## Identified Officers

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Suits – Institution, Place of institution and Parties to the Suit.

Paper Presented by

Sri S.S. Sankar Reddy,
Addl. Judl. Magistrate of I class,
Gudivada.

I. INTRODUCTION:

The basic aim of a legal system of a country is to impose duty to respect the legal rights conferred upon the members of the society. The person making a breach of that duty is said to have done the wrongful act. On the basis of nature and gravity of such wrongful acts, those are separated under two categories: Public Wrong and Private Wrong. Public wrong is deemed to be committed against the society and the Private wrong, against individuals. The gravity of the former is greater than that of the latter. The first category is termed under the Law as ‘crime’ governed by the Criminal Laws (Substantive and Procedural) and the second category, as ‘civil wrong’ governed by the Civil Laws. Under the Criminal Law the action is taken by the state in its name and the accused has to pay fine to the State’s fund and is punished by imprisonment or sentenced to death and in such cases the proceeding is started either by lodging the FIR or by lodging complaints (in case of Complaint cases) as provided by the Criminal Procedure Code, 1973.

In case of civil wrong, the remedy is the compensation either liquidated or unliquidated damages; the remedial measures ensured to the people is based on the Latin maxims damnum sine injuria (damage without injury), injuria sine damnum (injury without damage) and ubi jus ibi remedium. According to the first two maxims if the legal right of a person is violated he will get the remedy, even in case where no actual damage is caused to him; but where he has no legal right, then if any actual damage is caused to him, he cannot be entitled to get the remedy. The ubi jus, ibi idem remedium (where there is a right there is a remedy), speaks of the remedial measure available in the formerly mentioned cases. Such remedial measures are enforced through the institution of suit. The Code of Civil Procedure, 1908 is the procedural or the adjective law of India in civil matters. Sections 26 and Sections 35-35B read with Orders I (Parties to the Suit), II (Framing of the Suit), IV (Institution of the Suit), VI (Pleadings) and VII (Plaint) provide the procedural principles and rules regarding institution of suits.

Choosing the proper place of suing: A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. A decree passed by the Court in such cases is a coram non judice. So choosing the proper court is the next which depends on the contents of the plaint. Section
9 of CPC has declared that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of a court is decided by the legislature; parties by the framing of the plaint cannot interfere into the extent of this jurisdiction. They can choose one of some of the courts having same jurisdiction. In Ananti v. Chhannu, the Court has laid down the correct law on this point: The Plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen.

II. Presentation of the Plaint: Commencement of the Suit:

Section 26 and Order 4 contain the provisions relating to the institution of a suit. Rule 1 of Order 4 goes as:

1. Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf.
2. Every plaint shall comply with the rules contained in Order VI an VII, so far as they are applicable.
3. The plaint shall not be deemed to be duly instituted unless it with the requirements specified in sub-rules (1)and(2).

Section 26 provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Order 4 Rule 1 lays down the procedure for institution of suit; but does not speak of any ‘other manner’ for the purpose. The amendment makes it clear that unless the plaint is filed in duplicate it will be deemed to be incomplete. Sub-rule (3) has been inserted in order to curtail unnecessary adjournments for due compliance of the provisions of sub-rules (1) and (2) after the filing of the plaint. The plaint may be presented either by the affected person himself, or by his advocate or by his recognised agent or by any person duly authorised by him. A proceeding which does not commence with a plaint is not a suit within the meaning of Section 26 and Rule 1 of Order 4.

III. Parties to the Suit:

A.) Parties to suit are of two kinds namely necessary party and proper party. A necessary party is a party without whom suit cannot be decided. A proper party is a party in whose absence suit will not be defeated. Hence non-joinder of necessary party is fatal to the suit and non-joinder of proper party is not fatal to the suit. Also, proper party is a party against whom any relief has not been sought. [O.I R.9]. It has been time and again reiterated by Supreme Court and High Courts that the question of necessary party and proper party has to be looked with utmost due diligence with an object to avoid multiplicity of proceedings.
O.I of the Code deals with parties to suit and the said Order in brief is as follows:-
O.I R.1:- Considers who may be joined as plaintiffs. All those persons having right either jointly or severally to seek relief arising from same acts or transactions and if such persons brings separate suits if any common question of law or fact arises all such persons can be joined as plaintiffs.
O.I.R.2:- Considers power of Court to order separate trials and accordingly in order to avoid embarrassment or delay in trial of suit due to joinder of a plaintiffs Court can ask plaintiff to elect for separate trials or Court itself can pass necessary orders for separate trials to expedite matter.[Rule 3A deals with defendants].
O.I.R.3:- Considers who may be joined as defendants. All those persons against whom common question of law or fact arises if separate suits were brought against them and against whom same relief arising out of same transaction or acts can be added as defendants.
O.I.R.4:- States that Court may give judgment for or against one or more joint parties.
O.I.R.5:- States that defendant need not be interested in all the reliefs claimed against him.
O.I.R.6:- The plaintiff has an option to join parties liable on any one contract including parties to bill of exchange, hundis and promissory notes.
O.I.R.7:- This rule states a situation when the plaintiff is in doubt as to whom he should add as defendant. In such a scenario he can add all those persons so that the question as to which of the defendants is liable or to what extent may be determined as between all the parties.
O.I.R.8:- This rule states that one person may sue or defend on behalf of all in same interest. The proof of existence of community must be proved for numbering the suit as laid down in O.I.R.10:- This rule states that when wrong plaintiff is added under a bonafide mistake new plaintiff may be added if it is so warranted to determine real matter in the dispute. Further it goes to say that at any stage of the proceedings Court may strike out or add the parties [O.I.10(2)]. Also, where defendant is added plaint has to be amended and the amended copies will be served on the new defendant and if Court thinks fit on original defendant.

B.) A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and
adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made.

C.) If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

IV. PLACE OF INSTITUTION OF SUIT:

1.) Every suit shall be instituted in the court of lowest grade competent to try it (Section 15 of C.P.C.). Where a part of cause of action arose within the limits of the court, such court has jurisdiction to recover balance of amount on contract. (A.I.R. 1998 Delhi, 404, AIR, 1998 AP-381). Objections regarding the place of suing can be entertained by appellate or revisional Court. [AIR 1986 Cal.330. (page No.35 of Code of Civil Procedure Section addition by Justice Narayana)].

2.) Section 15 of C.P.C. deals with the territorial jurisdiction, where as Section 16 of C.P.C. deals with pecuniary jurisdiction and statutory/subject matter jurisdiction. Under Special Acts, Jurisdiction of a civil court is ousted. Example, SARSFESI Act. However, the civil court has right to determine whether under special or peculiar circumstances, it can entertain a civil suit.

Example: Fraud, misrepresentation, nature of property i.e. agricultural lands.

3.) Section 17 of C.P.C. deals with immovable property situated within jurisdiction of different courts. Option is given to the party to institute suit in any court within local limits of whose jurisdiction any portion of the property is situate. Section 18 of C.P.C. deals with the place of institution of suit, where local limits of jurisdiction of courts are uncertain. Section 19 of C.P.C. deals with suits for compensation for wrongs to person or moveables. Under Section 19 of C.P.C. a suit for malicious prosecution demanding damages may be filed.

V. CASE LAW:

1.) ‘Place of suing’:- Subhash Mahadevasa Habib Vs. Nemasa Ambasa Dharmadas (D) By LR. and others, 2007 (6) ALT(D.N.)(SC) 18.4 (D.B.), Section 21-A - CPC (Amendment) Act 104 of 1976. Maintainability of a suit challenging validity of prior decree on an objection as to ‘place of suing’ (territorial jurisdiction). It was observed that though section reads objection as regards ‘place of suing’ no reason to exclude objection as regards pecuniary jurisdiction.
2.) Sec. 21- **Scope of Jurisdiction of the appellate court to entertain an objection as to ‘Place of suing’:**- It is settled law that when a court disposes of a matter on merits, it shall not be permissible for an appellate or revisional court to go back to the objection as to the place of suing. However, it is permissible under specified circumstances. While, taking note of the object of place of suing the legislature has obviously created a provision under Sec. 21 in order to minimize the objections as to the context of jurisdiction.

3.) **The jurisdiction of a Court:** In a suit based on a promissory note, the right of the plaintiff depends upon the assignment of a Promissory Note in his favour. The act of assignment would constitute as part of the cause of action and the court within whose jurisdiction the assignment had taken place will exercise the jurisdiction to entertain the suit. This principle is laid down in the reported decision of our Hon’ble High Court in Mallisetti SubbaRao vs. Kanneti Siva Parvathi Devi – 2017(5) ALT 419(DB).

4.) **Jurisdiction of Civil Court under Wakf Act:** The Hon’ble Apex Court while dealing the issue of jurisdiction to entertain a suit by a civil court in wakf matters in reported citation RAMESH GOBINDRAM (DEAD)THROUGH LRS V/S SUGRA HUMAYUN MIRZA WAKF, 2010 LawSuit(SC) 574 observed as under:

The well-settled rule in this regard is that the Civil Courts have the jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of Civil Courts to try suits of civil nature is *very expensive*. Any statute which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a Civil Court. Any such exception cannot be readily inferred by the Courts. The Court would, lean in favour of a construction that would uphold the retention of jurisdiction of the Civil Courts and shift the onus of proof to the party that asserts that Civil Court’s jurisdiction is ousted.

VI. **Conclusion:**

The cause of action is a bundle of facts and to examine the issue of jurisdiction, it is necessary that one of the inter-linked facts must have occurred in a place where the suit has been instituted. It is not that every fact be treated as a cause of action in part and may create a jurisdiction of the court, in whose territorial jurisdiction it has occurred. The condition precedent for creation of jurisdiction is that the facts occurred therein must form an integral part of the cause of action. A mere allegation by a plaintiff for the purpose of creating a jurisdiction should not be enforced for conferring jurisdiction.
RES JUDICATA AND RES SUB JUDICE, ON PLEADINGS, PLANTS AND WRITTEN STATEMENTS

Paper presented by
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Res judicata means matter once adjudicated, cannot be re-adjudicated. The doctrine of res judicata technically means that a matter in issue which has already been tried by competent court, then another trial between the same parties in respect of the same matter shall not be allowed. It is a very important doctrine in civil justice system, it emphasis that a subject matter of the suit which has already been decided, is deemed to be decided forever, and cannot be reopened by the same parties. The doctrine of “Res-judicata”, which also called ‘estoppel per rem judicatam’, implies that “a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation and over the parties thereto, disposes once for all of the matters decided so that they cannot afterwards be rasied for re-litigation between the same parties.

The doctrine of res judicata is based on the need of giving a finality to judicial decisions. This principle of res judicata is mainly based on three maxims:

1. Nemo debet bis vexari pro una et eadem causa, means, no man should be vexed twice over for the same cause.
2. Interest republicae ut sit finis litium, means, it is in the interest of the State that there should be an end to a litigation
3. Res judicata pro veritate occipitur, means, a judicial decision must be accepted as correct.

Section-11 of CPC reads as below:

Res judicata – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation-I – The expression ‘former suit’ shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
Explanation-II – For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation-III – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V – Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII – The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII – An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

As per the Judgment of the Hon’ble High Court of A.P. for the State of Telangana and A.P. in Senior Regional Manager, Food Corporation of India, Hyderabad VS Y. Thirupalu and another which was reported in 2017(6) ALD 239 (DB) = 2017 (5) ALT 437 in which the Hon’ble High court held that in order to constitute res judicata the following, among other, conditions must be satisfied.

a) There must be two suits – One former suit and the other subsequent suit;

b) the matter, directly and substantially in issue, must be the same either actually or constructively in both suits

c) the matter, directly and substantially in issue in the subsequent suit, must have been heard and finally decided by the court in the former suit

d) the parties to the suits, or the parties under whom they or any of them claim must be the same in both the suits; and
the parties, in both the suits, must have litigated under the same title.

By way of eight explanations, the section has been explained elaborately. The main expressions of the section, interpreted by the courts are:

**Suit or issue:**

‘Suit’ in Section 11 CPC means, proceedings in action in courts of the first instance as distinguished from proceedings in appellate courts, though the general principles of res judicata may apply to appellate proceedings -- *Mt. Lachhmi v. Mt. Bhulli AIR 1927 Lah 289 (FB)*. ‘Suit’ in the context of Section 11 CPC must be construed liberally and it denotes the whole of the suit and not a part of it or a material issue arising in it – *Mirza Abid Kazim Hussain v Mirza Nasir Hussain AIR 1977 All 201*. ‘issue’ means, not only the actual matter determined but every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with, the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of matters of claim or defence - *AIR 1972Punj 1 (FB)*.

**Matter directly and substantially in issue:**

Explanation-III clarifies that the ‘matter’ referred in the section must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation-IV clarifies that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. If the matter is not in issue either directly or substantially in the previous suit it will not be res judicata in the subsequent suit -- *Lonan Kutty v. Thomman & others AIR 1976 SC 1645*. The matter in issue may be one of fact or of law or one of mixed law and fact (related to the parties and subject matter of the suit)-- *Mata Din v. A.Narayanan AIR 1970 SC 1953*. The test to determine whether an issue was directly and substantially in issue in earlier proceedings or collateral or incidental is that, if the issue was necessary to be decided for adjudicating on the principal issue and was decided, it would have to be treated as directly and substantially in issue and if it is clear that the judgement was in fact based upon that decision, then it would be res judicata in a latter case -- *Sajjada Nashin v. Musa AIR 2000SC 1238*

**Former suit:**

Explanation-I clarifies the expression ‘former suit’ as given in the section, means the suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
Same parties:
A ‘party’ is a person whose name appears on the record at the time of the decision. A person who applied to be made a party but whose application was refused, is not a party to the litigation -- Kala chand Banerjee v. Jagannath Marwari AIR 1927 PC 108.

Court competent to try:
Means a court of concurrent jurisdiction as regards pecuniary limit as well as the subject matter AIR 1917 Nag 107 (DB), competency in section 11 CPC has no reference to territorial jurisdiction so far as courts in India are concerned – Narayan Rao v. State of A.P AIR 1957 AP 992; Shiv Ram v. State of Rajasthan AIR 2000 Raj 228. It is the competency of the original court that determines res judicata, irrespective of any provision as to a right of appeal from the decision of such court – Surjit Singh v. Alembic Glass India Ltd., AIR 1987 All 319 (Explanation-II). If the court which tried the first suit was competent to try the subsequent suit at the time when the first suit was brought, the decision of such court would be conclusive, although on a subsequent date the said court ceased to be the proper court to take cognizance of the suit relating to that matter – Jeevantha v. Hanumatha AIR 1954 SC 9.

Heard and finally decided:
A decision on an abstract question of law unrelated to facts which give rise to a right cannot operate as res judicata. Nor also can a decision on the question of jurisdiction be res judicata in a subsequent suit or proceeding – Supreme court employees Welfare Association v. Union of India AIR 1990 SC 334. In order to support a plea of res judicata, it is not enough that the parties are the same and that the same matter is in issue, it must also be shown that the matter was heard and finally decided – Greater Cochin Development Authority v. Leelamma Valson AIR 2002 SC 952.

General principles applicable to res judicata:
One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if the doctrine is not applied – K. Krishnan v. Tirumala Tirupathi Devasthanams 1995(2) ALT 122 (DB) The foundation of plea of res judicata must be laid in the pleadings. If this is not done, no party would be permitted to raise it for the first time at the stage of appeal – ITC Ltd., v. Commissioner of Central Excise, New Delhi (2004) 7 SCJ 237 The rule of res judicata does not apply to question of jurisdiction, or, a pure question of law unrelated to the rights of the parties (2001) 1 Ker LJ 564.
When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedures principles like, estoppel, waiver or res judicata – Ashok Leyland v. State of Tamilnadu 2004 AIR SCW 1001. Finding about title given incidentally or collaterally in injunction suit does not operate as res judicata in title suit – K.Lakshminarasimha chari v. K. Satyanarayana 2002(2) ALD 753. Decision of civil court in a suit for injunction cannot operate as res judicata in a later suit between the same parties for declaration of title and recovery of possession RVS Vara prasad v. Dr.V Ramdas 2003 (3) ALT 716.

**Res judicata and interlocutory orders:**

The principles of res judicata can be invoked not only in separate subsequent proceedings but they also get attracted in subsequent stage of the same proceedings-- Erach Boman Khowar v. Tukaram Sridhar Bhat AIR 2014 SC 544. Interim orders passed in suit operate as res judicata only during the trial of that suit, as such an interlocutory order in previous suit does not bar the court from passing interim order in a later comprehensive suit – Abhi Prasad v. Pushpa Doshi AIR 1984 Cal. 250.

**Res judicata between co- defendants and co-plaintiffs:**

Res judicata applies not only to the parties to the suit i.e., plaintiff, defendant as well as their privies but also it applies between codefendants. The conditions are;

(a) There must be a conflict of interest between the defendants
(b) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims
(c) The question between the defendants must have been finally decided; and
(d) The co-defendants were necessary and proper parties in the former suit.

If there is conflict of interest between co-plaintiffs and it is necessary to decide that conflict in order to give relief against the defendants and the matter is decided, then it will operate as res judicata between the co-plaintiffs. Similarly, an adjudication between co-defendants will operate as res judicata if there is a conflict of interest between the defendants concerned, it is necessary to decide the conflict in order to give the relief which the plaintiff claims, the question between the defendants has been finally decided, and the co defendants are necessary or proper parties in the former suit -- Iftikhar Ahmed v. Syed Meherban Ali AIR 1974 SC 749.

**Execution proceedings:**

Explanation-VII to Sec. 11 CPC clarifies that the provisions of the section apply to the execution proceedings also. When a matter, which directly and substantially arises for decision in an execution proceeding, is heard and decided either actually or constructively by a competent court in that proceeding such decision is final between the parties and operates as res judicata in a subsequent execution proceedings – Ramachandra Nahaka v. V. Bharat Rana AIR 1960 Orissa 197 (FB). The principles of constructive res
judicata is applied to execution proceedings – Rajkishore Mohanty v. Kangali Moharana AIR 1972 Ori 119. A claim proceeding under O-21 R-58 is not a ‘suit’ and an order therein does not operate as res judicata AIR 1967 SC 1390.

Suit decided on preliminary point:
If a suit is decided on a preliminary issue without conclusions on other issues, such other issues are open to be raised in subsequent suit and are not barred by principle of res judicata -Indraj v. Collector AIR 1981 NOC 150. Further, if a suit is dismissed on a preliminary ground or on the ground that it is premature, its judgment does not operate as res judicata in the subsequent suit. - Amba Prasad v. Mahboob Ali shah AIR 1965 SC 54.

 Judgment obtained by fraud or collusion:
 If the judgment has been obtained by fraud or collusion it is considered a nullity and the law provides machinery whereby its nullity can be so established. “Fraud and justice never dwell together’, where it is established that a judgment is obtained by playing fraud on court, principles of res judicata do not apply -- S. Kamalamma v. The joint collector [2001 (5) ALD 828 (DB)]. A collusive decree can also be challenged in the court of law – Nachittar singh v. Jagir Kaur AIR 1986 P&H 197.

Dismissal in default, ex parte decree and compromise decree:
Dismissal of suit in default does not amount to adjudication of controversy, but it bars the plaintiff from bringing fresh suit on the same cause of action. Similarly where a suit is withdrawn without seeking permission to file fresh suit, the fresh suit would not be maintainable.

The law is well settled by now that an ex parte decree can operate as res judicata because an exparte decree is a decree on merit – Baldevdas Karsondas Patel v. Mohanalal Bapalal Bahia AIR 1948 Bom 232. It was held that an ex parte decree would operate as res judicata between the parties in any subsequent suit in respect of the same subject matter and in respect of all grounds mentioned in the suit – B.Pochaiah v.G. Akkapalli AIR 1992 AP 42.

A compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of res judicata.

However, a decree based on consent of parties, if against public policy, statute or court's order cannot operate as res judicata -- State of Punjab v. Amar Singh AIR 1974 SC 994.

Constructive res judicata:
If, in the former suit, plea of ownership to the suit house was substantially involved which could and ought to have been raised and not raised, subsequent suit on the basis of the same title or ownership would be
barred by constructive res judicata under Explanation IV to Sec. 11 CPC – Aanaimuthu Thevar v. Alagammal 2005 AIR SCW 3518.

Res judicata and Estoppel:

- Res judicata is based upon public policy that litigation should end.
- Estoppel is part of law of evidence (S.115 of Indian Evidence Act) where a party cannot change his stand once taken.
- Res judicata prevents someone from saying same thing in different litigation.
- Estoppel stops him from saying different thing at different times, either in the same suit or different suits.
- Res judicata bars the suit itself.
- Estoppel only stops certain piece of evidence from being taken on record while the trial continues.
- Res judicata ousts the jurisdiction of the court.
- Estoppel stops the mouth of a party.
- Res judicata derives from a court decision.
- Estoppel from facts asserted by parties.

Res judicata and criminal cases:

Article 20(2) of the Constitution of India says, ‘No person shall be prosecuted and punished for the same offence more than once. The relevant provision in the Indian Evidence Act is Section 44. The relevant provision under Code of Criminal procedure is Section 300. Criminal courts finding would not operate as res judicata in respect of civil courts proceedings- Adi Pheroz shal Gandhi v. H.M. Seervai, Advocate General AIR 1971 SC 385.

RES SUBJUDICE

The latin word ‘res’ means a thing, ‘subjudice’ means ‘under judgment’. It denotes that a matter or case pending for consideration by court or judge. When two or more cases are filed between the same parties on the same subject matter, the competent court has power to stay subsequent proceeding. Section 10 CPC deals with the doctrine of res subjudice. The object of the section is to prevent court of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. This section is intended to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. Section-10 CPC reads as below:
No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme court.

Explanation – The pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action.

For applying this section, the following conditions are required:

a) There must be two suits, one previously instituted and the other subsequently instituted.

b) The matter in issue in subsequent suit shall be directly and substantially in issue in previous suit.

c) Both suits between same parties or their representatives.

d) Previous suit must be pending in same or in any other court.

e) The court dealing with previously instituted suit is competent to grant relief claimed in subsequent suit.

f) parties are litigating under the same title in both the suits.

If the above conditions are satisfied, the subsequent suit is stayed under the principle of res sub judice. If the previous suit is pending before a foreign court, this principle will not apply.

The application for stay of suit has to be filed in the court where the subsequent suit is pending.

One of the tests for applicability of Sec. 10 to a particular case is whether on the final decision reached at in the previous suit would operate as res judicata in the subsequent suit—Soma Rama mohan Reddy v. Soma Saraswathi 2006 (1) ALT 484. Once the previous suit is decided on merits after hearing both the parties, the decision in that suit operates as res judicata upon the subsequent suit. Section 10 CPC enacts merely a rule of procedure and a decree passed in contravention there of is not a nullity—Pukhraj D. Jain v. G. Gopalakrishna AIR 2004 SC 3504

The course of action which the court has to follow according to Sec.10 is not to proceed with the trial of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. It has been construed by courts as not a bar for passing of interlocutory orders such as an order for consolidation of later suit with the earlier suit, or
appointment of a receiver or an injunction or attachment before judgment – *Indian Bank v. Maharashtra State Co-op. Marketing Federation Ltd.*, **AIR 1998 SC 1952**.

A suit in which an appeal has been filed is a pending suit – *Sagar Shamsher jang Bahadur Rana v. Union of India* **AIR 1979 Delhi 118**.

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<tr>
<td>1 Section 10 CPC</td>
<td>1 Section 11 CPC</td>
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<tr>
<td>2 Literal meaning is, a thing to be decided or is pending for consideration. Legally it means Stay of subsequent suit on the ground of pendency of previous suit.</td>
<td>2 Literal meaning is, a thing that was already decided. Legally it means that dismissal of suit on the ground that such matter was heard and finally decided.</td>
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<td>3 To apply it, previous suit must be pending</td>
<td>3 To apply it, the former suit must have been heard and finally decided.</td>
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<td>4 Both suits are before the courts which have jurisdiction.</td>
<td>4 Both courts must be competent courts.</td>
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<td>5 It applies to the whole suit</td>
<td>5 It applies to the whole suit or even to an issue which was already decided.</td>
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<td>6 If the previous suit is pending before a foreign court, this principle will not apply.</td>
<td>6 If the former suit is decided by a foreign court and if such decision is conclusive as per section 13 of CPC it applies to any matter.</td>
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<td>7 It has got limited application when compared to res judicata</td>
<td>7 It has got wider application, as it applies to all proceedings, including execution petitions.</td>
</tr>
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<td>8 It stays the subsequent suit, which expression shall mean, a suit instituted when already another suit is pending.</td>
<td>8 The expression former suit means, a suit that was decided prior to the suit in issue, irrespective of its date of institution.</td>
</tr>
<tr>
<td>9 The subsequent suit is stayed till disposal of previous suit and once such previous suit is decided, the decision in that suit operates as res judicata upon the subsequent suit.</td>
<td>9 The subsequent suit is barred when the former suit was decided. As such, no pendency of such matter in the court.</td>
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INTRODUCTION: The term interlocutory application or interlocutory petition has not been defined anywhere in civil procedure code. However, civil rules of practice has defined the term interlocutory application in Rule 2(j), as an application to the court in any suit, appeal or proceeding already instituted in such court other than a proceeding for execution of Decree or Order. Several interlocutory orders arise during the course of trial of a suit, hearing of an appeal or enquiry in a proceeding. Among the myriad of interlocutory applications that come before a civil court on a regular basis the topics dealing with the appointment of advocate commissioner is prominent one. It is not an exaggeration to say that not even a day passes for any judicial officer dealing with civil cases without deciding on some aspect relating to appointment of advocate commissioner.

INCIDENTAL PROCEEDINGS: The appointment of advocate commissioner and the incidents thereof is dealt in the chapter of incidental proceedings. Section 75 of the code envisages incidental proceedings. Incidental or consequential orders are those which follow as a matter of course being necessary compliments in the main order without which the matter would be incomplete or ineffective. The concept of ‘Commission’ is an important subject matter in the branch of CPC. Commissioner is an impartial person who is appointed by the Court and act as an agent of the Judge. The power of the Court to issue Commissioner, by the Court, is for doing full and complete Justice between the parties. The Commissioner in effect is a projection of the Court appointed for a particular purpose. If an application is filed seeking appointment of Advocate commissioner, it must be decided without any delay and within a reasonable time. It was so observed in: P.PEDDA SAIDAI AIR v. T.PADMAVATHI [1997 (5) ALT 818]. The above decision is also referred in another case between S. SINGAREDDY (DIED) & Another vs., K RAMACHANDRA REDDY (dt 27-10-2005) A.P. High Court

LEGAL PROVISIONS FOR APPOINTMENT OF COMMISSIONERS

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<th>S.No.</th>
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<td>Or .XXVI,R.1-8,16,16A,17,18 of CPC. OR 18 Rule 4 CPC</td>
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<tr>
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**How Commission is issued:** Part-III of the CPC deals with Incidental Proceedings covering Sections 75 to 78 thereof. Section 75 contemplates power of Court to issue commissions; Section 76 indicates commission to another Court; Section 77 adumbrates letter of request while Section 78 outlines commissions issued by foreign Courts. Section 75 of the CPC enacts that the Court may issue a Commission for any of the following purposes:

1) to examine any Person
2) to make a local investigation
3) to examine or adjust accounts
4) to make a partition
5) to make a scientific investigation
6) to conduct for sale ,
7) to perform a ministerial act.

**1) COMMISSION TO EXAMINE ANY PERSON:**

Section (76 – 78), order (XXVI) 26, Rules (1 – 8) ,Order 18 Rule 4 of the Code of Civil Procedure deals with the Commission to examine witness. The court may issue a commission for the examination on interrogatories or otherwise of any person in the following circumstances: –

- Rule 1 of Order 26: On Medical grounds: When the witness is unable to attend to court proceedings due to medical reasons.
- Rule 2 of Order 26: On its own motion: On sue moto or on application supported by affidavit by any party.
- Rule 3 of Order 26: Commission to any person which the court believes is a proper person to examine a witness who resides within its local Jurisdiction;
- Rule 4 of Order 26: issue a commission for the examination on interrogatories or otherwise for the following persons:
  1) Any person residing beyond the local limits of the Jurisdiction of the court,
  2) Any person who is about to leave the Jurisdiction of the court before the date on which he is required to be examined in court,
  3) Any person in the service of government and who cannot, in the opinion of the court, attend without detriment to the public service; or
  4) if he is residing out of India and the court is satisfied that his evidence is necessary;
In D.Chendrakala and Ors. Vs.Matashrama seva Sangam, 2007(1) ALT230 it was held that in complex cases the prayer for recording of evidence by commissioner could be declined by the Court instead of mechanically ordering the petition, ought to had in exercise of judicial discretion declined to appoint a commissioner to record the evidence of witnesses to be examined to prove the disputed will, because there would be a difference in the way a witness gives evidence when he was examined in the comfort of his house and in cases where he was examined in open court.

2) TO MAKE LOCAL INSPECTION (Rules 9 & 10)
The court may, in any suit, issue a commission to such person as it thinks fit directing him to make local investigation for the purpose (a) elucidating any matter in dispute, (b) ascertaining the market value of any property or the amount of any mesne profits or damages. In Padam Sen vs St. of U.P. it was held that the object of local investigation is not to collect evidence which can be taken on the spot in view of the peculiar nature of the suit. Such evidence enables the court to properly and correctly understand and assess the evidence on record and clarify any point which is left doubtful. The Hon’ble High Court of Andhra Pradesh, after referring to the dicta in Ponnusamy Pandaram vs The Salem Vaiyappamalai Jangamar, observing the object of local investigation under Or.XXVI, R. 9 of the Code 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.

In 2013 the Hon’ble High Court of Ap in Bandaru Muthyalu and another Vs Pallimappala raju CRP No.5525/2011 held that in situations where there is controversy as to identification, location or measurement of land, local investigation should be done at the early stage so that the parties are aware of the report of the Commissioner and go to the trial prepared.

In a suit for injunction:-

The law does not prohibit or any bar imposed on the Court from appointing a Commissioner in a suit for Injunction simplicitor on the ground of collection of evidence in favour of petitioner. It all depends upon facts and circumstances of the Case. The Hon’ble AP High Court in Varala Ramachandra Reddy Vs Mekala Yadui Reddy and others, 2010 (4) ALD 198 held that an Advocate commissioner can be appointed in an injunction suit for the local inspection of the suit site and to demarcate the suit schedule property with the help of surveyor.

The Hon’ble AP High Court in podugu Appa Rao and others Vs Grandhi Sathya Raju and others CDJ,2008 APHC 1132 Held that the
Advocate commissioner can be appointed to find out whether the tenant had committed any act of waste, effecting the value and utility of the building as sustainable under Law.

The Hon’ble AP High Court in Mallikarjuna Sreenivasa Gupta Vs K. Shashireka, 2006 (3) ALD 362 held that in a case filed for declaration of title, an application was filed contending that the defendant has encroached upon portion of the site. In such cases the court held the appointment of Advocate Commissioner as necessity because by mere looking into the sale deed it is not possible to determine whether there is any encroachment into suit property.

In Jammi Venkata Krishna Rao and others Vs. Jammi Venkata Hanuma Ravindranath 2016(5) ALT 14 it was held that when identity of suit property is in dispute in injunction suit appointment of commissioner to note down its physical features is not erroneous especially when it is alleged that defendants are trying to obliterate the physical features of the property.

In Bandi Samuel and another Vs. Medida Nageswara Rao 2017 (1) ALT 493 it is held that an advocate commissioner can be appointed in a suit for permanent injunction for local inspection of the suit site and to demarcate the suit schedule property with help of the surveyor. In this regard our Hon’ble A.P. High Court, gave illustrations where appointment of commissioner can be done in a suit for injunction.

The Hon’ble Andhra Pradesh High Court, in K. Dayanand And Another vs P. Sampath Kumar, after considering the dicta observed in several rulings 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.

In Shaik Sareena Kasam vs., Patan Sadab Khan (APHC) at para–10, the court observed that “where there is dispute regarding boundaries or physical features of the property or any alienation of encroachment as narrated, the facts have to be physically verified because the recitals of the documents may not reveal the true facts and measuring the land on the spot by surveyor may become necessary.” In another case i.e., Bandaru Mutyalu (DB) (APHC) it was observed that “there is no principle of law or rule or provision that in a suit for injunction, no commissioner can be appointed to measure and demarcate the property so also even at initial stage to be commencement of trial, leave about even an exparte
Commission for measuring 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. (So also:- M. Vedapuri vs. O.M.Raj and another, reported in CDJ 2008 MHC 4400; Teraj Sarammal vs. Bajranglal Daman, CDJ 2004 MHC 947.)

Commission to demarcate the schedule property:
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.

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,(2013 (3) ALD 64 (SC)), His Lordship M.Satyanarayana Murthy, J, held that appointing advocate commissioner by the trial court for the purpose of demarcating schedule property and fix boundary stones to the propety 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.

3) COMMISSION FOR SCIENTIFIC INVESTIGATION: (Rule 10-A)

O.26 R.10 A deals with Commision for Scientific Invetigation. As per the provision if the scientific investigation is required to be conducted in a suit for deciding the dispute between the parties and in the opinion of court such investigation cannot be done before the court, then the concerned court may issue a commision to such person directing him to address such questions and get a report to the court. Scientific investigation also includes sending of the documents to a forensic expert in order to find out the truth or to compare the signatures made in the disputed document with that of admitted documents.

4) COMMISSION TO PERFORM MINISTIRIAL ACTS: Or.26 R.10 B

When court appoints commissioner for performance of any Ministerial act, which cannot be conveniently be performed before the court, the commissioner is not performing any judicial act nor any act which would change the rights of the parties or the procedures and the rules of evidence so as to prejudicially effect the rights of parties in relation to procedure. The report of commissioner for performance of such act shall form part of record under Rule 10(2) of Or.26 CPC. Observer in the Code of Elections, special officers appointed for survey etc., are the instances. Where any question
arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the Court, be conveniently performed before the court, the court may issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the court. In *Damoder Reddy (died per Lrs.)*,*Chevella Mandal VS M. Mohan Reddy,Chevella Mandal and ors.*2007(3)ALT 664 it was held that –Appointment of Commissioners for performance of ministerial act, contains identical provision by treating him as officer of court, so he was not subject to be examined as a witness.

5) **COMMISSION FOR SALE OF PROPERTY:** (Rule 10-C)
Where, in any suit, it becomes necessary to sell any moveable property which is in the custody of the Court, pending the determination of the suit and which cannot be conveniently preserved, the court may, issue a commission to such person as it thinks fit, directing him to conduct such sale and report thereon to the court.

6) **COMMISSION FOR ACCOUNTS:** (Rules 11 & 12)
In any suit in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment. The proceedings and report of the Commissioner (if any) shall be evidence in the suit.

7) **COMMISSION FOR PARTITION:** (Rules 13 & 14)
Where a preliminary decree for partition of immoveable property has been passed, the court may issue a commission to such person as it thinks fit to make a partition or separation according to the rights as declared in such decree, except in undivided estates assessed to the payment of revenue where the partition is made by the Collector under S.54 and Or.XXVI R.13. The commissioner was merely called upon to make proposals for partition on which the parties would be heard, and the court would adjudicate upon such proposals in the light of the preliminary decree and the contentions of the parties. The proposals of the commissioner cannot from their very nature be binding upon the parties nor the reasons in support thereof.

8) **COMMISSION BY THE HON’BLE HIGH COURTS:**
If a High court is satisfied:
(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,
(b) that the proceeding is of a civil nature and
(c) that the witness is residing within the limits of the High Court’s appellate jurisdiction, it may issue a commission, upon application by a law officer of the state government, for the examination of such witness.
The commission will be issued to any court within whose jurisdiction the witness resides or to any person deemed fit to execute it where the witness resides within the local limits of the original civil jurisdiction of the High Court. After the commission has been executed it shall be returned together with the evidence to the Hon’ble High Court, which shall forward it to the Central Government along with the letter to request for transmission to the foreign court. (Order XXVI, Rules 19-22)

**CIRCULARS BY HON’BLE HIGH COURT- APPOINTMENT OF COMMISSIONER:**

The Hon’ble High Court of AP has issued two circulars regarding the appointment of commissioner and relating to the procedure ought to be followed in appointment of commissioners. They are ROC No.694/SO/77 dated 15.7.1977 and ROC No.405/SO/2007 dated 23.4.2007.

**APPLICATION FOR COMMISSION:**

Every application for the issue of a commission shall state grounds thereof and shall supported by an affidavit setting forth the length of time that the execution of the commission is likely to occupy, the details regarding the locality where the commission is to be executed and its distance from the court, the estimated expenses of the commission and the remuneration, if any, of the proposed commissioner and in the case of the commission for local inspection or to examine accounts, mesne profits etc., the specific points on which the enquiry is desired.

**GUIDELINES FOR APPOINTMENT OF ADVOCATE COMMISSIONER:**

The power of the court in appointing a commission is discretionary. For Issuance of Commission, the satisfaction of the Court which is more essential than the request of the parties. 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 he matter in issue, relating to the main case as well as the facts leading to the dispute. In a recent judgment between *V Rama Naidu & others vs V Rama devi* 2018(3) ALT 58; it was held that there is no hard and fast rule of in which case the commissioner to be appointed. In a suit for specific performance of agreement to sale, initially a commissioner was appointed for cross examination of Pw1 and when he has not executed the warrant, the court suo-motu, appointed another commissioner for the purpose by cancelling the previous commission/warrant. It was also observed
that appointment of the commissioner by the Court on its own by virtue of enabling provisions under Order 26 Rule 19 r/w. 4 & 5, 4A CPC cannot be find fault including guidelines in the expression of Salem Bar Association case-II.

In Ponnu Swamy vs., Salem Vaiyappamalai Jangamar Sangam it was held that the object of Order 26 Rule 9 CPC is to collect evidence at the instance of parties who relies on same and which evidence cannot be taken in court but could be taken only from its peculiar nature on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. In a suit for possession if an application is filed seeking appointment of a Commissioner for the purpose of collection of evidence, such application is liable for rejection. It is well settled that if the oral and documentary evidence adduced before the Court are sufficient enough to adjudicate the controversy in the suit, the application for appointment of a Commissioner is liable for rejection. The report submitted by the Commissioner constitutes an important piece of evidence and it cannot be said that such report has no evidentiary value since the statements made therein are not tested by cross-examination of the Commissioner.

In Sarala Jain’s case as was held by our Hon’ble High Court, following the verdicts of Hon’ble Apex Court in mohd.mehtab Khan’s case,, the Court, while appointing a Commissioner has to keep in mind the following aspects:

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 to avoid any pre-trial decrees.

ADVOCATE COMMISSIONER SHOULD NOT BE APPOINTED TO GATHER EVIDENCE TO PROVE THE CASE OF PARTIES:

In Krishnamurthy, T.K vs. Tamil Nadu Water and Drainage Board, reported in 2006 (5) CTC 178, His Lordship S.Rajeswaran, J has held that Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties, 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.

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 if application for appointment of Commissioner is not properly understood and appreciated and resulted in dismissal of the application; to hold that an appeal would not lie, which would result in taking away the affected party’s right, which is enshrined in the Act itself.

**APPOINTMENT OF COMMISSIONER FOR SECOND TIME:**

As a general rule, once a commission has been appointed and a report has been submitted, the Court will consider it and take an appropriate decision in accordance with law. It would not appoint second commission, Vide 1990 (2) LS 29 (AP). But if the Court finds that the first commission failed to discharge its duty or the Commissioner was not a proper person, second commission can also be appointed, **GUTHULA v. RUDRARAJU [1998 (5) ALT 410]** In Gopalakrishnan vs P. Shanmugam on 21 January, 1995 = (AIR 1995 Mad 274) Order XXVI, Rule 9 of the Code of Civil Procedure provides for the appointment of Commissions for local investigation and it stipulates that 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. While considering the scope of the powers, the duties and obligations as also the considerations to be kept in view before proceeding to appointee one or more than one commission or subsequent Commissions, Courts have laid down certain principles and guidelines to be adhered to.

It has been held that a Court cannot issue a second Commissioner, mechanically for the mere asking without setting aside the earlier report and even if the Court chooses to re-issue the Commission, sufficient and proper reasons have to be recorded and that an indiscreet and indiscriminate exercise of power, in this regard is likely to affect even a fair trial of the suit or
the proceedings. That apart, merely because on an earlier occasion, the Commission has been re-issued, per is not a justification also to assume that the earlier report submitted by the Surveyor Commissions was bad or perfunctory or deserve to be scrapped. It might have been re-issued for getting some additional particulars and that from the fact of re-issue of commission alone it cannot be contended that the earlier report was bad or that it was scrapped. Mechanical and indiscriminate appointment of more than the Commission, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the commissions are going to be borne by the applicant for the purpose would create an unhealthy practice of not only more than one report on records, but also would lead to the vice of a person or party to the proceedings not being satisfied with the Commissioner’s report seeking for the appointment of successive Commissioners till he is able to get a report of his choice.

In S.Rukman Naik Vs P.Anjani Prabha and Anr,2004 (4) ALD 876, an interesting question came for consideration. While the first report is pending consideration, is it proper on the part of the Court to appoint Advocate- Commissioner for the second time for inspecting the site and submitting his report – To answer, the Hon’ble Andhra Pradesh High Court held that in Para 21 as follows:

“Without passing any order on the report of first Advocate-commissioner, this court ought not to have considered CA No.113 of 2004 for re-entrusting the warrant to Ms.W.V.S.Rajeswari, Therefore, the order passed in CA No.113 of 2004 is not in consonance with Order 26,Rule10(3).

In M.Chenna Venkata Reddy and others Vs.A.P. Housing Board, Gruhakalpa, Hyd.and others 1999(5) ALT 223 it was held that appointment of Second Commissioner only justified when Court declares finding of First Commissioner unsatisfactory and there is need for further inquiry.

In Pamula Narasaiah and Anr. Vs Pamula Murali and Ors, 2002(1)ALD 393, 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.”
In Chokkalingapuram Thevangar Vardhaga Sangam, West Car Street, Chokkalingapuram, Aruppukottai Taluk, through its President v. Chokkanathaswami Temple, Chokkalingapuram, Aruppukottai Town, represented by its Executive Officer reported in 1996(I) M.L.J. 254, in which, this Court has held thus:- “Civil Procedure Code (V of 1908) Order 26, Rule 10(3). Commissioner appointed and report submitted by him. 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. (So also: Kitnammal vs Nallaselvan And Ors, (2005) 2 MLJ 227).

EXPARTE APPOINTMENT OF COMMISSIONER:

Except where the purpose of appointing a commissioner is to note them physical features existing as on that day, appointment of commissioner is to be under taken only after hearing both the parties. In Chalapathi veeranna and ors vs Chalapathi venkatachalam AIR 1959 AP 170 it was held that it is not a condition precedent to the issue of a commission for local investigation to serve notice on the opposite party. The evidence of commissioner appointed at the earlier stages of the suit to note the physical features would certainly go a long way in helping the court to arrive at the truth.

EVIDENTIARY VALUE OF ADVOCATE COMMISSIONER’S REPORT:

A party can countemand 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. In K.Viswanathan vs. D.Shanmugham Mudaliar and Anr. Reported in 1986(I) M.L.J. 319, held that under Order 26, Rule 10(2), C.P.C. the report of the Commissioner is evidence in the suit and forms part of the records.

In Chintapatla Arvind Babu vs., K Bala Kistammka it was observed that Report of Advocate Commissioner is evidence and it is generally more credible evidence. In this regard the implication of Rule 10 cannot be lost sight of when it says that the report of the Commissioner and evidence taken by him as Commissioner in a suit shall form part of record. But, as per decision of Hon’ble Supreme Court in Lekh Raj V. MuniLal and others, (2001) 2 Supreme Court Cases 762, and as was held in Selvi vs Dorothy Paul, C.R.P. PD. No. 1669/2011, in law, the evidence of an Advocate Commissioner is not binding on Court and in fact, his report is to be appreciated along with other evidence available on record in a given case. It was also held that once a local commissioner report was brought on record as part of evidence to show the subsequent events, it was incumbent on the Court to consider the same.
COMMISSIONER REPORT IS PART OF RECORD-COMMISSIONER NEED NOT BE EXAMINED AS A WITNESS TO PROVE IT:
According to O.26 R.10(2) the report of the commissioner shall be the evidence in the suit and shall form part of record. But either the court on its own or parties with the permission of the court are at liberty to summon the commissioner to examine him personally touching any of the matter referred to him or mentioned in his report. If the court, for any reasons, is dissatisfied with the report, it can also direct such further enquiry to be made as it shall think fit, according to sub-rule (3) of Rule 10. The law is settled in this regard that the report of the commissioner be considered as part of record and is evidence irrespective of the fact whether commissioner is examined as a witness or not.

In *Karri Mariyamma and Anr. Vs Penumatcha Ramamma and Anr 2007 (1)ALD 127* it was held that in this context, it needs to be observed that the report submitted by the commissioner under Rule 9 of Order 26 CPC becomes part of the record, as is evident from Rule 10 itself. The necessity for examination of a commissioner would arise, if only one of the parties disputes the correctness of the report. When no objections are filed to the report and when Rule 10 of Order 26 CPC mandates that the report together with the enclosures shall become part of the record of the suit, the mere fact that the commissioner was not examined, does not disentitle the court from taking the report into account. The Hon'ble High Court further cautioned the trial courts that when substantial objections are taken to the report of the commissioner, it would be advisable and desirable to examine the commissioner for the purpose of having a clear picture. But on that ground also, it can not be said that the report can not be looked into by the court unless the same is exhibited or commissioner is examined as a witness too. It is open for the parties also to examine the commissioner on the manner in which he had conducted the investigation. This is only an interpretation which can be placed under R.10(2). It is a different matter if neither the court nor any of the parties take any objection to the report. In such a situation the report becomes final, part of the record and can also be taken as a piece of evidence. But if once the party objects to it and specifically wants the commissioner to be examined, the court has no option except to examine the commissioner.

COMMISSIONER IN EXECUTION PROCEEDINGS:
Order 26 R.18(A) provides that provisions of Or.26 are applicable to execution proceedings.

(vide *Gurram Anantha Reddy vs Katla Sayanna(30.3.2015)*. In Vadlamani Suryanarayana Murthy vs Saripalli Balakameshwari 2007(2)ALD 94 the
Hon’ble High court held that B Narasappa vs B Govindappa 1992(1)ALT 48 is per incuriam. In this case the court held that the JDR can certainly put forward his grievance and then it shall always be competent for the executing court to adjudicate the same but the appointment of a commissioner in matters of this nature would amount to reopening the entire issue and may lead to a situation of annulling the decree as a whole.

**COMMISSIONER CANNOT BE APPOINTED FOR SEIZURE OF ACCOUNTS BOOKS:**

In Padamsen and another vs State of UP, the Hon’ble apex court further held that the court cannot seize account books forcibly by appointing an Advocate Commissioner, it can summon them and if not produced it can penalize the party or draw an adverse inference against them. It also categorically ruled out that it is not the business of court to collect the evidence in favour of one party.

**COMMISSIONER CANNOT DELEGATE HIS DUTY TO OTHERS:**

If a person is appointed under O.26 R.9 of CPC as a Commissioner for local inspection, he cannot delegate the said work to any other person as it is the right of the court alone and if such person as it is the right of the Court alone and if such person who took the delegated work has executed the warrant the report cannot be relied upon by any court a the execution of warrant itself is without jurisdiction (Shamanna Shetty Vs BL.Chenne Gowda ILR 2006 Karnataka 3588).

**PROCEDURE FOR EXECUTION OF COMMISSION:**

In any Civil Suit or proceeding, Commissioner appointed, has to follow the procedure prescribed under Rule 10 of Order XXVI of C.P.C. As per Rule 10, Subrule (1), the commissioner, after such local inspection as he seems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him to the court.

**CONCLUSION:**

Commissioners appointed by the Court shall act as helping hand in dispensing the cases in interests of justice according to law. As stated above the civil court gets several interlocutory applications on appointment of commissioners day-in and day-out. The courts trying these applications are expected to dispose of the applications on merits as expeditiously as possible because ‘Delay in justice is Denial of justice’.
Appointment of Receivers

Paper Presented by
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The term receiver is not defined but the concept of receivers was dealt under Order XL of Code of Civil Procedure, 1908 and Rules 286 to 293 of A.P. Civil Rules of Practice and Circular Orders, 1980.

A “Receiver” is an impartial 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 does not seem reasonable to the Court that either party should hold it. He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the Court, exercising functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest hence regarded as custodia legis\(^1\).

In other words, a receiver is an officer of the court subject to the court’s direction and control and is a custodian and agent whose functions are limited to the care, management, protection and operation of the property committed to his charge. The receiver owes his allegiance to the court which appointed him, but may owe fiduciary duties to each of the receivership estate’s constituents.

**APPOINTMENT OF RECEIVER:**

Receiver can be appointed at any time not only on the application of a party to the suit but also by one who is not a party to the suit but interested in the preservation of the property. An appointment of receiver should be in Form No.9 of Appendix-F appended to the CPC.

As per Order XL of the Code, Whenever it appears to the Court to be just and convenient, it may appoint a receiver of any property whether before or after the decree.

\(^1\) P. Lakshmi Reddy Vs. L. Lakshmi Reddy, AIR 1957 SC 314
The words ‘just and convenient’ did not mean that the court is to appoint a receiver merely because the court thinks it convenient but for the protection of rights or for the prevention of injury.

Protection of properties and safeguarding the rights of the parties are the twin objectives impelling the appointment of receiver\(^2\). It is one of the harshest remedies which the law provides from the enforcement of the rights, and therefore should not be lightly resorted to, since it deprives the opposite party from the possession of property before a final judgment is pronounced. Appointment of receiver is neither a measure of punishment nor such action is taken to teach a lesson to one of the contesting parties\(^3\). The mere circumstance that the appointment of receiver will do no harm to anyone is no ground for appointing receiver.

The appointment of receiver is complete on passing of the order of appointment. By such order, the Court assumes control over the property and from that time the parties to the suit retain possession only as custodians for the Court\(^4\).

**PRINCIPLES GOVERNING APPOINTMENT OF RECEIVERS:**

Madras High Court in Krishna Swamy chetty Vs Thangavelu chetty\(^5\) laid down five principles i.e., ‘panch sadachar’ for appointing receivers as follows:

i. The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion shall not be arbitrary or absolute.

ii. The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.

iii. Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or imminent danger or loss demanding immediate action and of his own right, he must be reasonably clear and free from doubt.

2. Chelikam Rajamma Vs. Padilete Venkataswamy Reddy, 1993 (2) ALT 154
3. ICICI Ltd. Vs. Karnataka Ball Bearings Corp. Ltd., AIR 1999 SC 3438
5. A.I.R 1955 Mad 430
iv. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a defacto possession since that might cause irreparable wrong.

v. The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc.

In **Bh. V.Rama Raju Vs Bh. Ramakrishnam Raju**⁶, A.P. High Court laid down necessary factors for consideration for the appointment of a receiver pending disposal of a suit as follows:

a. Whether the suit property is being subjected to waste

b. Usufruct whether being frittered away.

c. Necessity for making a provision for livelihood of the plaintiff.

d. In a suit for partition where there is no prima facie case and in the absence of above circumstances the court may ultimately order to deposit adequate amount.

In **Chelikam Rajamma vs. Padilete Venkataswamy Reddy**⁷ it was held that the appointment of receiver cannot be resorted to lightly without considering the entire facts and circumstances. The party seeking the appointment of a receiver must make out a case that he/she was not only kept out of possession of the properties unauthorisedly, but the party in possession is indulging in acts of waste leading to the inference of incompetence.

**SCOPE AND AMBIT OF POWER OF RECEIVER:**

A receiver when appointed to manage the suit property acts as an officer of the Court. The possession of the receiver is possession on behalf of the Court and a party cannot claim any title adverse to the opposite party when the receiver remained in possession⁸.

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6. 1996 (3) A.L.T 702
7. 1993 (2) A.L.T 154
Despite appointment of a receiver, rights and obligations of third parties in respect of properties in custodia legis remains unaffected. Where a receiver appointed by the Court is in actual physical possession of a property, no one whosoever he may be, can disturb the possession of the receiver. Court may hold such person who disturbs receiver’s possession as guilty for committing contempt of Court. A man who thinks that he has a right paramount to that of a receiver must before he takes any step of his own motion, apply to the Court for leave to assert his right. Grant of leave in such cases is the rule and refusal is an exception.

The rule that receiver’s possession will not be disturbed without the leave of the Court is however not applicable if the receiver is not in actual physical possession of the property⁹.

In Venkatamalliah Vs T.Ramaswamy¹⁰ it has been held that a receiver who has been authorized by an order of a Court to collect the debts due to a firm is entitled to institute a suit in his own name for the recovery of debt provided he does so in his capacity as a receiver, the authority ‘to collect the debts’ being wide enough to empower him to take such legal steps as he thinks necessary including instituting a suit.

In Hiralal Patni Vs Loonkaran Sethiya¹¹ it was held that, Court may, for the purpose of enabling the receiver to take possession and administer the property, by order remove any person from the possession or custody of the property. Further when a person is a party to the suit the Court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him.

**TERM OF RECEIVER:**

The Apex Court in Hirala Patni Vs Loonkaran Sethiya¹² held that:

a. If a receiver is appointed in a suit until judgment, the appointment ceases by the judgment in action.

b. If a receiver is appointed in a suit without his tenure being expressly defined he will continue to be receiver till he is discharged.

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¹⁰. A.I.R.1964 S.C.818
¹¹. A.I.R 1962 S.C.21; Savax vs Masood Hosain A.I.R. 1965 A.P. 143
c. But after the final disposal of the suit as between the parties to the litigation, the receiver’s functions are terminated, he would still be answerable to the Court as its Officer till he is finally discharged.

d. The Court has implied power to continue the receiver even after the final decree, if the exigencies of the case so require.

**REMUNERATION OF THE RECEIVER:**

Order XL R.2 vested discretion in the court appointing a receiver to fix the amount to be paid to him as remuneration for his service. There are no absolute standards in the matter of fixation of remuneration. Court may make an appraisal of the nature and volume of the work entrusted to the receiver and the time taken by him for discharging the duties connected therewith and should fix the remuneration.

In K. Satyanarayana Vs The Commissioner of Income Tax, Hyderabad it has been held that, his allowance may be either a percentage of the receipts or a specified sum by way of salary. The amount which will be allowed to him is what is reasonable having regard to the difficulties and facilities of collection and management and the other circumstances of the estate.

**APPOINTMENT OF RECEIVER IN AN INJUNCTION PETITION:**

Court can appoint a receiver when relief of injunction may not serve the desired end in full. Issuance of a temporary injunction does not affect the right as to appointment of a Receiver. Even in the absence of any application, the Court may appoint the Receiver while rejecting the application for temporary injunction to prevent larger mischief.

Hon’ble High Court in R.lakshmaiah Vs N. Lakshmi held that under Or XXXIX R.1 of Code, the Court may by order grant an injunction or make such other order for the purpose of saving and preventing from wasting, damaging, alienation, sale, removal or dispossession of the property as the Court thinks fit until disposal of the suit and thus the Court has wide powers not only to grant a temporary injunction but to make such other order for any of the purposes. Referred to above and this will certainly include an order of an appointment of a receiver. It has been further held that if the facts and circumstances justify the appointment of a receiver it may do so suo motu even without an application from the parties for that purpose.

13. 1960 A.L.T 776
14. AIR 1978 All 189.
15. AIR 1998 Bom 99
CONCLUSION:
Appointment of commissioners and receivers by the court is a double edged weapon and so shall be used cautiously as it can cause the justice to prevail if used cautiously and at the same time can cause injustice prevail under the protective veil of law if carelessly resorted to. Commissioners and receivers are helping hands in dispensing the cases according to law in the interest of justice and so they shall be used only in need. Appointment of commissioners to record the cross examination to save the time of Court and to speed up the trial process will defeat the rights of other parties in bringing to the knowledge of the court the demeanor of the witness and his right to get examined the witness in the open court in the presence of Judge. Similarly, appointing a receiver without any necessity, merely on the ground that no injustice is caused to the other party is nothing but infringing his right under the guise of law, as the actual owner was deprived of his rights over his property. Hence, court should be very cautious in appointment of commissioners and receivers as it can be the boon to the justice delivery system if used correctly and can also be a bane if carelessly used and there lies the efficiency of a judge in using his discretion in the best interest of justice.
REFERENCE OF DOCUMENTS TO EXPERTS FOR OPINION

Paper presented by

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As the Judge is not expected to be an expert in all the fields – especially where the subject matters involves technical knowledge. He is not capable of drawing inference from the facts which are highly technical. In these circumstances he needs the help of an expert – who is supposed to have superior knowledge or experience in relation to the subject matter. This qualification makes the latter’s evidence admissible in that particular case though he is no way related to the case. Because an expert has an advantage of a particular knowledge vis-a-vis a judge who is not equipped with the technical knowledge and hence not capable of drawing an inference from the fact presented before him.

Who is an expert?

Section 45 defines an expert is a person who is especially skilled in a given filed. An expert is a person who devotes his time and study to a special branch of learning. The Supreme Court of United state of America defined an expert is a person who possesses knowledge and experience not possessed by making in general. The courts in India in their judgments described an expert is a person who has acquired special knowledge, skill or experience in any art, trade or profession. Such knowledge need not be imparted by any University. He might have acquired such knowledge by practice, observation or careful study. The expert operates in a field beyond the range of common knowledge.

When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identify of handwriting or finger impressions, the opinions upon that point of persons especially skilled in such foreign law, science or art or in questions as to identify of hand writing or finger impressions are relevant facts. Such persons are called experts. In simple an expert is one who is skilled in any particular art, trade or profession being possessed of peculiar knowledge concerning the same.

Expert Evidence – Indian Evidence Act:

Expert evidence is covered under Ss.45-51 of Indian Act, S.45 of the act allows that when the subject matter of enquiry related with science or art, as to require the course of previous habit or study and in regard to which inexperienced persons are unlikely to from correct judgment. It allows an
expert to tender evidence on a particular fact in question and to show to the court that his finding are unbiased and scientific.

**S.46 of the Act states** that facts, **not otherwise relevant**, are relevant if they support or are inconsistent with the opinion of experts when such opinions are relevant.

**S.47 of the Indian Evidence Act** exclusively deals with the opinion as to the handwriting. The explanation further elaborates the circumstances under which a person is said to have known the disputed handwriting. The expert opinions not confined to handwriting alone. The opinions in relation to customs are also admissible according to S.48 of Indian Evidence Act.

Our Hon’ble High Court of A.P in **Bhavanam Siva Reddy and others v Bhavanam Hanumantha Reddy another, Elaborately** discussed the law on the subject of reference of documents to experts as follows:

1. **Section 45 of the Indian Evidence Act** speaks that for the **Court to form an opinion** the **opinion** of an expert is **relevant**. This section is thus an exception to the general rule as regards exclusion of opinion evidence.

2. **Section 51 days says that** whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

3. **Section 46 makes facts**, not otherwise relevant, are relevant – (1). If they support or are inconsistent with the opinions of experts, when such opinions are relevant.

4. **Regarding opinion evidence** – the other relevant sections are sections. 47-50, 73 & 67, among which.

5. **Section 50- speaks** of relevancy of opinion on **relationship** for the court to form an opinion.

6. **Section. 49-speaks of relevancy** of opinion on **usages** and **tenets** of any body of men or family – for the court to form an opinion.

7. **Section. 48 – speaks of relevancy** of opinion on existence of custom or right in general or relating to a considerable class of persons – for the court to form an opinion.

8. **Section – 47, 73 & 67 speaks** on handwriting opinion evidence and proof.

9. **Section.67-speaks** of requirement of proof of handwriting of person alleged to have signed or written the document in question – for the court to appreciate the evidence.

10. **Section.47 – speaks** of relevancy of opinion of person acquainted with the handwriting of the person – by whom any document was written or signed – in question – for the court to form an opinion. The acquaintance may be from – he has seen when that person writes or he has received the documents purporting to be written by that person or when in the ordinary course of
business the documents purporting to be written by that person have been habitually submitted to him.

11. **Section 73** – deals with comparison of signature, writing or seal with admitted or proved ones reads that in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is too be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

12. The court may direct any person present in Court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person, this section applies also, with any necessary modifications, to finger impressions.

13. The amended provisions in reference to the above for electronic evidence are cover by

1). Section – 47- A – opinion as to digital signature,

2). Section – 67 – A Proof as to digital signatures,


14. Section 45-51 nowhere speak of requirement of corroboration to the opinion evidence. Section 134 of Evidence Act says no particular number of witnesses shall in any case be required for the proof of any fact.

**Expert as a witness:**

The phrase expert testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special knowledge simply testifies as to the impressions produced in his mind. Expert evidence is often sought in the matters of handwriting, age, on weather, general conduct of a business etc.

A person having special knowledge of the value of land by experience though not by any profession can be treated as an expert. A witness in order to give an opinion must be competent (peritus)-i.e., an expert in the filed and the subject matter must be one in respect of which an opinion is allowed. What a person thinks in respect of the existence or non-existence of fact is opinion. Whatever is presented to the senses of a witness and of which he receives direct knowledge **Without any process of thinking and reasoning is not opinion.** Expert is the person who specifically or specially skilled or practiced on any subject. Expert evidence is thus the direct evidence of an
expert in the field from what he perceived by the senses of perception or in any other manner. According to Russell-any person who is skilled or has adequate knowledge in a particular field is called Expert.

The Hon'ble Supreme Court in the case of Ramesh Chandra Agrawal Vs Ragency ;Hospital ltd, & Ors delineated the requirements of expert evidence under section 45 of the Evidence Act. The court stated that the first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even Esoteric, the central role of expert cannot be disputed.

The credibility of the expert witness and his competency to give opinion and the reasons given sporting it are the material aspects in the appreciation of evidence by the court concerned:

(1) The test to determine competency of an expert is (a) Educational background in the field, (b) practical knowledge in the field, (c) Careful analysis in arriving to the conclusion opined & (d) Ability to explain the expertise and how he arrived to the conclusion opined.

(ii) The test to determine credibility of an expert is (a). Basis of opinion. The opinion must be based on facts and reasons there from to support the conclusion. How far to rely there from is a matter of appreciation in evidence by the court. The expert furnishes the date with reasons to his opinion there from and the Court decides there from and from other material in evidence if any.

(iii) The correct approach for the Court would be to weigh the reasons on which the expert report is based and the quality of experts opinion would ultimately depend upon the soundness of the reasons on which it is founded.

Cases in which Expert Evidence can be admitted:

According to Sec.45 of Indian Evidence Act, expert evidence is admissible when the court has to form an opinion upon a point of foreign law, or of science or art or as to identity of handwriting or finger impression. It will be seen that this section speaks of expert evidence on matters of "science or art", and does not specifically mention "trade" or "skill". The word "science" is a broad term and it is not always easy to determine what is or not a subject of scientific inquiry. A general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of
forming a correct judgment upon it without such assistance.

In other words, this is so when it so far partakes of the character of a science or art as to require a course of previous habit or study to obtain a competent knowledge of its nature.

Expert opinion can be secured only through the order of the court and not voluntarily by the party to the suit. If the opinion are on the points of foreign law, or of science, or of art, which are already in existence, by the time the suit is filed, they can be relied upon, as being relevant to the controversy in the suit but the opinion to be procured during the pendency of a suit in relation to the document which is subject matter of the suit, cannot be secured, except with the leave of the court, or with intervention of the court. Once the report of an expert is proved and admitted in evidence, the same can be read as part of the statement of the author of the report. It is not necessary that the report of the expert should be corroborated by his statement before court before taking the same into the consideration. Once the expert’s opinion is accepted by the court, it ceased to be the opinion of the expert and becomes the opinion of the court.

The cases in which testimony of an expert is admissible are of two types:

1. When the conclusions to be drawn by the court depends upon the existence of facts which are not of common knowledge and which are peculiarly within the special knowledge of men whose experience and study enables them to speak with authority upon the subjects in question.

2. When the conclusions to be drawn by the court depends both upon the facts stated as well as the knowledge of the facts themselves not within the range of ordinary intelligence. In the first class of cases the facts are to be stated by the expert and the expert states the facts and give his conclusions in the form of opinion which may be accepted or rejected by the court from appreciation of evidence.

Reference of documents to experts for opinion:

The application for sending the disputed signatures to an expert for comparison with the admitted signatures cannot be ordered as a matter of course, but it has to be considered keeping in view the facts and circumstances of a particular case. An exercise, to be undertaken under section 45 of the Evidence Act, visa-vis, a document, must be comprehensive and total. A party cannot be permitted to split the purposes in the context of examination through an expert under section 45 of the Evidence act. In other words, if several parts of the documents are to be subjected to expert opinion, the relief must be claimed in relation to all.
Different applications cannot be permitted to make in relation to each and every facet of the document, in a way, it can be said that such a course is prohibited under Order II CPC, in so far as, it governs the course of applications also. No document need be sent to an expert on mere failing of an application requesting the Court to send it to an expert and it is only when the trial court is not in a position to come to a just conclusion, it must feel it necessary to send such document to an expert. The learned Judge while refusing to permit the document to be sent to an expert at that stage, still left it open to send the disputed signatures of the party therein to a handwriting expert as contemplated under Section 45 of the Evidence Act, If the Court is unable to come to a conclusion even after looking into the document.

Our Hon’ble High Court of A.P in *Nookala Sridevi V. D.Krishnarjuna Rao* held that the court can refer documents to experts if satisfied that said document require opinion of expert, it need not arrive at any conclusion by looking into it before referring it to expert.

The signature marked on Xerox copy can never constitute the basis, therefore order granting permission to send Xerox copies of documents to the handwriting expert was liable to be set aside. The application for sending document to handwriting expert need not be filed soon after written statement is presented. The party can file application even at the stage of argument. *(Guru Govindu V. Devarapu Venkataramana, AIR 2006 AP371).*

Where earlier application for sending promissory notes to the expert was dismissed, the subsequent application for permission to send said promissory note to the Security press to obtain opinion as regards date of manufacture of revenue stamps affixed on it was barred by res judicata. *(Vajjala Sree Rama Murthy V.Tadepath Narayana Murthy, 2006 AIHC (NOC) 343(AP): AIR 2006 AP 315).*

Comparing handwriting by Court:- Even inspite of availability of expert evidence, the court can also compare the signatures under section 73 of the Indian Evidence Act and opinion of the expert is only a guiding factor and it is for the court to examine the entire evidence on record including the evidence of handwriting expert and come to a just conclusion.

Signatures on vakalat and written statement are not contemporaneous:- Interpolations can be found with a naked eye and the court can examine the document and record its finding subject to raising plea of material alterations in the written statement. But, the court cannot order for examination of disputed signatures with the admitted signatures on vakalath and writing
statement which are contemporaneous. See, Palle Chadrapani Vs. M. Prathap Reddy, 2017(5) ALT 292.

**Genuineness of a document is in serious dispute:** In such a case, it is desirable that such document is examined by an expert and an opinion given thereon to aid the court to come to a right conclusion. See. Pobolu Prameela Rani Vs Bogi Prasanthi an another, 2017 (3) ALT 280.

**When a document need not be sent for expert’s opinion?**:- If court can form an opinion on evidence adduced, document need not be sent to Expert for opinion. See. Guru Govindu v. Devarapu Venkataramana, 2006(5) ALT 17 L. NARASIMHA REDDY, j.

**Section 73 of Evidence Act:** courts to take assistance of experts section 73 of the evidence Act does bar the judge from ultimately deciding whether the signatures are forged or not still as a rule of prudence in disputed cases, it is always desirable that a court shou7ld secure the opinion of quality handwriting expert on the subject. After the opinion of the expert, is introduced into the evidence as required by law and the court can come to conclusion. See. Sakriya Kerishna Bai (died) per LR.Vs. Syed Ismail (died) per Lrs., 2018 (1) ALT 772. D.V.S.S.SOMAYAJULU, j.

**Section 73 of Evidence Act:** The law is very clear by interpretation of scope of section 73 of the Indian Evidence Act that the court has no power to ask for writing or thumb impression of an accused of a crime before commencement of enquiry or trial. Sec. Amit Khetawat Vs. State of Telangana, 2017(3) ALT (CRI.)[A.P]2. B. SIVA SANKARA RAO, j.

**Section 73 of Evidence Act:** Section 73 of Evidence Act does not permit a court to give a direction to the accused to give specimen writing for anticipated necessity for comparison in a proceeding which may later be instituted in the court. Sec. State of Haryana Vs. Jagbir Singh and another - 2004 (1)ALT (D.N)[SC]2.1(D.B). DORAISWAMY RAJU and AJITH PRAKASH SHAH, jj.

**Spectrographs test:** There is no provision in the code or any other law, which empowers the police or a criminal court, to subject the accused to the test, either from the provisions of the Act of 1920 or Section 53 Cr.P.C or Sections 73 and 165 of the Evidence Act to compel the accused to give his voice sample for the purpose of spectrographs test Sec. Amit Khetawat Vs. State of Telangana, 2017(3) ALT(CRI.)[A.P]2. B. SIVA SANKARA RAOJ, J.

**Court generally being not an expert in comparison of signature and handwriting etc:** Though the court got power under section 73 of Evidence Act and there is even other remedies to prove, the court generally being not an expert in comparison of signature and handwriting etc., with scientific
expertise; take an experts opinion with reasons under Section 45 read with 51 of Evidence Act. See. **P.Kusuma Kumari Vs. State of A.P., (2) ALT(CRI.) (A.P)476. B.SIVA SANKARA RAO.j.**

**Expert opinion is an assistance to court:-** Before exercising powers under section 73 of Evidence Act to form an opinion by comparing the handwriting or signature of a party, it would always be proper for the court to take the assistance of Handwriting Expert to be in a better position to form an appropriate opinion. See. Matta Srinivasamurthy Vs.Arepalli Srirama Murthy, 2015(3) ALT 266. R.KAN ThA RAO.j.

Comparison by Court: There is no legal bar to prevent the Court from comparing the disputed signatures with the admitted signatures under section 73 of Evidence act. However, the court, in doing so, must keep in mind the risk involved as the opinion formed by court is susceptible to error especially when such exercise is bing conducted by court no conversant with the subject. See. **Chidara Uma Maheshwar Rao Vs. Methuku Janardhan, 2013(6) ALT 806. C.V.NAGARJUNA REDDY, j.**

**Comparison by Court:** In case of necessity, Court takes upon itself task of comparing signatures. Need not invariably send signatures for comparison to a handwriting expert Facts of case relevant to decide when and whether to send to handwriting expert section 73 provides for comparison by court itself absolutely, no legal bar preventing court from comparing signatures or handwriting by its won byes, however, must refrain from playing role of an expert opinion of handwriting expert not immune from being fallible / liable to error, like that of any other witness. See. **Ajay Kumar Parmar Vs. State of Rajasthan, 2013(2)SCJ809(D.B) DR.B.S.CHUHAN and FAKKIR MOHAMED IBRAHIM KALIFULLA,jj.**

**At what stage, application for expert opinion is to be filed?:-** If the dispute is as to execution of a document by one of the parties to the suit, the application to send the document to expert must be filed before the evidence of such party is closed. See. **Pulapar thi Sankuntala Bai Vs. Mygapula Ramanjaneyulu, 2006(3)ALT 607.**

**Slight variation in the signature:-** Though there is a slight variation in the signatures, it need not be given much weightage due to gap of eight years – contention rejected. See. **G.Aravind Kumar Vs. Md.Sadat Ali (died) and another, 2011(5) ALT 574.**

**Uncorroborates evidence of a hand writing:-** Uncorroborates evidence of a hand writing expert is an extremely weak type of evidence and the same should not be relied upon either conviction or for acquittal. See. **S.P.S Rathore Vs. C.B.I. and another, 2016(3) ALT (CRI.) (SC) 307(D.B).**

Scientific Investigation:- It is only the Government Security Press that can certify the date or period at which a particular stamp paper was printed. (para 5). See. Ravuluru Venkata Subbamma Vs. Ravaluru Somasekhar, 2009(5) ALT 549.

Expert opinion before Trial :- Allowing of application for sending disputed documents for Expert’s opinion before commencement of trial is not legal. See. J.L.Babu V. S.Gowri Shankar and another, 2009(5) ALT 415.

Expert opinion at Appellate stage:- receiving of an Expert’s opinion at appellate stage would amount to receiving additional evidence under order 41, Rule 27, CPC See. V.Chidambara Reddy Vs.K.Govinda Reddy, 2008(6) ALT 312. P.S.NARAYANA, j.

Expert’s opinion is important:- Where injuries are caused by firearms, opinion of ballistic expert is important. It was held by the Hon’ble supreme court in Sukhwant singh Vs. State of Punjab, 1995(2) ALT (CRI.) (SC)201 (S.B). A.S.ANAND and FAIZAN UDDIN, jj.

Examination of mental condition of a person:- Expert opinion obtained that appellant was normal – It cannot be said that appellant was deprived of his senses even temporarily See. Ram Deo Chauhan Alias Raj Nath Chauhan Vs. State of Assam, 2000(2) ALT (CRI.) (SC) 142 (D.B). K.T THOMAS and R.PSETHI,jj.

Application seeking issue of commission to make scientific investigation:- Application seeking issue of commission to make scientific investigation of disputed and admitted signatures and send expert opinion is maintainable even in execution proceedings. See. Theetla Vijayudu Vs. Gaddam Lakshmidevi and others, 2005(5) ALT 655, P.S.NARAYANA, J.

Expert opinion in suit on pronote:- Where a defence is taken that signature was taken on a blank pronote and the pronote is fabricated, it would be just and proper exercise of discretion to send the document to Handwriting Expert for his opinion as regards the age of links in signature and body of pronote, See. Penumastha Ramachandra Raju Vs. Gaddam Raja Sekhar Reddy, 2005(6) ALT 49, P.S. NARAYANA, J.
Genuineness of documents. Modes of proof: Expert evidence regarding handwriting is not the only mode by which genuineness of a document can be established. The requirement in Section 67 of the Act is only that the handwriting must be proved to be that of the person concerned. In order to prove the identity of the handwriting any mode not forbidden by law can be resorted to – of course, two modes are indicated by law can be resorted to – of course, two modes are indicated by law in section 45 and 47 of the Act. The former points expert opinion to be regarded as relevant evidence and the latter points opinion of any person acquainted with such handwriting to be regarded as relevant evidence. There can be other modes through which identity of handwriting can be established. See. Gulzar Ali and others Vs. State of Himachal Pradesh, 1997 (6) ALT (DN) 8.2. K.T.THOMAS and M.K.MUKHERJEE, jj.

Expert opinion is a weak piece of evidence and its value is corroborative and doesn’t supercede the ocular, impregnable evidence. It never be counted as conclusive proof with one exception that the expert’s evidence on DNA Report is a conclusive one and it never shattered under Law.
APPRECIATION OF EXPERT'S EVIDENCE

Paper presented by

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What is appreciation?

Appreciation of evidence is a term used in Indian Law to refer to the consideration or examination of the evidence by the Court. It involves weighing the credibility and reliability of the evidence presented in the case.

Who is Expert?

Expert is the person who specifically or specially skilled or practiced on any subject.

What is opinion?

What a person think in respect of the existence or non-existence of fact, is opinion.

The Supreme Court in case of Himachal Pradesh Vs. Jai Lal and others reported in AIR 1999 SC 3318 explained who is an expert and what are his functions.

1. An expert witness, it one who has made the subject upon which he speaks a matter of particular study, practice; or observations; and he must have a special knowledge of the subject.

2. In order to bring the evidence of a witness as that of an expert, it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

3. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so and to enable the Judge to form his independent Judgment by the application of this criteria to the facts proved by the evidence of the case.
4. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the date and materials furnished which form the basis of his conclusions.

The definition of an expert can be found out from section 45 of Indian Evidence Act that a person can be called as experts when a person specifically skilled in any of the following:

1) Foreign Law,
2) Science or Art,
3) Identity of Hand Writing,
4) Finger Impression.

And such knowledge has been gathered by him:

1) By practice,
2) Observation,
3) Proper studies.

The opinion of expert on such point is admissible to enable the Court to come to a satisfactory conclusion.

Section 45 to 55 of Indian Evidence Act deals with the opinions of the third persons, when relevant.

**Evidentiary value of expert opinion:**

Witnesses are expected to depose what they have seen and heard and not to draw inferences from what they see. The privilege of drawing inferences is given to the court not to the witness – held in Babuli Vs state of Orissa (D.B) 1973 lawsuit (SC 358).

But in Fakhruddin Vs state of MP AIR 1967 SC 1326, Hon’ble Supreme Court suggested three modes of proof of document. Firstly by direct evidence, secondly by expert evidence and thirdly by the court coming to the conclusion by comparison.

As a general rule the opinion or belief of third person is not relevant and admissible as the witnesses are allowed to state facts alone of what they themselves saw or heard. However, cases in which the question involved is beyond the range of common experience and knowledge or court has no special study and necessary experience on the subject and is not in a position
to form a correct opinion, in such cases help of an expert in that field is
necessary—held in Sitaram Sri Gopal Vs Daulati Devi AIR 1979 SC 1225.

Opinion of an expert even if obtained, not conclusive, ultimately Court
has to come to the conclusion. Even though whatever the expert says may be
an opinion, yet, it may be of valuable assistance in appreciating probabilities
arising out of the other evidence on record.

The witness in order to give an opinion must be competent i.e. an expert
in the field and the subject matter must be one in respect of which an opinion
is allowed. However, an expert opinion is only an opinion and could not take
the place of substantive evidence.

In a decision reported in 2017 (4) ALT 682 in between Bhavanam
Siva Reddy and others Vs. Bhavanam Hanumantha Reddy and another
rendered by Hon’ble Justice Dr.B.Siva Shankara Rao his lordships clearly
discussed the law on expert’s opinion from paragraph 14(a) to 14(h).

The cases in which testimony of an expert is admissible.

His lordships categorized the cases in which testimony of an expert is
admissible into two types.

1. When the conclusion to be drawn by the Court depends
upon the existence of facts which are not of common
knowledge and which are peculiarly within the special
knowledge of men whose experience and study enables them
to speak with authority upon the subjects in question.

2. When the conclusion to be drawn by the Court depends both
upon the facts stated as well as the knowledge of the facts
themselves not within the range of ordinary intelligence.

In the first class of cases – The facts are to be stated by the expert and
the conclusion is to be drawn by the Court.

In the second class of cases – The expert state the fact and give his
conclusion in the form of opinion which may be accepted or rejected by the
Court from appreciation of evidence.

“The credibility of the expert witness and his competency to give opinion
and the reasons given supporting it are the material aspects in the
appreciation of evidence by the Court concerned”.

The test to determine competency of an expert is:

(a) Educational background in the field.
(b) Practical knowledge in the field.
(c) Careful analysis in arriving to the conclusion opined.
(d) Ability to explain the expertise and how he arrived to the conclusion
opined.
The test to determine credibility of an expert is:

(a) Basis of opinion. The opinion must be based on facts and reasons there from to support the conclusion. How far to rely there from is a matter of appreciation in evidence by the Court. The expert furnishes the date with reasons to his opinion there from and the Court decides there from and from other material in evidence if any.

The correct approach for the Court would be to weigh the reasons on which the expert the Court is based and the quality of expert’s opinion would ultimately depend upon the soundness of the reasons on which it is founded – held in Uma Kanth Bajpaye Vs. State of U.P. (2) 1993 All. Cr.R.14.

In a Judgment reported in AIR 1967 AP 338 in Bommidy Purnesh Vs. Union of India at page No.348 held that:

The expert must given evidence based on his opinion and reasons with opportunity to cross examine by the parties assailing the correctness of the opinion, without which mere report of certificate of an expert is of no evidence.

How to receive Expert opinion into evidence:

The opinion of Expert does not automatically form part of record and court cannot consider it without examining the Expert, unless both parties give consent to receive the expert opinion into record.

The Expert shall give evidence on the aspects such as, introductory identification of who is preparing the report and who it is prepared for; the documents examined; the inspection and testing process explained; the expert’s opinions and conclusions.

In Mohd. Vs. State of U.P. (4) AIR 1997 SC 69 the Apex Court held that where the expert had given no reason in support of his opinion, nor was it shown that he possess special skill, knowledge and experience in the science of identification of finger prints, it is unsafe to rely on such unreasoned opinion, even it is a developed science and the report is otherwise admissible and relevant under section 45 of Evidence Act.

Supreme Court Of India (C.B.) Shashi Kumar Banerjee V/S Subodh Kumar Banerjee – 1963 Lawsuit (SC) 191 – 1964 AIR (SC) 529 – it is necessary to observe that expert’s evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence......the mere opinion of the expert cannot override the positive evidence of the attesting witnesses.
**Appreciation of Expert evidence:**

Honourable Supreme Court in *State (Delhi) V.PaliRam, 1979 2 SCC 158* held that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own Judgment by its own observation of those materials. Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking, such issues are for the court or jury to determine.

In *Ramesh Chandra Aggrawala V. Regency Hospitals, 2009 9 SCC 709*, it was dealt with the difference between an ‘expert’ and ‘a witness of fact’.

“An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions”.