subject to such conditions and limitations as may be prescribed, the Court may issue commission to make a local investigation. With this, Section 75 it would be appropriate now to refer Order XXVI Rule 9 of

C.P.C. Sub-title of Order XXVI of C.P.C. makes a reference to “Commissions to examine the witnesses”. Rule 9 of Order XXVI provides “Commissioner for local investigation.”

Sometimes, it becomes pre-trial decree:-

In Sarala Jain and others Vs. Sangu Gangadhar, in view of the law laid down by the Apex Court in Mohd. Mehtab Khan's case, reported in 2013 (3) A.L.D. 64 (SC), His Lordship held that appointing Advocate-Commissioner by the trial Court for the purpose of demarcating schedule property and fix boundary stones to the property of the respondents amounts to granting pre-trial decree as it satisfied part of the reliefs claimed in the Suit. In such case, commissioner cannot be appointed for the said purpose. Further, it was held in this case that to appoint an Advocate-Commissioner, Court has to keep in mind the following :-

- (1) Total pleadings of both parties;
- (2) Relief claimed in suit;
- (3) Appointment of Advocate-Commissioner for specific purpose at interlocutory stage shall not amount to grant pre-trial decree; and
- (4) Necessity to appoint Advocate-Commissioner to decide real controversy between parties.

If we keep these principles in mind while dealing with an application for appointment of Advocate-Commissioner in a Suit, We can easily find out whether allowing such application becomes pre-trial decree or not. Moreover, it shall be kept in mind that party shall adduce oral evidence and place the factual facts of his case at the first instance. Such a function cannot be entrusted to a Commissioner.

Appointment of Commissioner in a Suit for Injunction :-

In 2014, the Hon'ble Andhra Pradesh High Court, in K. Dayanand and another vs P. Sampath Kumar, after considering the dicta observed in the rulings reported in 2009 (2) ALD 238; 2012 (3) ALD 384; 2011 (2) ALD 472; 2006 (4) ALD 675; 2005 (6) ALD 389; 2011 (4) ALD 231; (2009) 12 SCC 773; 1997 (1) A.P.L.J. 61 (SN); 2010 (4) ALD 198; 2008 AIR SCW 6500; (2008) 8 SCC 671 and 2013 (1) ALT 548, it was held that there is no absolute bar on appointment of Commissioner in a Suit for Injunction also as per the law laid down in the above referred judgments nor the provisions of Section 75 and Order XXVI Rule 9 do impose such a prohibition.

It is not the business of Court to collect evidence in favour of one party :-

In Padam Sen and another Vs. The State of U.P., AIR 1961 SC 218, three Judge Bench of the Hon'ble Supreme Court has held that Court has no inherent power under Section 151 to appoint an Advocate-Commissioner to seize account books in the possession of the Plaintiff, upon an application by the Defendant that he has apprehension that they would be tampered with. The Hon'ble Apex Court further held that the Court cannot seize them forcibly by appointing an

Advocate-Commissioner, but it can summon them and if not produced, it can penalise the party and also draw adverse presumption against him. If the documents are forged, while in the possession of the Plaintiff, the Defendant can prove the forgeries and dispute the entries. The Hon'ble Supreme Court has categorically held that it is not the business of the Court to collect evidence in favour of one party.

Advocate-Commissioner cannot be appointed for making an enquiry about factum of possession:-

In *K.M.A.Wahab & others vs. Eswaran & another*, reported in 2008 (3) CTC 597, His Lordship, A.Kulasekaran, J, has held that the appointment of Advocate Commissioner for making enquiry about the factum of possession of the property in dispute is improper since the same has to be adjudicated upon framing issues and on appreciation of evidence. The Advocate-Commissioner cannot be appointed to find out the factum, as to who is in possession of the property. Even if an Advocate-Commissioner is appointed and his report is filed, it can be questioned by the other side by filing objections, as the dispute in the Suit could be resolved only on the basis of oral and documentary evidence let in by the parties. In *Rajendran vs. Lilly Ammal @ Nelli Ammal*, reported in 1998 (II) CTC 163, His Lordship S.Jagadeesan, J, has held that Advocate-Commissioner cannot be appointed to find out the fact as to who is in possession of suit property in a case.

In another case, in *Kuttiyappan, D. vs. Meenakshiammal Polytechnic Unit of M/s. Meenakshiammal Trust*, reported in 2005 (4) CTC 676, Her Lordship held that the defendants therein were not entitled to seek for appointment of Advocate-Commissioner to note their possession, as it is well settled that Commissioner cannot be appointed for noting down the factum of possession or the enjoyment of property.

Material issue of determining the possession cannot be left to an Advocate-Commissioner :-

Since the parties should prove their case by letting in legally acceptable evidence and the report of the Commissioner can only aid the Court in evaluating the evidence to come to just conclusion.

However, in *T.S. Ramu Vs. Neelakandan*, reported in 2004 (2) CTC 674, His Lordship S.Sardar Zackria Hussain, J, has held that appointment of Advocate Commissioner to find out the actual area under the occupation of the tenant and to file report is legally maintainable under Section 18 (A) of the Act. However, in the instant case, the purpose for seeking appointment of Commissioner is different.

If no prompt actions are taken to appoint an Advocate-Commissioner, it may destroy the valuable rights of the parties:

In *M.P. Appulu Vs. A. Fatima Zohra & another*, reported in 1982 (2) MLJ 340, His Lordship T.Sathiadev, J, has held that "There are circumstances in

which, it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the Parties. It may so happen, when a landlord high-handedly starts pulling down a portion of the main building, the tenant would be greatly interested in securing a Commissioner appointed forthwith. If the right of tenant to have access to stair-case is obstructed, he is most interested in seeking appointment of Commissioner and secure immediate relief, for restoring amenities, which is assured to him under Section 17 of the Act." His Lordship T.Sathiadev, J, while interpreting Section 18 (A) of the Act held that application for appointment of Commissioner shall properly be understood.

Advocate Commissioner is an officer of the Court and shall act Judicially without any bias.

Appointment of advocate-commissioner for the second time:

In S. Rukman Naik vs P. Anjani Prabha and anr., 2004 (4) ALD 876, an interesting question came for consideration. While the said report is pending consideration, is it proper on the part of Court to appoint Advocate-Commissioner for the second time for inspecting the site and submitting his report in respect of which the Advocate Commissioner appointed on the first occasion had submitted his report ? To answer, the Hon'ble Andhra Pradesh High Court held that in para 21 as follows: "In view of the foregoing facts and circumstances, the Division Bench has taken note of the status quo order passed by this Court in S.A.14 of 2002 when C.A. No.113 of 2004 was filed by the Petitioner in the contempt case to appoint Advocate-Commissioner and re-entrust the warrant to Ms. W.V.S. Rajeswari, who was earlier appointed as Advocate-Commissioner to note down the physical features. Without passing any order on the report of first Advocate-Commissioner, this Court ought not to have considered C.A. No.113 of 2004 for reentrusting the warrant to Ms. W.V.S. Rajeswari, Therefore, the order passed in C.A. No. 113 of 2004 is not in consonance with Order XXVI, Rule 10(3) of the Code of Civil Procedure but also against the order passed by the Division Bench in a batch of CRPs filed by the petitioner." As to appointment of a second Advocate Commissioner, In Pamula Narsaiah And Anr. vs Pamula Murali And Ors, citations:

2002 (1) ALD 393, 2001 (6) ALT 385, it was observed as follows: "Therefore, I hold that under Sub-rule (3) of Rule 14 of Order 26, the Court below has no power to reopen or review its own order when it has confirmed and passed a final decree.

on the basis of the Advocate-Commissioner's report. If the parties are so aggrieved, they can assail the correctness or otherwise of the order by approaching the appellate Court. If once the Court below has confirmed and passed a final decree on the basis of the Advocate-Commissioner's report, it has no power to vary or set aside the Advocate-Commissioner and appoint a second

Commissioner.” Mere lapse in report, cannot be ground for appointment of second commissioner. Commissioner’s report, is not per se evidence. Court has discretion to appoint second commissioner depending on facts and circumstances of the case before it.

Evidentiary value of Advocate-Commissioner’s report:-

A party can countermand the evidence of Commissioner’s report by letting in other evidence. A Local Commissioner can only report on existing facts and not how they came about, as per decision of Hon’ble Supreme Court in Lekh Raj Vs. Muni Lal and others, (2001) 2 Supreme Court Cases 762. In K. Viswanathan Vs. D. Shanmugham Mudaliar and anr. reported in 1986(1) M.L.J. 319, held that under Order XXVI Rule 10(2) of C.P.C. the report of the Commissioner is evidence in the Suit and forms part of the records. In Veppanathar @ Karuppannam and anr. Vs. Laiappan reported in 2000-1 Law Weekly 893, in which, the Hon’ble Madras High Court has held that :- “Under Order XXVI Rule 10(3) the Court, if it is dissatisfied with the report, can direct setting aside the report, the Court can direct the Commissioner to rectify the defect or deficiency, taking into consideration the objections and evidence let in, in that behalf and to file a supplementary report. As far as possible, Commissioner, who has already visited the property should be directed to file a supplementary report and only if that is not possible, the report could be scrapped.

Introducing Additional Evidence – When?

In a decision reported in Penta Urmila and others Vs. Karukola Kumarasamy, (2005 (2) ALD 130), the Court in paragraph 6 has held as follows :-

In a Suit for Permanent Injunction, the vital and important issue is whether the Plaintiffs are in possession of the Suit Schedule Land and whether there was attempt by the Defendant/s to interfere with such possession of Plaintiffs. The burden is entirely on the Plaintiffs to bring convincing and cogent evidence on record and for so doing, it is not permissible for them to invoke Order XXVI Rule 9, which is intended for different purpose. Further, in Appeal Suit, the Advocate Commissioner files a report, as directed by Appellate Court with the assistance of the Mandal Surveyor it would certainly amount to introducing additional evidence which is ordinarily not permissible unless proper application is made under Order XLI Rule 27 satisfying the conditions therein.

Local inspection by advocate-commissioner:-

Object of local investigation under O. XXVI, R. 9 of the Code which cannot be limited, in Bandaru Mutyalu and another Vs. Palli Appalaraju, C.R.P No.5525 of 2011, dt. 01-07-2013, it was held that in situations where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared.

The Hon'ble Andhra Pradesh High Court in the case between Varala Ramachandra Reddy Vs. Mekala Yadi Reddy and others, 2010 (4) ALD 198, wherein, it was held that an Advocate Commissioner can be appointed in an injunction suit for local inspection of the suit site and to demarcate the suit schedule property with the help of the Surveyor. If it is a case in between landlord and tenant, the landlord can seek for appointment of Advocate Commissioner on the ground that the tenant has substantially damaged the back portion of the building and is also attempting to unauthorisedly put up some construction and in view of the attitude of the tenant, it was found necessary to appoint an Advocate-Commissioner to make a local inspection of the building and to note down the physical features of the building and the structure thereon and submit a report to the Court with plan and accordingly, the application can be maintainable under Section 18 (A) of the Act.

Further, the Hon'ble Andhra Pradesh High Court in the case between Mallikarjuna Srinivasa Gupta Vs. K.Sheshirekha, 2006 (3) ALD 362 in which case, a suit was filed for declaration of title and an application was filed contending that the defendant therein encroached a portion of the site. The stand of the defendant therein was that he has not encroached any portion of the site as alleged by the plaintiff. In the circumstances, the Court held as follows:-

“By mere looking into the sale deed or the lay out, it is not possible to determine the rights, unless it is verified whether any portion of the building is constructed in Plot No.62. Therefore, it is essential to consider the request of the petitioner for appointment of Advocate Commissioner for the purpose mentioned therein.”

For the purpose of taking measurement of the suit land:-

The Hon'ble Supreme Court in Gurunath Manohar Pavaskar & others vs. Nagesh Siddappa Navalgund and others, reported in CDJ 2007 SC 1339, has held that the learned trial Judge may appoint an Advocate-Commissioner for the purpose of taking measurement of the suit land.

The Court has discretionary power to appoint Commissioner :-

In A.Nagarajan vs. A.Madhanakumar, reported in CDJ 1996 MHC 497, His Lordship Shivappa, J held that for the purpose of elucidating facts in respect of any matter in dispute where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, certain facts, to make it clear, intelligible and to throw light upon the matter in issue, relating to the main case as well as the facts leading to the dispute.

Whether the Execution Court has power to appoint an Advocate-Commissioner?

In Gurram Anantha Reddy vs Katla Sayanna Dt. 30-03-2015, it was held as: "The contention that in Execution Proceedings, Commissioner cannot be appointed and the E.P. Court has no power to appoint Commissioner under

Order 26 Rule 9 of the Code of Civil Procedure has absolutely no merit in view of the reason that as per Order 26 Rule 18-A of the Code of Civil Procedure, the provisions of Order 26 of Code of Civil Procedure are applicable to the proceedings in execution of a decree or order also.”

In cases of delivery of possession of immovable properties to the parties concerned, the trial Court cannot pass orders directing Court commissioner to deliver possession of property to parties concerned upon preparing report. This is not a method which is contemplated and guidelines laid down by Hon’ble Apex Court. After submission of report by Court Commissioner, parties are to be given an opportunity to raise objection and thereafter final decree proceedings can be concluded after hearing parties. Therefore, directions to Court Commissioner to deliver possession to parties concern cannot be issued in the light of a decision reported in 2009 AIR (SC) 2863 in between Shub Karan Bubna @ Shub Karan Prasad Bub Vs Sita Saran Bubna and others rendered by Hon’ble Supreme Court of India, wherein it is held that in case of delivery of possession of house property with meets and bounds to effect partition, the Court has to further takeup proceedings after submission of the reports by the Commissioner by way of hearing the parties. The said guidelines were relied upon in a decision reported in 2016 LawSuit (Bom) 1768 in between Latabai Subhashrao Dahake Vs Jayanth Punjaji Takarkhede rendered by Hon’ble High Court of Bombay (Nagpur Bench).