

## **Order-26 Commissions**

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## **Order-26 Commissions**

### Order-26 Commissions

#### **1. Cases in which Court may issue commission to examine witness :-**

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the

local limits of its jurisdiction who is exempted under this Court from attending the Court or who is from sickness or infirmity unable to attend it: <sup>1</sup> [Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

1. Added by Act 104 of 1976, Sec. 75 (w.e.f. 1st February, 1977).

## **2. Order for commission :-**

An order for the issue of a commission for the examination of witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

## **3. Where witness resides within Courts jurisdiction :-**

A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

## **4. Persons for whose examination commission may be issued :-**

(1) Any Court may in any suit issue a commission <sup>1</sup>[for the examination on interrogatories or otherwise of]- (a) any person resident beyond the local limits of its jurisdiction; (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and (c) <sup>2</sup>[any person in the service of Government] who cannot, in the opinion of the Court, attend without detriment to the public service: <sup>3</sup> [Provided that where under rule 19 of Order 16, a person cannot be ordered to attend a court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice: Provided further that a commission for examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.]

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides; or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate court.

1. Subs. by Act 104 of 1976, Sec. 75 for the words "for the examination of" (w.e.f. 1st February, 1977).
2. Subs. by the A.O. 1937, for "any civil c' military officer of the Government".
3. Added by Act 104 of 1976, Sec. 75 (w.e.f. 1st February, 1977).

**4A. Commission for examination of any person resident within the local limits of the jurisdiction of the Court :-**

<sup>1</sup> .-Notwithstanding anything contained in these rules, any Court may, in the interest of justice or for the expeditious disposal of the case or for any other reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction, and the evidence so recorded shall be read in evidence.

1. Inserted vide " Order-26 Commissions" Dt.December 30, 1999 Published in Received the assent of the President on the 30th December, 1999 and was published in the Gazette of India, (Extra.), Part II sec.1, No. 59, dated December 30, 1999

**5. Commission or request to examine witness not within India :-**

Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within <sup>1</sup> [India] is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

1. Subs. by Act 2 of 1951, Sec. 53, for "the States".

**6. Court to examine witness pursuant to commission :-**

Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

**7. Return of commission with depositions of witnesses :-**

Where a commission has been duly executed, it shall be returned, together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall <sup>1</sup> [ (subject to the provisions of rule 8)] form part of the record of the suit.

1. Subs. by Act 104 of 1976, Sec. 75, for the brackets and words "(subject to the provisions of the next following rule)" (w.e.f. 1st February, 1977).

## **8. When depositions may be read in evidence :-**

Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless-

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined or exempted from personal appearance in Court, or is a <sup>1</sup> [person in the service of the Government] who cannot, in the opinion of the Court, attend without detriment to the public service; or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in Cl. (a), and authorizes the evidence of any person being read 'as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

1. Subs. by the A.O. 1937, for "civil or military officer of the Government".

## **9. Commissions to make local investigations :-**

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market-value of any property or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court: 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.

## **10. Procedure of Commissioner :-**

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) Report and depositions to be evidence in suit-Commissioner may be examined in person.-The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in

open Court touching any of the matters referred to him or mentioned in his report, or as to his report or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. <sup>1</sup> [Commissions /or scientific investigation, performance of ministerial act and sale of moveable property]

1. Ins. by Act 104 of 1976, Sec. 75 (w.e.f. 1st February, 1977)

**10A. Commission for scientific investigation :-**

(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.]

**10B. Commission for performance of a ministerial act :-**

(1) Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the Court, be conveniently performed before the Court, the Court, may, if, for reasons to be recorded, it is of opinion that it is necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.]

**10C. Commission for the sale of moveable property :-**

(1) Where, in any

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

(3) Every such sale shall be held, as far as may be, in accordance with the procedure prescribed for the sale of moveable property in execution of a decree.]

**11. Commission to examine or adjust accounts :-**

In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

**12. Court to give Commissioner necessary instructions :-**

(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) Proceedings and report to be evidence-Court may direct further inquiry.- The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

**13. Commission to make partition of immoveable property :-**

Where a preliminary decree for partition has been passed, the Court may in any case not provided for by Section 54 , issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

**14. Procedure of Commissioner :-**

(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such

report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

**15. Expenses of Commission to be paid into Court :-**

Before issuing any commission under this Order, the Court may order such (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

**16. Powers of Commissioners :-**

Any Commissioner appointed under this Order may, unless otherwise directed by the order or appointment,-

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

**16A. Questions objected to before the Commissioner :-**

(1) Where any question put to a witness is objected to by a party or his pleader in proceedings before a Commissioner appointed under this Order, the Commissioner shall take down the question, the answer, the objections and the name of the party or, as the case may be, the pleader so objecting: Provided that the Commissioner shall not take down the answer to a question which is objected to on the ground of privilege but may continue with the examination of the witness, leaving the party to get the question of privilege decided by the Court; and, where the Court decides that there is no question of privilege, the witness may be recalled by the

Commissioner and examined by him or the witness may be examined by the Court with regard to the question which was objected to on the ground of privilege.

(2) No answer taken down under sub-rule (1) shall be read as evidence in the suit except by the order of the Court.

**17. Attendance and examination of witnesses before Commissioner :-**

(1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon witnesses, shall apply to persons required to give evidence or to produce documents under this order whether the commission in execution of which they are so required has been issued by a court situate within or by a court situate beyond the limits of <sup>1</sup>[India] and for the purpose of this rule the Commissioner shall be deemed to be a civil court: <sup>2</sup> [Provided that the Commissioner is not a Judge of a civil court, he shall not be competent to impose penalties; but such penalties may be imposed on the application of such Commissioner by the Court by which the commission was issued.]

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

1. Subs. by Act 2 of 1951, Sec. 53, for "the State".

2. Added by Act 104 of 1976, Sec. 75 (w.e.f. 1st February, 1977).

**18. Parties to appear before Commissioner :-**

(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may

**18A. Application of Order to execution proceedings :-**

The provisions of this Order shall apply, so far as may be, to proceedings in execution of a decree or order.]

**18B. Court to fix a time for return of commission :-**

The Court issuing a commission shall fix a date on or before which



the commission shall be returned to it after execution, and the date so fixed shall not be extended except where the Court, for reasons to be recorded, is satisfied that there is sufficient cause for extending the date.]

**19. Cases in which High Court may issue commission to examine witness :-**

(1) If a High Court is satisfied-

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceedings is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in Cls. (a), (b) and (c) of sub- rule (1)-

(a) by a certificate signed by the Consular Officer of the foreign country of the highest rank in India and transmitted to the High Court through the Central Government, or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Central Government, or

(c) by a letter or request issued by the foreign Court and produced before the High Court by a party to the proceeding.

**20. Application for issue of commission :-**

The High Court may issue a commission under rule 19-

(a) upon application by a party to the proceeding before the foreign Court, or

(b) upon an application by a law officer of the State Government acting under instructions from the State Government.

**21. To whom commission may be issued :-**

A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or where<sup>1</sup>[\* \* \*] the witness resides within the local limits of <sup>2</sup> [the ordinary original civil jurisdiction of the High Court], to any person whom the Court thinks fit to execute the commission.

1. The words "the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and" omitted by the A.O., 1937.
2. Subs. by the A.O., 1937., for "its ordinary original civil Jurisdiction".

**22. Issue, execution and return of commissions and transmission of evidence to foreign Court :-**

The provisions of rules 6, 15, <sup>1</sup> [sub-rule (1) of rules 16- A, 17, 18 and 18-B] of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Central Government, along with the letter of request for transmission to the foreign Court.]

1. Subs. by Act 104 of 1976, Sec. 73, for the figures and words "16, 17 and 18", (w.e.f. 1st February, 1977).