



LEGAL PRINCIPLES GOVERNING APPOINTMENT AND WORKING OF COMMISSION UNDER CIVIL PROCEDURE CODE

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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. The Commissioner in effect is a projection of the Court appointed for a particular purpose. ¹The 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.

According to CPC², various purposes for which commissions are issued are as follows: _

- To examine a person,
- To make local investigation,
- To carry out partition,
- To examine accounts,
- To hold scientific, technical or expert investigation
- To carry out sale of property which is in the custody of the court and subject to speedy decay,
- To perform ministerial act.

Although, the powers of the court to issue commission have been statutorily laid down, these purposes are very wide in nature. This leads to creation of grey areas in many circumstances and it becomes imperative to analyze the authorities on this topic and reasoning provided in the same to enable us to establish principles that govern the appointment of court commissioners.

¹ Ponnusamy vs. Salem Vaiyappamalai Jangamar Sangam -AIR 1986 Madras 33.

² Section 75 CPC.

COURT COMMISSIONER CANNOT BE APPOINTED TO COLLECT EVIDENCE

The settled principle of law is that a court commissioner cannot be appointed to collect evidence in respect of a claim. The role of a court commissioner comes into play if any controversy arises after both the parties have put forth their evidence to support their claim³

ELUCIDATING MATTER IN A DISPUTE

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 was explained in M.Nachiappan vs A.Nachiappan⁴. It was laid down that 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.

APPOINTMENT OF COURT COMMISSIONERS IN EXERCISE OF INHERENT POWERS OF THE COURT

In Padam Sen v State of UP⁵ it was held that inherent powers given to the court under S 151 CPC cannot be exercised to issue commission to seize the property of a person (Account books in the present case) over which he has his private right.

But in Bandhua Mukti Morcha v Union of India⁶ it was held that although Supreme court rules 1966, make the provisions of Order 26 of CPC applicable to Supreme Court, Order 26 is not exhaustive in nature and Supreme Court can appoint commission in exercise of its inherent powers for any purpose if it deems it appropriate for enforcement of fundamental rights.

³Miss Renuka v. Sri Tammanna and Ors - AIR 2007 Kar 133.

⁴ 2011 SCC OnLine Mad 990.

⁵ (1961) 1 SCR 884.

⁶ (1984) 3 SCC 161.



OWNERSHIP AND POSSESSION

In *Maruti Manohar Rathod v Sanjay Rathod*⁷ it was held that a Court Commissioner cannot be appointed to bring documents on record that affirm or deny ownership of anyone to the suit property.

In this case the plaintiff had prayed for injunction to restrain the defendants from disturbing his possession and or carrying out construction on the suit property. Appointment of court commissioner to determine ownership would certainly lead to collection of evidence to support the claim of the plaintiff and therefore the same was rejected by the court.

Similarly it is a well settled law that court commissioner cannot be appointed to determine possession of premises because the same would amount to collection of evidence by the court.⁸

BOUNDARY DISPUTES

“The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its pecuniary nature can only be had on the spot. The cases of boundary disputes and disputes about the identity of lands are instances, when a Court should order a local investigation under Order XXVI, Rule 9 of Code of Civil Procedure”⁹. Therefore, in cases of boundary disputes, Courts are in favor of appointment of court commissioner to settle those questions in respect of which the court ordinarily does not have the requisite expertise.

APPOINTMENT OF COURT COMMISSIONER IN CASES INVOLVING ENCROACHMENT

“In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon. Oral evidence cannot conclusively prove such an issue”.¹⁰

It has been held by the Supreme Court that where dispute is regarding demarcation of suit land owing to the plaintiff and the respondents living adjacent to each other, appointment of Court Commissioner becomes necessary.¹¹

⁷ 2019 SCC OnLine Bom 6446.

⁸ *Nalubai Narayan Shinde v. Gopinath Shinde* (2011) 2 AIR Bom R (NOC 191) 59

⁹ *Kashinath Chindhuji Shastri vs Haribhau Nathuji Bawanthade* -2004 (2) MhLj 722

¹⁰ *Kashinath Chindhuji Shastri vs Haribhau Nathuji Bawanthade* -2004 (2) MhLj 722

¹¹ *Haryana Waqf Board v Shanti Sarup,* (2008) 8 SCC 671 (672).



In *Devidas son of Bhivsen Patil v. Dnyaneshwar son of Ramesh Narkhede and others*,¹² it was the case of the petitioner that the defendant had encroached upon his land during the pendency of the suit and he had therefore filed an application for appointment of court commissioner to adjudicate the dispute. The court allowed the application because the real controversy in the suit could be settled only when the land belonging to the plaintiff and the defendant was measured.

While section 83 Evidence Act raises presumption that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate it also lays down that maps or plans made for the purposes of any cause must be proved to be accurate. Therefore, there is no presumption of accuracy in respect of the map or plan which is made for a particular cause. Consequently, a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. So, if a dispute is in respect of encroachment of a site and if the map of the site is not agreeable by both the parties, then it is imperative to appoint a Commissioner for the same.¹³

APPOINTMENT OF COURT COMMISSIONER FOR THE SECOND TIME.

In *Devidas son of Bhivsen Patil v. Dnyaneshwar son of Ramesh Narkhede and others*¹⁴, 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.

In *Vijay Son of Shrawan Shende v. State of Maharashtra*¹⁵, 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.

¹² WP/7186/2011 Bombay High Court (Aurangabad Bench)

¹³ *Kashinath Chindhuji Shastri vs Haribhau Nathuji Bawanthade*- 2004 (2) MhLj 722

¹⁴ *Supra.*

¹⁵ AIR Bom R 764.

However if the earlier measurement is carried out by a competent authority and there is nothing on record to show that any person is aggrieved by such measurement, then reappointment of commissioner is unwarranted.¹⁶

EVIDENTIARY VALUE AND SIGNIFICANCE OF COURT COMMISSIONER'S REPORT

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. Commissioner's report is not binding on Court and can be rebutted by letting in other evidence.

A Local examination by Commissioner can only report on existing facts and not how they came about¹⁷

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.¹⁸

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.¹⁹

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 already adduced evidence.²⁰

¹⁶ Chandrarao v. Dhondurao WP 3854/2011 Bombay High Court (Aurangabad Bench).

¹⁷ Lekh Raj vs Muni Lal -(2001) 2 SCC 762.

¹⁸ Bhaskaran v Shobha-, 2011 AIR CC 26 (Ker).

¹⁹ Chinmayee Saha v Renuka Haider, -AIR 2016 Cal 33 .

²⁰ Naghbhushan Rao v. M Rama Rao.- AIR 1992 Ori 76.

WHEN THE REPORT OF THE COMMISSIONER IS 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.²¹

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.²²

CONCLUSION

Thus, 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.

²¹ JA Taban v Khairul Nissa-, AIR 1970 Delhi 205.

²² Southern Command MES Coop Credit Society v VKN Nambiar,- (1988) 2 SCC 292 .