

## **LAW ON APPOINTMENT OF ADVOCATE COMMISSIONER IN SUITS**

The provisions relating to appointment of Commissioner is set out in Civil Procedure code. Under “Incidental proceedings” section 75 and Order XXVI Rules 1 to 22 of the Code deal with it. The aspect of Advocate Commissioner is dealt under section 75 and Order XXVI rule 9 of Code. Civil Rules of Practice from rules 134 to 141 also deal with it.

As per section section 75 of the Code subject to conditions and limitations as may be prescribed, the court may issue a commission in following aspects namely –

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

Whereas Order XXVI rule 9 specifically deal with Commissions to make local investigation. The rule states 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 Menes profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the court shall be bound by such rules.

### **Object and scope:**

The object of “**section 75 and Order 26 Rule 9** “of Civil Procedure Code is to elucidate any matter in dispute. In any suit where there is just and proper cause for

elucidating any matter in dispute as the case may be, the court can appoint Commissioner.

The scope of appoint of Commissioner is not to assist any party to collect evidence. From various judgments in appointment of Advocate Commissioner the aspects to be considered are that :

- 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.**

**Purpose of appointment of Advocate – Commissioner:-**Commission cannot be appointed for making an enquiry about factum of possession. The appointment of Advocate Commissioner for making enquiry about the factum of possession of the property in dispute is improper.

**Legal prepositions where Appointment of Commissioner is deem proper:**

1. In a Suit for injunction, there is no absolute bar on appointment of Commissioner. It is not the business of the Court to collect evidence in favour of one party.
2. Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties.
3. Prior notice in case of Appointment of advocate Commissioner : Without notice: Though Order 26 Rule 9 CPC per does not envisage notice to the opposite party, the order containing unilateral direction without notice to the other side is perceived as somewhat unusual and contrary to the convention and practice for, it cannot be said that an application for appointment of an Advocate-Commissioner for the said purpose does not broke delay in issuing notice to the other side and hearing them.
4. Exparte orders in Appointment of advocate Commissioner:- Even ex-parte and without issuing notice to the other side, an Advocate Commissioner can be appointed.
5. When appointment of commissioner becomes Pre-trial decree:- When the plaintiff sought for Appointment of advocate Commissioner to survey schedule property with the help of Surveyor and fix boundary stones to his land, Appointment of advocate

commissioner by trial court for demarcating schedule property and to fix boundary stones to the land of respondents amounts to granting pre-trial decree.

6. Appointment of Advocate-Commissioner for the second time. Unless there is ambiguity in the earlier report or not executed as per order of court, second time Advocate-Commissioner can be appointed. When the court is not satisfied can set aside report by recording reasons and then appoint new advocate commissioner. However, the Court has discretion to appoint second commissioner depending on facts and circumstances of the case before it. But the discretion of court must be judicious for the purpose of elucidating facts in respect of any matter in dispute where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, certain facts, to make it clear intelligible and to throw light upon the matter in issue, relating to the main case as well as the facts leading to the dispute.

7. New Advocate Commissioner can be appointed in a suit schedule land with the assistance of Mandal Surveyor or the Assistant Director of Survey and Settlement, Held, the burden is on the defendant to prove that the property which the petitioner is claiming is different from the property based on the boundaries. Appointment of an Advocate-Commissioner to note down the physical **features**. Orders in the nature of appointment of an Advocate-Commissioner to note down the physical features and boundaries of the disputed properties are incidental and complimentary in nature and assist the Court in arriving at a just decision in the is unlike supplementary orders.

8. Before appointing commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. 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 the Court in effectively deciding the main dispute between the parties.

### **At what stage Advocate Commissioner can be appointed:**

Before the issues are framed:- It cannot be said that no Commission could be appointed before the issues are framed or evidence. At the stage arguments not permissible:- Reopening of suit and appointment of Commissioner allowing of application filed by defendants for reopening of the suit and for Appointment of advocate Commissioner to note the physical features of suit schedule land at a belated stage after completion of evidence and at the stage of defendants\arguments is impermissible as it would pave the way for the parties.

### **Local inspection by Advocate-Commissioner:-**

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. an Advocate-

Commissioner can be appointed in an injunction suit for local inspection of the suit and to demarcate the suit schedule property with the help of the Surveyor. As earlier mention that for purpose of factum of possession cannot be ascertain by Commission. Identification of property and not the title or possession of property to determine whether there is an existence of fact.

### **Evidential value of Advocate – Commissioner’s report:-**

Report of Advocate-Commissioner forms part of the records. Advocate-Commissioner report 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.

For all above propositions the latest case law in respect of appointment of Advocate Commissioner is **“Bandi Samuel Vs. Medida Nageshwara Rao 2017 (1) ALT 493 dated 04-11-2016”** reported the two important aspects of order XXVI r.9 of C.P.C are that (1) when advocate commissioner may be appointed (2) what to elucidate any matter?

**Apart from latest case laws** there are some circular passed by Hon’ble High Court of Andhra Pradesh regarding the procedure and panel of appoint of advocate commissioner.

### **Conclusion:-**

Therefore, appointment of advocate Commissioner as a matter of course shall not done. The court should convinced for the purpose and the ingredients of Order 26 Rule 9 CPC. Thus as per C.P.C. provisions, the Court has discretion to appoint a commissioner but the discretion has to be exercised in a judicious and sound manner.

**BY  
B.JYOTSNA L.L.M,  
JUNIOR CIVIL JUDGE,  
AMADALAVALASA.**