

# **DIVISIONAL JUDICIAL SEMINAR**

UNDER THE PATRONSHIP  
**CHHATTISGARH STATE JUDICIAL ACADEMY, BILASPUR**

**TOPIC**

**COMMISSION REPORT -**  
**ISSUE OF COMMISSION & LOCAL INSPECTION,**  
**PROCEDURE & ADMISSIBILITY IN EVIDENCE**

**PRESENTED ON**

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**PRESENTED ON BEHALF OF**  
**DISTRICT AND SESSIONS COURT DURG**



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## CHAPTER - 1. - INTRODUCTION

*"Interim means, not that which decides the course but that which only settles some intervening matter relating to the cause; a degree or judgement given provisionally during the course of a legal action."*

**- Justice C.K. Thakkar**

### ***OBJECTIVE AND PURPOSE:***

The rationale behind issuing commissions originates from the jurisprudence that there should not be any abuse of process during the pendency of proceedings. Commission is one of the forms of interim orders inter alia, temporary injunctions, security for costs, payment in courts and interlocutory orders etcetera; issued by the court to assist the parties vis-a-vis suit in the prosecution and protection of the subject matter of the suit. However, commissions are not issued to determine the substantive rights and liabilities of the parties concerning the subject matter of the suit or proceeding, but is an interim order i.e., incidental proceedings to protect the rights of the parties during the pendency of the suit.

This presentation here would elucidate the definition of "commissions", its need and procedure of issuance of commission and under which circumstance and situations commission can be issued. The presentation will also elaborate on the evidentiary value of the report submitted by the Commissioner.

## CHAPTER - 2. - WHAT IS COMMISSION ?

- **Definition and Governing Principles:**

Commission is one of the forms of interim orders like *temporary injunctions, security for costs, payment in courts etc.* Black's Law Dictionary defines interim as temporary and provisional.

*Commission* refers to ***person or body of persons appointed to carry out the functions that are delegated to them by the court.*** They act as agents of the court to perform those functions that courts of law ordinarily cannot perform<sup>1</sup>. The Commissioner in effect is a projection of the Court appointed for a particular purpose.

The law regarding issuance of commission is provided by ***Section 75 to 78 of the Code of Civil Procedure (CPC) and Order 26 of CPC.*** While Section 75 to 78 lay down the Powers of the court and the Circumstances in which commissions are issued, Order 26 gives detailed Procedure regarding the same. Whereas ***Chapter XXIII, Part - B from Section 284 to 299 of Criminal Procedure Code,*** deals with Commissions for the Examination of Witnesses.

- **Who can be a Commissioner?**

Generally, there is a panel of commissioners which is formed by the High Court in which advocates are selected who are competent to carry out the commission issued by the Court.

The person appointed as commissioner should be independent, impartial, disinterested in the suit and the parties involved in it. Such a person should have the requisite skills to carry out the commission.

It will be a complete waste of time and resources of the Court and the parties if a person who cannot read and understand the accounts and documents is appointed as commissioner to adjust accounts. Similarly, a person who does not have the qualifications to conduct scientific investigation should not be appointed as a commissioner for such task.

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<sup>1</sup> Ponnusamy vs. Salem Vaiyappamalai Jangamar Sangam -AIR 1986 Madras 33.

The District judge supervises the subordinate Courts who have to take special care while appointing a commissioner. The same person should not be appointed by the Court in all commissions and a person who hangs about the Court should not be appointed.

- **Does the Court has discretionary power to appoint Commissioner ?**

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<sup>2</sup>.

- **Purpose of Issuance of Commission:**

***Rule 9 of Order 26 CPC*** lays down that a Commission for local investigation can be appointed inter alia for the purpose of ‘elucidating any matter in dispute’. This principle is laid down as the court has discretionary powers in the interest of justice to appoint commissioner to throw light upon/ explain the main issue/dispute and the facts leading to the dispute. Thus, ***role of a commissioner is to settle any doubt that may arise in the matter in issue or in any disputed questions of fact and to assist the court in clarifying or confirming the necessary aspects of the matter in dispute***<sup>3</sup>.

With this the importance of Commission is explained by the Hon'ble C.G. High Court in ***Saroj Bai vs. Ramdas Lahare and others***<sup>4</sup> held that "***Commissioner appointed U/O 26 Rule 9, CPC cannot get the spot inspection carried out by a third person and any such report would not be proper and legally acceptable***".

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<sup>2</sup> A. Nagarajan vs. A. Madhanakumar, 1996 (1) CTC 229, (1996) IMLJ 422

<sup>3</sup> M.Nachiappan vs A.Nachiappan C.R.P. (PD) (MD) No. 204 of 2010

<sup>4</sup> Second Appeal NO. 178/2012, DOJ 05.12.2014

### **CHAPTER - 3. - WHEN COMMISSIONS CAN BE ISSUED UNDER CPC ?**

**Section 75 of the Code of Civil Procedure** empowers the appointment of commission and the procedure is described in detail in Order 26. The power of the court to issue commission can be used by the court to do full justice among the parties. It can be used by the court either on the application of the party to the suit or with self-motivation.

**According to Section 75 of the Code of Civil Procedure, 1908, the court may issue a commission for any of the following purposes:**

1. Examination of witnesses.
2. Perform a local investigation.
3. For adjustment of accounts.
4. To do a partition.
5. To hold investigation.
6. For conducting a sale.
7. For the performance of a ministerial act.

#### **1. EXAMINATION OF WITNESSES - Ss 76 TO 78 AND RULES 1 - 8 OF ORDER 26.**

Generally the examination of witnesses is done in an open court. The evidence of the witnesses is examined by cross - examination and recorded in the presence of all. However sometimes it may happen where the witness may not be able to come and appear in the court. The reasons for the inability to come to the Court must be reasonable.

The Court relaxes the rule of attendance in the Court and issues commission only if the Court finds that the reason for non - attending the court is justified. The reasons for non - attendance of the witnesses may be on the grounds of illness, or if the witness resides beyond the local limits of the jurisdiction of the Court or any other reasons as the Court may find sufficient<sup>5</sup>.

Similarly the Court may issue commission for the recording of the statement of the witness, if the court apprehends danger to the life of the witness, if he becomes compelled to come to court<sup>6</sup>.

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<sup>5</sup> Ramkrishna Kulvant Rai v. F.E. Hardcastle & Co. (p) Ltd., Air 1963 Mad 103

<sup>6</sup> Vinayak Trading Co. v. Sham Sundar & Co. AIR 1987 AP 236.

Provisions of **Order 18 Rule 4, Sub-Rule (2) to (8)** are related to the same which states as under:

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may be shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty day from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provision of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commissions under this rule.]

## **2. PERFORM A LOCAL INVESTIGATION - RULES 9 AND 10 OF ORDER 26.**

Courts can issue commission where it finds that there is a need to:

1. To get a proper clarity regarding a matter in dispute; &
2. To get a proper valuation of the property in dispute if any, or
3. if any damages or mesne profits is involved in the claim of a suit, then finding the exact amount for the same.

The main reason to conduct a local investigation by issuing a commission is to ***find out and obtain evidences which would bring clarity and help the court in determining the case.*** The investigation is performed where the evidences

are of peculiar in nature and which can only be ascertained by visiting and conducting an investigation at the spot.

This is why where the Local Commissioner had not carried out demarcation in accordance with the applicable instructions of the trial court. The Apex Court has held that the demarcation which was carried out by the local commissioner in the presence of the parties and after hearing them the report which was submitted and its acceptance by the trial court and also by the First Appellate Court was not correct<sup>7</sup>.

### **3. ADJUSTMENT OF ACCOUNTS - RULES 11 and 12, ORDER 26.**

The above rule guide the action of conducting an investigation by the Court by issuing a commission to examine and for the adjustment of accounts. The Court issues gives necessary instructions to the commissioner and the reports provided by the Commissioner shall then be deemed to be evidence in the Court<sup>8</sup>.

### **4. TO DO A PARTITION - RULES 13 AND 14 OF ORDER 26 .**

When a decree of Partition is passed and the Court issues a Commission when a preliminary decree of partition of an immovable property has been passed by the Court. The duty of the Commission is to make the partition according to the guidelines provided by the decree. The Commissioner then divides the property into the required number of parts and then allots the shares to the parties. After partitioning and allotting the parts of the property to the rightful owners, the Commissioner prepares a report and provides it to the Court. After allotting, if any party objects or is unsatisfied of something, the Court hears their objections and passes a final allotment decree<sup>9</sup>.

### **5. TO HOLD A SCIENTIFIC, TECHNICAL AND EXPERT INVESTIGATION - RULE 10 - A OF ORDER 26.**

When the Court finds that the issue of a case deals with any peculiar dispute which requires a scientific investigation and which cannot be successfully

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7 Ram Lal & Others v/s. Salig Ram. Civil Appeal No. 8285 of 2009

8 Padam Sen v. State of UP, AIR 1961 SC 218

9 Tushar Kanti v. Savitri Devi, AIR 1996 SC 2752

conducted in the Court premises, the Court issues a commission to investigate into the matter and inquires into the matter.

#### **6. TO SELL PROPERTY - RULE 10 - C OF ORDER 26.**

The Court issues a commission when the Court requires selling a movable property on which the Court has custody and on which a case is pending. The selling of the property becomes necessary if the property cannot be properly preserved or if the court deems the selling necessary in the interest of justice. The Commissioner is directed to sell off the property and submit the report of the sale to the Court.

#### **7. FOR THE PERFORMANCE OF A MINISTERIAL ACT - RULE 10-B OF ORDER 26.**

The Court issues a Commission when a requirement of the performance of a ministerial act comes. Ministerial Acts constitutes works like accounting, calculation and works of the same nature.

The ministerial acts do not require the application of judicial mind and if done by the Court, it would lead to wastage of Court's precious time. The Court issues a commission who would perform all the ministerial acts as required and after completion the Commissioner shall provide the report to the Court<sup>10</sup>. The Commissioner does not perform any judicial acts and does only the ministerial acts for which the Commission had been issued by the Court.

#### **WORD OF CAUTION:**

From time to time, the Supreme Court and the High Courts have issued commissions explaining the appointment of Commissioners. For example, the Andhra Pradesh High Court has decided **Sarla Jain v. Sangu Gangadhar**<sup>11</sup>, referring to the supreme court's verdict in the case of **Mohammad Mehtab Khan v. Khushnuma Ibrahim Khan**<sup>12</sup>, by stating that the appointment of advocate-commissioner by the

<sup>10</sup> Jagatbhai Punjabbhai Palkhiwala v. Vikrambhai Punjabbhai Palkiwala, AIR 1885 Guj. 34

<sup>11</sup> C.R.P. No. 5837/2015

<sup>12</sup> (2013) 9 SCC 221

trial court for the purpose of demarcation of disputed property and fixing of boundary stones for the property of the defendant amounted to pre-trial decree as doing so is part of the prayer made in the original claim. In such a case, the Commissioner cannot be appointed for the said purpose. Further, in this case, it was provided that for the appointment of an Advocate-Commissioner, **the Court has to take into account the following-**

1. Total arguments of both sides;
2. Relief claimed in the suit;
3. Appointment of Advocate-Commissioner for a specific purpose in the interim stage shall not be for grant of the pre-trial decree; and
4. Appointment of Advocate-Commissioner to decide the actual dispute between the parties.

## CHAPTER - 4. - LOCAL INSPECTION

- **What is commission for local inspection?** - Order 26 Rule 9-10, CPC.

The Court can appoint commission for local inspection if the Court is of the opinion that a local inspection is necessary:

- For proper clarity of any matter in dispute, or
- for 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. Provided that, where the State Govt. has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

- **Local inspection by Advocate-Commissioner**

In 2013, the Hon'ble High Court of Andhra Pradesh after referring to the dicta in *Pormusamy Pandaram vs The Salem Vaiyappamalai Jangamar*<sup>13</sup>, observing the object of local investigation under O, 26, R 9 of the Code it was held that in situations where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared.

The Hon'ble Andhra Pradesh High Court has held that 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<sup>14</sup>.

- **Duty of court while issuing commission:**

When issuing a commission for making a local investigation u/o 26, Rule 9 CPC the court shall define the points on which the Commissioner has to report. No point which can conveniently and ought to be substantiated by the parties by evidence at the trial shall be referred to the Commissioner.

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13 AIR 1986 Mad 33

14 Varala Ramachandra Reddy Vs. Mekala Yadi Reddy and others 2010 (4) ALD 198

- **Court to define points for the report of Commissioner:**

When issuing a commission for making a local investigation u/o 26, Rule 9 CPC the court shall define the points on which the Commissioner has to report. No point which can conveniently and ought to be substantiated by the parties by evidence at the trial shall be referred to the Commissioner.

- **Issuing commission is discretionary & not right of party:**

Issuing Commission u/o 26 rule 9 CPC for local investigation is in the discretion of the court. No party to the suit can claim as a right to get a commission issued. But the discretion has to be exercised judiciously<sup>15</sup>.

- **Stage of issuing commission:**

After the issues have been struck the presiding officer should consider, may be on an application by a party, if the preparation of a site plan or enquiry after local inspection at the spot is necessary for the proper decision of the case. The commission should, as far as possible, be issued on that very day with clear and detailed directions to be recorded in the Judge's notes, as to what the Commissioner is required to show in the plan and on what points he is required to make a specific report.

- **Survey commission & identity of property:**

Where a suit for declaration and possession of rights in the disputed land was decreed and the decree was upheld without properly identifying the disputed property by survey of commissioner, it has been held that when serious dispute of identifying the land was involved, upholding the decree without properly identifying the disputed land by survey of commissioner was not proper<sup>16</sup>.

- **Survey of adjoining plots not necessary when property identifiable by boundaries:**

Where in a suit for mandatory injunction seeking demolition of construction on suit property, the commissioner had identified the suit property with reference to its boundaries, it has been held by the Supreme Court that the commissioner's report u/o 26 rule 9 & 10 CPC cannot be

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15 Dr.K.C. Tandon Vs. IXADJ Kanpur-Nagar,1998(33) ALR 267 (All)

16 Shreepat vs. Rajendra Prasad, 2000 (40) ALR 534 (SC)

discarded on the ground that survey of adjoining plots was necessary. Even if there was any discrepancy normally the boundaries should prevail and survey would not be necessary<sup>17</sup>.

- **Options of court in the event of conflict between boundaries & area :**

Where in a suit for mandatory injunction seeking demolition of construction on suit property, the commissioner had identified the suit property with reference to its boundaries, it has been held by the Supreme Court that the commissioner's report u/o 26 rule 9 & 10 CPC cannot be discarded on the ground that survey of adjoining plots was necessary. Even if there was any discrepancy normally the boundaries should prevail and survey would not be necessary<sup>18</sup>.

- **Survey when not necessary?**

Where in a suit for mandatory injunction seeking demolition of construction on suit property, the commissioner had identified the suit property with reference to its boundaries, it has been held by the Supreme Court that the commissioner's report u/o 26 rule 9 & 10 CPC cannot be discarded on the ground that survey of adjoining plots was necessary. Even if there was any discrepancy normally the boundaries should prevail and survey would not be necessary.

- **Survey Commissioner's report not conclusive even when confirmed :**

On being confirmed, the report of a Survey Commissioner can be read as evidence in the case, but that does not mean that any opinions expressed therein by the Survey Commissioner are conclusive and binding on the court. The report has to be examined in the light of the other evidence and the other evidence judged in the light of the report and the Court has to arrive at its findings on the basis of the entire evidence on the record in the light of the pleadings of the parties on the issues that arise for decision in the case. The Survey Commissioner's report 'good, bad or indifferent' is not to be taken as binding on the Court issuing the commission once it is confirmed and admitted in evidence.

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<sup>17</sup> Subhaga Vs. Shobha, 2006 (6) ALJ 235(SC)

<sup>18</sup> Supra Note 4

## CHAPTER - 5. - COMMISSION FOR THE EXAMINATION OF WITNESSES UNDER CRPC.

**Dispensing with the attendance of witnesses by issuing a commission for his examination.**

When in the course of the inquiry or the trial, the judge or the Magistrate thinks that the presence of the witness is necessary for proper dispensation of justice but the attendance of the witnesses would incur delay and expenses which would be unreasonable, then the court may dispense the presence of the witness and it will then issue a commission that would ensure the examination of the witness according to the provisions of this Criminal Procedure Code.

### TO WHOM COMMISSION IS GIVEN?

Under [Section 285](#) of the CrPC, guidelines as to who shall be given the commission are given, which are:

- If a witness is within the territories to which this Code extends the commission shall be directed to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, within whose local jurisdiction the witness is found.
- If the witness is in India, but in an area where this Code does not extend, the commission shall be directed to the Court or officer as specified by the Central Government by way of a notification.
- If the witness is in a place outside India but arrangements have been made by the Central Government with the Government of that country or place for taking the evidence of witnesses in relation to criminal law of that country or place, then commission will be issued in such form, directed to that Court or officer, and sent to the authority for transmission as specified through a notification issued by the Central Government.

Where the accused is to examine on commission in a foreign country then the facility of the lawyer cannot be dispensed with, in the case of accused just because he has tampered with the foreign witnesses in initial stages.

Moreover, the court passes the order for the examination of witnesses in commission when the court is satisfied not only about the necessity of such evidence but also about the effective enforceability of commission of examination of witnesses. When court finds that there are no reciprocal arrangements in existence it is not inclined to make any order.

### EXECUTION OF COMMISSION

Under [Section 286](#) of the Code, upon the receipt of the Commission, the Chief Metropolitan Magistrate, or Chief Judicial Magistrate, can summon the witness before them or go to the place where the witness is, and shall take down his evidence in the same manner, and exercise the same powers, as in trials or warrant cases under the CrPC.

### RETURN OF COMMISSION

After any commission issued under [Section 284](#), which talks about the dispensation of the attendance of witnesses, and it has been executed, then it shall be returned along with the evidence of the witnesses examined under the commission, to the Court or Magistrate issuing the commission, its return and the deposition shall be open at all reasonable times for the parties to inspect, is subject to all just exceptions, present in the evidence in the case by either party and it shall also form part of the record.

Any deposition that is taken, if satisfies the conditions present in Section 33 of the Indian Evidence Act, 1872, may also be received as a piece of evidence at any later stage of the case before another Court.

### EXECUTION OF FOREIGN COMMISSION

As per [Section 290](#) of the Code, Sections 286, Section 287 and Section 288 apply to the execution of its commission and also its return shall also apply to the commission issued by any Court, Judge or Magistrate in the same way as they apply in Section 284 of the Code.

The Courts, Judges and Magistrates mentioned above are:

- One who has jurisdiction at a place in India, where the scope of this Code does not extend and Central Government may specify in this regard.
- The one who is practising outside India in a country which is specified by the Central Government by way of notification and such Court, Judges and Magistrate should be competent to issue commission and execute it on the basis of the criminal law prevalent in the country.

### ADJOURNMENT OF PROCEEDING

Under [Section 289](#) of the CrPC, it is mentioned that in every case where the commission is given under Section 284, then the trial, inquiry or other proceedings can be suspended for a time which is sufficient for the execution of the commission and even its return.

Several cases have laid down that the taking of evidence on commission in criminal cases should be used in a very restricted manner, which is in extreme cases of delay, expense or inconvenience, and also in the case of a sick person or a pardanashin woman. The Rajasthan High Court in the case of ***Om Prakash vs State of Rajasthan***<sup>19</sup>, held that a pardanashin lady is not exempted from appearance in a Criminal Court as a matter of right.

In the case of ***Gulabrao v. S.D. Raje***<sup>20</sup>, Bombay high court has held that when a witness is a complainant in a defamation suit, his attendance cannot be done by issuing a commission for his examination, merely because of the fact that he is a Minister. The inconvenience which is considered by the Court is not only the inconvenience to the parties but also the inconvenience to the witness who is to be examined. Thus, an apprehension of arrest, or a risk to the personal safety of a witness caused by threats given by the accused, would amount to “inconvenience” in the eyes of the law.

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<sup>19</sup> CRIMINAL APPEAL NO. 651 OF 2012

<sup>20</sup> (1972) 74 BOMLR 720

## CHAPTER - 6. - COMMISSION REPORT - ADMISSIBILITY IN EVIDENCE.

- Commission's Report : It's Evidentiary Value.

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*. The report of the Commissioner has therefore, evidentiary value and can be utilized by either of the parties as evidence in support of their claim.

In *Lekh Raj vs Muni Lal*<sup>21</sup> it was held by the Hon'ble Apex Court, that a local examination by Commissioner can only report on existing facts and not how they came about. In *Bhaskaran v Shobha*<sup>22</sup> it has been held by the Kerala High Court that the report of the commissioner which has been prepared by conducting inspection without giving prior notice to the defendants cannot be considered as sufficient evidence to claim a decree of injunction unless the commissioner is examined.

However, the report of commissioner is like any other evidence and therefore lacks sanctity. The court has the power to examine the commissioner personally in open Court relating to any matters referred to him or mentioned in his report or as to the manner in which he has made the investigation. In fact, the court also has the power to set aside the commissioner's report in the exercise of its inherent powers because if the report does not provide any assistance in the matter, it should no longer be a part of the records of the case as held in by the Calcutta High Court<sup>23</sup>.

It has been held by the Orissa High Court that it is not incumbent upon a Judge to call for another report of the commissioner if he does not accept the evidence of the commissioner. Moreover failure to call upon the second report of the commissioner does not amount to an error in law if both the parties have

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21 (2001) 2 SCC 762

22 2011 AIR CC 26 (Ker).

23 Chinmayee Saha v Renuka Haider, -AIR 2016 Cal 33

already adduced evidence<sup>24</sup>. *Commissioner's report is not binding on Court and can be rebutted by letting in other evidence*<sup>25</sup>.

- **When it be Beyond the Scope of Appointment Order?**

Statements that are made in the report of the commissioner in respect of the matters that are beyond the scope of the appointment of Commissioner are not admissible in evidence<sup>26</sup>.

Where the report of commissioner tends to show that the demised premises are no longer in occupation of the tenant but in the occupation of strangers, then inference of subletting can be drawn and the report of the commissioner can be treated as legal evidence for the said purpose<sup>27</sup>.

- **Appointment of Court Commissioner for the Second Time:**

In a case before the Bombay High Court an application was made for the second time for appointment of court commissioner for measurement of land. The same was allowed because earlier, the court commissioner was an Advocate who had no expertise in measurement of land. Since the present matter was in respect of encroachment of land, appointment of a competent authority as commissioner for local investigation was necessary<sup>28</sup>.

The Hon'ble Bombay High Court had held that if the correct procedure of measurement was not adopted by the commissioner appointed for the first time, then the court can order re-measurement by another higher and competent authority<sup>29</sup>.

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24 Naghbhushan Rao v. M Rama Rao, AIR 1992 Ori 76

25 M.P. RAJYA TILHAN UTPADAK SAHAKARI SANGH MARYADIT, PACHAMA, DISTRICT SEHORE AND OTHERS Versus M/S. MODI TRANSPORT SERVICE *CIVIL APPEAL NO. 1973 OF 2022*

26 JA Taban v Khairul Nissa-, AIR 1970 Delhi 205

27 Southern Command MES Coop Credit Society v VKN Nambiar,- (1988) 2 SCC 292

28 Devidas son of Bhivsen Patil v. Dnyaneshwar son of Ramesh Narkhede and others WP/7186/2011 Bombay High Court (Aurangabad Bench).

29 Vijay Son of Shrawan Shende v. State of Maharashtra AIR Bom R 764

The Andhra Pradesh High Court has observed that 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<sup>30</sup>.”

- **Appointment of Advocate-Commissioner in Suits, Appeal and Execution:**

The object of Order 26 Rule 9 of The Civil Procedure Code, 1908 is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order 26 Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute<sup>31</sup>.

- **Appointment of Commissioner in a suit for injunction**

In 2014, the Hon'ble Andhra Pradesh High Court has 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 26 Rule 9 do impose such a prohibition.

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

In *Padam Sen and another vs. The State of U.P.*<sup>32</sup>, three Judge Bench of the Hon'ble Supreme Court has held that Court has no inherent power under section 151 to appoint an Advocate – Commissioner to seize account books in the possession of the plaintiff, upon an application by the defendant that he has apprehension that they would be tampered with. The Hon'ble Apex Court further held that ***the Court cannot seize***

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30 Pamula Narsaiah and another vs Pamula Murali and others 2002 (1) ALD 393, 2001 (6) ALT 385

31 K. Dayanand and another vs P. Sampath Kumar Civil Revision Petition No.3760 of 2014, Decided on 11-11-2014

32 AIR1961 SC 218

*them forcibly by appointing an Advocate-Commissioner, but it can summon them if not produced, it can penalize the party and also draw adverse presumption against him.* If the documents are forged, while in the possession of the plaintiff, the defendant can prove the forgeries and dispute the entries. *The Hon'ble Supreme Court has categorically ruled that it is not the business of the Court to collect evidence in favor of one party.*

➤ **Advocate – Commissioner cannot be appointed for making an enquiry about factum of possession**

The Andhra Pradesh has held that appointment of Advocate Commissioner for making enquiry about the factum of possession of the property in dispute is improper since the same has to be adjudicated upon framing issues and on appreciation of evidence<sup>33</sup>.

Similarly, in another case, the Andhra Pradesh High Court has held that Advocate –Commissioner cannot be appointed to find out the factum, as to who is in possession of the property. Even if an Advocate-Commissioner is appointed and his report is filed, it can be questioned by the other side by filing objections as the dispute in the suit could be resolved only on the basis of oral and documentary evidence let in by the parties<sup>34</sup>.

➤ **Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties:**

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

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33 K.M.A. Wahab and others vs. Eswaran and another 2008 (3) CTC 597

34 M/s. Benz Automobiles Private Limited Vs. Mohanasundaram, 2003 (3) MLJ391

Commissioner can only aid the Court in evaluating the evidence to come to just conclusion. Advocate Commissioner cannot be used for fact finding purposes and as such the order passed by the Court below is not sustainable under law<sup>35</sup>.

The Madras High Court has held that Advocate Commissioner cannot be used for fact finding purposes and as such the order passed by the Court below is not sustainable under law. It is always open to the decree-holder to examine the concerned persons as witnesses and prove as to how and in what manner they got the cable connection relating to the suit. If no prompt actions are taken to appoint an Advocate-Commissioner it may destroy the valuable rights of the parties<sup>36</sup>.

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

The Hon'ble Supreme Court has held that the learned trial judge may appoint an Advocate-Commissioner for the purpose of taking measurement of the suit land<sup>37</sup>.

- **Examination of Commissioner as witness:**

According to Or. 26, rule 10(2) CPC the Commissioner's report is part of evidence in the case. Commissioner need not be examined as a witness for proving his report. See---

- State of U.P. vs. Smt. Ram Sri, AIR 1976 All 121 (D.B.)
- Haji Kutubuddin vs. Allah Banda, AIR 1973 All 235

- **Value of Commissioner's report after his examination as witness:**

Even if Commissioner was examined as a witness, the court has discretion to take or not to take into consideration the report of the

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35 Krishnamurthy, T.K. vs. Tamil Nadu Water and Drainage Board 2006 (5) CTC 178

36 Devadoss vs. A. Duraisingh 2002 (3) CTC 748

37Gurunath Manohar Pavaskar and others vs. Nagesh Sidappa Navalgund and others CDJ 2007 SC 1339

commissioner in respect of a dispute fact after considering the objections against it<sup>38</sup>.

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

In the Execution Proceedings, Commissioner cannot be appointed and the Appellate Court has no power to appoint Commissioner under Order 26 Rule 9, CPC<sup>39</sup>.

- **Introducing additional evidence – When?**

In a decision reported in ,the Court has held that in a suit for permanent injunction vital and important issue is whether the plaintiffs are in possession of the suit schedule land and whether there was attempt by the defendant/s to interfere with such possession of plaintiffs. The burden is entirely on the plaintiffs to bring convincing and cogent evidence on record and for so doing, it is not permissible for them to invoke Order 26 Rule 9, which is intended for difference purpose. Further, if at this stage, Advocate Commissioner files a report, as directed by Appellate Court with the assistance if the Mandal Surveyor it would certainly amount to introducing additional evidence which is ordinarily not permissible unless proper application is made under Order 41 Rule 27 satisfying the conditions therein<sup>40</sup>.

- **SOME IMPORTANT LEADING CASES :**

1. **Mohit Kumar vs Ashok Kumar Tiwari.**

**Citation:** WA No. 86 of 2020, Decided on 20 May 2020.

It is emerging from the records that even the Tahsildar was aware about the procedure for re-establishing the permanent boundary mark, which is found to be missing at the time of demarcation, but even then the team of Revenue

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38 Haji Kutubuddin vs. Allah Banda, AIR 1973 All 235.

39 Gurrām Anantha Reddy vs Katla Sayanna 2015 (4) ALT 302

40 Penta Urmila and other vs. Karukola Kumarasamy (2005 (I) ALT 811, 2005 (2) ALD 130),

Inspectors & Halka Patwari, constituted by the Tahsildar, had adopted different procedure, which is mentioned in the Rule 9 of the Instruction Book to be inaccurate. The boundary dispute can be resolved only by demarcating the lands under the provisions of the Code of 1959 and the Rules & procedure prescribed for it.

In this case it was held that, in cases where the land marking chanda and munnara the Patwari had adopted a new procedure as against the age old instructions of land revenue manual, which provides the procedure for establishment of missing chanda which cannot be sustained. It has been further held that, in case of missing Chanda, the demarcation shall be carried out strictly following the procedure laid down in Chhattisgarh Bhoo Abhilekh Adhiniyam.

## **2. *Ramdulare vs. Shivdulare***

**Citation:** Second Appeal No. 626 of 1998, Decided on 27<sup>th</sup> August 2009.

It was held that the commission cannot be issued for collecting evidence where the Court can get evidence itself or with a view to remove the defect. The Hon'ble High Court of Chhattisgarh relying on the judgement of Hon'ble Supreme Court in *Haryana Waqf Board v. Shanti Sarup and others*<sup>41</sup>, held that Local Commissioner can be appointed only to clarify the position of the existing state of affairs only after the evidence is led

It was for the petitioner-defendant to show that he is in possession of the property in dispute, which was handed over to him at the time of registration of sale deed, as per his assertions. Court is not to collect evidence for the parties and hence, Local Commissioner cannot be appointed to report as to who is in possession of the property in dispute.

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41 (2008) 8 SCC 671

In *Mangtu Ram Sahu vs. Yogendra Kumar Dheewar*<sup>42</sup>, it was held that " reverting to the facts of the present case in the light of the principle of law laid down in Madhya Pradesh High Court in the above said judgement, it is quite vivid that demarcation has been made by the concerned revenue officer vide Ex-P3 without identification of the permanent boundary marks and even the officer who has conducted demarcation has not been examined and only the plaintiff, this demarcation report has marked and exhibited and it is well settled law that mere marking or exhibiting will not dispensed with the proof of document by the plaintiff.

**3. *Radhey Shyam vs Shankar Lal Gupta And Others.***

**Citation** : Second Appeal No.726 of 2003, Decided on 25<sup>th</sup> January, 2019.

To buttress his submission that without examination of the revenue officer who conducted demarcation, demarcation report cannot be relied upon. He would further submit that since it was not the demarcation made by the order of the Court under Order 26 Rule 9 of the CPC, therefore, that report is not evidence within.

In the matter of Laxman Singh v. Jagannath, it has been held by the M.P. High Court that in order to prove the demarcation report, examination of the officer who has demarcated the land is necessary and rejected the plaint at the second appeal stage

**4. *Smt. Neelam Agarwal vs Municipal Corporation, Raipur.***

Citation : FA No. 14 of 2009, Decided on 17-05-2019

The appellant would mainly attack the demarcation report submitting that the demarcation was not carried out in accordance with law, however, record of the trial Court including the order sheet nowhere discloses that the appellant had ever moved any objection against the demarcation report

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42 Second Appeal No. 59 of 2008

when the same was carried out by the Revenue Authorities under the orders passed by the High Court on 24.08.2005 in WP No.3048/2005.

**5. *Kishan Singh vs. Balram Singh.***

**Citation :** RSA No. 441 of 1999 Read With CMP No. 940 of 2003, Decided on 31<sup>st</sup> March, 2009.

Wherein in appeal, additional evidence in term of order 41 rule 27 was produced and court held that demarcation report has no value if notice was not give. Whereby it has been held that notice of demarcation if not given to party goes to root of case and demarcation was done in the presence of both the parties and their respective counsels and judgment debtor/petitioner was having full knowledge of demarcation of the suit land and his absence, if any, during demarcation by the Commissioner again point towards his negligence of dilatory tactics and nothing else.

**6. *Smt. Sunita vs The State Of Madhya Pradesh.***

**Citation:** M.P.No.5156/2019, Decided on 1 October, 2020.

On receipt of application for demarcation, the R.I. is said to have noticed the adjacent owners, however, the Panchnamas dated 15/12/2016 and 28/12/2016 record that no such notices were ever issued to the petitioners. The petitioners who are in possession by way of their dwelling houses and the non- issuance of notice before demarcation makes entire proceedings void and inadmissible.

In *Sendhwa Club & Another Vs. State of M.P. & Others*<sup>43</sup>, it has been held that demarcation U/s 129 has to be conducted in the presence of and under notice to all interested parties. The petitioners thus are interested and affected parties, hence a notice of demarcation ought to have been issued to them individually.

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43 M.P.No.5156/2019

7. *Punj Lloyd Limited Thr. vs Vivek Tripathi*

**Citation:** MP-1365-2018 Decided on 16-03-2018.

Demarcation has been carried out. If there is any dispute in regard to demarcation, then that can be challenged before the competent revenue Court in terms of the provisions contained in the MPLRC.

It is also settled principle of law that Commissioner can be appointed when there is dispute in regard to identity of the land. Admittedly, demarcation has been carried out and plaintiff is free to challenge said demarcation if he is so aggrieved before the revenue Court, and therefore, no ground is made out to seek appointment of Commissioner because a Commissioner cannot be a competent authority to decide the demarcation carried out by the revenue authorities.

8. **M.P. RAJYA TILHAN UTPADAK SAHAKARI SANGH MARYADIT, PACHAMA, DISTRICT SEHORE AND OTHERS Versus M/S. MODI TRANSPORT SERVICE**

**Citation :** CIVIL APPEAL NO. 1973 OF 2022, **DOJ:** MAY 11, 2022

The Hon'ble Supreme Court has held that the he commissioners' reports are 'non-adjudicatory in nature', and the courts adjudicate upon the rights of the parties - It is only an opinion or noting, as the case may be with the details and/or statement to the court the actual state of affairs. Such a report does not automatically form part of the court's opinion, as the court has the power to confirm, vary or set aside the report or in a given case issue a new commission.

**CHAPTER - 7. - NEW V.C. RULES BY HON'BLE CG HIGH COURT**  
**AFTER IN RE: GUIDELINES FOR COURT FUNCTIONING**  
**THROUGH VIDEO CONFERENCING DURING COVID-19**  
**PANDEMIC**

**Citation:** SUO MOTU WRIT (CIVIL) NO.5/2020

**Held:**

- The Supreme Court of India and all High Courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies;
- The concerned courts shall maintain a helpline to ensure that any complaint in regard to the quality or audibility of the feed shall be communicated during the procedure or immediately after its conclusion failing which no grievance in regard to it shall be entertained thereafter
- The District Courts in each State shall adopt the mode of Video Conferencing prescribed by the concerned High Court.
- The Court shall duly notify and make available the facilities for video conferencing for such litigants who do not have the means or access to video necessary, appoint an conferencing in appropriate amicus-curiae facilities. cases and If courts make may video conferencing facilities available to such an advocate.
- Until appropriate rules are framed by the High Courts, video conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage. In no case shall evidence be recorded without the mutual consent of both the parties by video conferencing.

**THE HON'BLE CG HIGH COURT RULES REGARDING EXAMINATION OF PERSONS :**

**Rule 8.1** - Any person being examined, including a witness shall, before being examined through video conferencing, produce and file proof of identity by submitting an identity document issued or duly recognized by the Government of India, State Government, Union Territory, or in the absence of such a document, an affidavit attested by any of the authorities referred to in Section 139 of the CPC or Section 297 of the CrPC, as the case maybe. The affidavit will inter alia state that the person, who is shown to be the party to the proceedings or as a witness, is the same person, who is to depose at the virtual hearing. A copy of the proof of identity or affidavit, as the case may be, will be made available to the opposite party.

**Rule 8.2** - The person being examined will ordinarily be examined during the working hours of the concerned Court or at such time as the Court may deem fit. The oath will be administered to the person being examined by the Coordinator at the Court Point.

**Rule 8.3** - Where the person being examined, or the accused to be tried, is in custody, the statement or, as the case may be, the testimony, may be recorded through video conferencing. The Court shall provide adequate opportunity to the under-trial prisoner to consult in privacy with their counsel before, during and after the video conferencing.

**Rule 8.4** - Subject to the provisions for examination of witnesses contained in the Evidence Act, before the examination of the witness, the documents, if any, sought to be relied upon shall be transmitted by the applicant to the witness, so that the witness acquires familiarity with the said documents. The applicant will file an acknowledgment with the Court in this behalf.

**Rule 8.5** - If a person is examined with reference to a particular document then the summons to witness must be accompanied by a duly certified photocopy of the

document. The original document should be exhibited at the Court Point in accordance with the deposition of the concerned person being examined.

**Rule 8.8** - The Court shall obtain the signature of the person being examined on the transcript once the examination is concluded. The signed transcript will form part of the record of the judicial proceedings, The signature on the transcript of the person being examined shall be obtained in either of the following ways:

**Rule 8.8.1** - If digital signatures are available at both the concerned Court Point and Remote Point, the soft copy of the transcript digitally signed by the presiding Judge at the Court Point shall be sent by the official e-mail to the Remote Point where a print out of the same will be taken and signed by the person being examined. A scanned copy of the transcript digitally signed by the Coordinator at the Remote Point would be transmitted by official email of the Court Point. The hard copy of the signed transcript will be dispatched after the testimony is over, preferably within three days by the Coordinator at the Remote Point to the Court Point by recognised courier/registered speed post.

**Rule 8.8.2** - If digital signatures are not available, the printout of the transcript shall be signed by the presiding Judge and the representative of the parties, if any, at the Court Point and shall be sent in non-editable scanned format to the official email account of the Remote Point, where a printout of the same will be taken and signed by the person examined and countersigned by the Coordinator at the Remote Point. A non-editable scanned format of the transcript so signed shall be sent by the Coordinator of the Remote Point to the official email account of the Court Point, where a print out of the same will be taken and shall be made a part of the judicial record. The hard copy would also be dispatched preferably within three days by the Coordinator at the Remote Point to the Court Point by recognised courier/registered speed post.

**Rule 8.9** - An audio-visual recording of the examination of person examined shall be preserved. An encrypted master copy with hash value shall be retained as a part of the record.

**Rules regarding Exhibiting or Showing Documents to Witness or Accused at a Remote Point:**

If in the course of examination of a person at a Remote Point by video conferencing, it is necessary to show a document to the person, the Court may permit the document to be shown in the following manner:

**Rule 9.1** - If the document is at the Court Point, by transmitting a copy or image of the document to the Remote Point electronically, including through a document visualizer; or

**Rule 9.2** - If the document is at the Remote Point, by putting it to the person and transmitting a copy/image of the same to the Court Point electronically including through a document visualizer. The hard copy of the document counter signed by the witness and the Coordinator at the Remote Point shall be dispatched thereafter to the Court Point via authorized courier/registered speed post.

**THE APEX COURT ALLOWS VIDEO CONFERENCING IN MATRIMONIAL MATTERS :-**

- ◆ Video conferencing is not permissible in matrimonial matters in light of the Supreme Court decision in *Santhini v. Vijaya Venketesh*<sup>44</sup>.

In the normal course, it would not have directed video conferencing in respect of matrimonial matters as per the above-referred Judgment, but in the present matter, since all the proceedings are being conducted in video conferencing, the Court directed the Family Court, District Gautambudh Nagar, U.P. to conduct the trial through video conferencing.

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44 (2018) 1 SCC 62.

### ◆ **The State Of Maharashtra vs Dr. Praful B. Desai**

It is a Landmark Judgment wherein the Apex Court upheld the validity of the video conferencing as a vital tool for collecting evidence where the witness may not be conveniently examined in court.

In this case an Emphasis was laid on Section 273, CrPC. It was submitted that Section 273, Criminal Procedure Code does not provide for the taking of evidence by video conferencing. It was submitted that Section 273 mandates that evidence "shall be taken in the presence of the accused". It is submitted that the only exceptions, which come within the ambit of the words "except as otherwise provided" are Sections 284 to 290

It is submitted that the term "presence" in Section 273 must be interpreted to mean physical presence in flesh and blood in open Court.

As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence.

Thus the Apex Court has encouraged the use of technologies in court proceedings by stating as under:

“77. The use of technology, both by the JJBs as well as by the CWCs is extremely important and we are disheartened to note from the affidavits and submissions made by MWCD that there is an acute shortage of computers and peripherals with the JJBs and CWCs.”

## CONCLUSION

Evidence is presented in the legal cases to prove the veracity of the arguments in a court of law. In criminal adjudication, the state has to prove guilt beyond a reasonable doubt, while the defendant has to present evidence to challenge the state's case. Each side should have the opportunity to review the other side's evidence before the trial and to object to the introduction of certain evidence before or during the trial, thus for the examination of witnesses whose presence is dispensed under special circumstances can be examined via commissions, which has been dealt in the corresponding Sections 284 to 299 of Criminal Procedure Code.

With regard to the Civil Adjudication, it is clear that there are many principles that govern the appointment and working of a Court Commissioner and Section 75 CPC only gives a wide spectrum of circumstances where court commissioner is appointed. While, it is a settled law that court commissioner cannot be appointed to collect evidence, in many cases it is quite unclear if the specific purpose for which a court commissioner is sought to be appointed amounts to collection of evidence or not. Therefore, the ratio of various authorities on this topic continues to serve as a guiding light. The purpose of a court commissioner is to aid investigation in matters where courts have their limitations or lack expertise as a result of which, their appointment becomes necessary in cases of boundary disputes and encroachment where measurement of suit land is required.

However, courts have always refrained from appointing commissioner for establishing title of the suit land or for proving possession as the same would directly amount to collection of evidence by the court. Furthermore, although the report of a Court Commissioner is a legal evidence and forms part of the records of the case, the same is rebuttable by other evidence. The court commissioner is also liable to be examined in the open court for statements made in the report.

One may conclude that the role of the court commissioner arises after the parties have adduced their evidence and the same is limited to either settlement of controversy that may arise in a suit or to settle doubts that the court cannot in the ordinary exercise of their functions solve. Moreover, the discretion of appointing a court commissioner is guided by established legal principles that are laid down by the authorities regularly.

With the introduction of new VC Rules, which as per the directions of the Hon'ble CG High Court has to work as per procedural Code, further relaxes the procedure of issuance of commission and give ease for the witnesses who are far and beyond the reach of the court, to be present virtually so as to ensure the recording of evidence, be it and expert witness or a commissioner itself.

**- THANK YOU.**

**PRESENTED BY -**

- MR. PANKAJ DIXIT, JMFC BHILAI - 3.
- MRS. SHIVANI SINGH, JMFC DURG.
- MS. ANKITA TIGGA, JMFC DURG.