

## **Salient features of Advocate Commissioner Application**

In this essay we shall discuss about critical examination of order XXVI Rule 9 C.P.C. it deals about appointment of commissioner for local investigation in various aspects.

### **Application for commission:**

Every application for the issue of a commission shall state grounds thereof and shall be 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 commission for local investigation or to examine accounts, *mesne profits etc.*, the specific points on which the enquiry is desired.

### **Commission to make local investigation:**

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 that Court;

### **Commissioner to demarcate plot to help Court better appreciate the evidence:**

During trial of a suit for declaration of title and permanent injunction, the application for appointment of Commissioner was filed for the purpose of demarcating the suit site with the help of Surveyor. The High Court held that whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by the other, the facts

have to be physically verified, because, the recitals of the documents may not reveal the true facts and in such cases, measuring the land on the spot by a Surveyor may become necessary. It is also observed that it is always better if the parties are allowed to adduce evidence at the stage of trial for better appreciation of the facts which will help of the Court in effectively deciding the main dispute between the parties.

**Notice to opposite party :**

The question that arises is whether any duty is cast on the Court to issue notice either before an order is passed for the appointment of a Commissioner or after. There is nothing in Rule 9 of Order 26 to warrant a contention that there is a duty cast on the Court to issue notice before an order is passed under that Rule. Under Rule 18 it is obligatory on the Court after issuing Commission to direct the parties to the suit to appear before the Commissioner in person or by their agents or pleaders. It is so because each party should have a chance of presenting his or her case and it is in conformity with the principles of natural justice that it is only evidence taken in the presence of the party that should be used against him and it is for that purpose that Rule 18 requires the Court to direct the parties to the suit to appear before the Commissioner. From the above discussion, it would follow that though it is not obligatory on the Court to issue notice to the defendant before the appointment of a Commissioner, it is mandatory on the Court after issue of the commission to direct the parties to appear before the Commissioner.

**Court has no power to suomotto appoint a local Commissioner : -**

Order XXVI of C.P.C. contains 22 rules. There is no provision conferring Suomotto powers on the trial Court or any Court vested in the powers under C.P.C to appoint

Commissions either for the purpose of examination of witnesses, or to make local investigations, or for the sale of movable properties, or for the performance of a ministerial act or for the purpose of examining and adjusting the accounts. That a Court cannot appoint a Commission without there being an application, is indicated in Rule 20 of Order XXVI of C.P.C., which is to the effect that the High Court may issue Commission to examine witnesses upon an application made by a party to the proceedings or upon an application by a law officer of the State Government. The power of the High Court under Rule 19 of order XXVI of C.P.C. ;to issue commission to examine witness in a given situation is itself conditioned by making an application by a party to the proceedings of a foreign Court or the Government law officer.

**A Second Commissioner for the same purpose when may be appointed :-**

The Report of the First Commissioner is on the record. The petitioner applied for another Commissioner on the ground that the sketch earlier made was suspended by the High court in a writ petition. It is held in **Koduru Sessa Reddy Vs., Gottigundala Venkata Ramireddy and others 2006 (1) ALD 372** that before appointment of a second Advocate-Commissioner, the Court should record its dissatisfaction about the report submitted by the first Commissioner, the object being to avoid conflicting reports before the Court. This view is relied upon with approval. The High Court held in this case that mere suspension of a sketch by the Writ Court does not render the sketch irrelevant and if any fresh inspection of the disputed properties by the Advocate-Commissioner becomes necessary, it is always open to the party aggrieved to approach the trial Court with a request to direct the first Commissioner himself to make a local inspection again debors the sketch in question. If the

party otherwise seeks to discredit the first Advocate-Commissioner's report in total and have a second Advocate-Commissioner for making local inspection, then invariably he should persuade the trial Court to conclude about the unacceptability of the report of the first Advocate-Commissioner with reference to the objections raised by him against the said report or any other relevant considerations that he may bring to the notice of the trial Court. It is categorically held that till the report of first Commissioner is scraped, a second Commissioner for the same purpose cannot be appointed by the Court as such practice will be prone for inconsistency.

Appointment of a second Commissioner in a suit for permanent injunction was sought for by the plaintiff. In the alternative, a redirection to the earlier Commissioner was also sought for directing the Commissioner to inspect suit site or to file fresh report or scrap report already filed. The trial Court redirected the Commissioner to inspect suit site and to file fresh report on the ground that there are certain discrepancies in the earlier report of the Commissioner. In this situation, the High Court has assertively held that the appointment of Commissioner for second time can be made only when the Court is not satisfied with report of earlier Commissioner as contemplated under Order 26 Rule 10(3) CPC. For that, the Court shall invariably record its reasons about its dissatisfaction over the proceedings of the Commissioner or as to why his report is not satisfactory. Merely because the party made averments in the affidavit, the Court cannot appoint a second Commissioner was held in **R. Vijayadu Vs., N. Ramachandrareddy 2004 (5) ALD 486.**

A Commissioner was appointed to evaluate mesne profit. He filed report but the Court found that the said report is

incomplete with regard to several matters. Court observed that the services of an experienced advocate are necessary to assess the mesne profit correctly and then appointed another Commissioner for the purpose again, directing him to execute the warrant. The challenge to the correctness of that order was on the ground that the reasons for appointment of a second Commissioner given by the trial Court are not proper or sufficient and that there is no finding recorded that the report of the Commissioner is unsatisfactory and that the Court has not examined the legal implication of appointing the Second Commissioner by virtue of Order 26 Rule 10 CPC whereby, the question would be whether the report already submitted by the Commissioner along with the statements of the witnesses should exist or be weighed out. The High Court held that the said order suffers from many illegalities and infirmities in addition to exercise of the jurisdiction in excess of what is contemplated under Order 26 Rule 10 CPC. It was also observed that there is no provision under Order XXVI of the Code for appointing more than one Commissioner or to reject the report of the Commissioner and the evidence without any justification. The law in regard to the appointment of more than one Commissioner by virtue of Order XXVI Rule 10 of the Code is no longer *res integra* and has been settled by precedents, including the precedents of the A.P. High Court. As a normal rule, there is no doubt that two separate commissioners should not be issued to deal with one and the same subject and to treat the report of both the Commissioners as evidence in the case. It is only when the report of the first Commissioner is unsatisfactory and the Court is dissatisfied with his proceedings, that a Second Commissioner could be appointed under the provision of Order XXVI Rule 10 sub-clause (*sic. Sub-rule*) (3). If a second Commissioner is appointed either by rejecting the report of

the first Commissioner or without that, the legal effect is that the report of the first Commissioner may be wiped out in law. But, in view of the implications of Order XXVI Rule 10 Sub-rule (2) of the Code, such a report and the evidence recorded by the Commissioner would be evidence in that case, which has to be taken into consideration while deciding the matter in issue by the Court and, therefore, as a routine, if a second Commissioner is appointed, it has got serious consequences laden with danger to the ultimate justice. Thus such a procedure of appointing second Commissioner or more than one Commissioner for the same purpose is said to be improper and illegal. The Court pointed out the following infirmities in the order of the trial Court while appointing another Commissioner.

Firstly, the trial Court opined that the Commissioner who was appointed already is a junior and that his report can be improved by appointing a senior advocate of the Bar, but the same is inconsistent with the appointment of the first Commissioner who has already done a part of the work, which is not found to be defective not rejected. Secondly, if a portion of the commission work was not fulfilled by the Commissioner for any reason, it is possible to direct the very same Commissioner to complete the work with further materials and with the co-operation of the parties and their advocates. Even assuming that the report of the first Commissioner is not complete, the Court could still consider whether the evidence on record through the report of the Commissioner was adequate or inadequate to decide the controversies between the parties in regard to the assessment of mesne profit. Patently, the report of the Commissioner covered the assessment of mesne profit at least for two years. Without examining there implications, the learned Subordinate Judge has landed in error in

appointing the second Commissioner, which was disapproved by the High Court of A.P since such an order is inconsistent with the law and in exercise of jurisdiction beyond the scope of law therein.

### **Collection of evidence and Commissioner**

#### **Appointment : -**

As per settled law Appointment of Advocate Commissioner - where there is an allegation of encroachment of land, an Advocate Commissioner can be appointed for local investigation as mere oral evidence will not aid either party to decide the issue of encroachment - Such appointment cannot be said to be for collection of evidence as the object of local investigation itself is to collect evidence. *Reported in 2016(1) ALT 134.*

### **Land Mark Judgments regarding to Commissioner**

#### **Appointment : -**

1. *Bandaru Mutyala and another Vs. Palli Appalaraju (4) 2013 (6) ALT 26 and it had held that in circumstances where there is controversy as to identification, location or measuments of the land, local investigation should be done.*
2. *In fact in Haryana Waqf Board Vs. Shanti Sarup and others (5) (2008) 8 SCC 671, the Supreme Court has also held that in a case where demarcation of the disputed land is warranted, it would be appropriate for the Court to direct investigation by appointing a local investigation under Order XXVI Rule 9 CPC.*
3. *C. Veeranna Vs. C.Venkatachalam (2) 1958 (5) ALT 792 division bench wherein it was held that even exparte, an Advocate Commissioner can be appointed without issuing notice to the other side.*
4. *Jammi Venkata Krishna Rao and others Vs. Jammi Venkata Hanuma Ravindranath in 2015 (5) ALT 14 : Noting*

down physical features of property by Commissioner enables the Court to arrive at appropriate decision regarding identity of property - Appointment of Commissioner for that purpose does not therefore, amount to collecting or gathering evidence, especially when plaintiffs is contending that defendants are trying to obliterate the physical features are noted down by Commissioner, it enables the Court to understand the physical features existed on the date of suit and any subsequent obliteration can be known easily by Court in the course of trial.

**Mandal Surveyor Assistant and Commissioner Appointment :-**

**2015 (3) L.S 20 .... G.L.Purusotham & Ors., petitioners. vs. Y. Nagaraju & Anr., ... Respondents. -** Suit for perpetual injunction from interfering from their alleged peaceful possession and enjoyment of plaint schedule properties - Court below appointed advocate commissioner exparte and directed him to file a report as to physical features of the suit locality, but in said order, court below not directed advocate commissioner to take assistance of Mandal Surveyor - I.A. filed for same advocate commissioner to direct him to inspect the plaint schedule properties with help of Mandal Surveyor and to locate it and file a fresh report - Court below dismissed the I.A - Present revision is filed against that order.

Held, in present case from pleadings of parties it is clear that respondents alleged that it is petitioners who encroached their property while petitioners alleged that it is the respondents who have encroached their property - Therefore, it is necessary to localize the suit schedule properties and this can be done with the help of an Advocate-Commissioner, who takes the assistance of the Mandal Surveyor and also with the reference to the F.M.B. and other relevant records.

**To find out who is in possession - Commissioner cannot to appointed : -**

Possession is a matter of proof of necessary oral and documentary evidence. The Court has to investigate and record finding as to who is in physical possession of the dispute property. In the regard, the investigation by a local Commissioner is not permissible. The position of law was make clear by several precedents. The recent one to be referred is ***Parepally Satyanarayana Vs., Vutukuri Meeneder Goad 2008 (1) ALT 461*** case. It is held that a Commissioner cannot be appointed to find out as to who is in occupation of the property.

**Commissioner's Report is part of record - Commissioner need not be examined as witness to prove it : -**

According to Order 26 Rule 10(2) the report of the Commissioner shall be evidence in the suit and shall form part of the record. But, either the Court on its own or the 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 made as it shall think fit, according to sub-rule (3) of Rule 10. The law is also settled in this regard. According to the decision was held in ***Shaik Fathima Bi Vs. Shaik Nanne Saheb (died) 2005 (4) ALD 164*** generally, the report of the Commissioner being part of record can be considered as evidence irrespective of the fact whether Commissioner is examined as a witness or not. The Court overruled the tenability of the objection raised by one party that the Commissioner's report cannot be relied upon when it was not marked as exhibit in the evidence and also for the reason that the Commissioner is

not examined. At the same time, the Court expressed that whenever the report of the Commissioner plays a vital role, contention that reversal of judgment of trial Court made on the strength of un-exhibited report of commissioner cannot be sustained. The High Court cautioned the trial Courts that when substantial objections are taken to the report of 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 cannot be said that the report cannot be looked into by the Court unless the same is exhibited or Commissioner is examined as a witness too.

**If any party raises objection on the Report, the Commissioner shall be examined : -**

The A.P. High Court observed that according to sub-rule (2) of Rule 10 of Order XXVI, the report of the Commissioner and the evidence taken by him during the inspection shall be evidence in the suit and shall form part of the record was held in **Smt. Vadda Rajeswaramma Vs., Dr. V.L.Narasimha Charyulu and Others, AIR 1988 AP 202**. Therefore, there is no controversy with regard to admissibility of the report as evidence during the trial and making the report of the Commissioner part of record. However, it is said, before the report is made part of the record and taken as piece of evidence; it is open for the Court to examine the Commissioner on matter referred to him in his report or as to the manner in which he made the investigation. It is open for the parties also to examine the Commissioner or on the manner in which he had conducted the investigation. The court observed that this is the only interpretation which can be placed upon sub-rule (2) of Rule 10. It is a different manner if neither the Court nor any of the parties take any objection to the report. In such a situation the report becomes final and becomes part of the record and can also

be taken as piece of evidence. But once a party objection to the and specifically wants that the Commissioner be examined, the Court has no option but to examine the Commissioner. Unless that is done, the Commissioner's report can neither form part of the record nor can it become a piece of evidence which could be relied upon at the stage of disposal of suit.

**Conclusion** : -

The appointment of Commissioner is guided by circumstances in every case and they have to be appreciated by the Court independently. From an appraisal of law and procedure laid down in the above paragraphs it is emerged that appointment of a Commissioner for local visits and to investigate the physical features, is generally an indispensable process in the Civil litigation. The affidavit supporting the application shall clearly indicate what the purpose of seeking the appointment of Commissioner is. The relief part of the petition shall also disclose the said purpose invariably. The warrant issued by the Court to the Commissioner shall contain the particulars of the work entrusted to him so that he will not exceed the scope of warrant. The parties shall also supply work-memo to the Commissioner enabling him to answer the questions raised by the parties according to the case put forth by him. Once a Commissioner is appointed, it is not significant at whose instance he was appointed; soon after his appointment, he will be the shadow of the judicial Court and his duties are judicial functions and therefore, he has to answer all the questions which are given to him in the work memo, which are within the scope of the warrant entrusted to him. Though his report by itself may not be the evidence, certainly it will help Court to properly appreciate the oral and documentary evidence adduced by the parties.