

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR**

**WRIT PETITION NO. 3846/2019**

Bapurao Balaji Deulkar

..VS..

Shriram B. Deulkar & ors.

-----  
Office Notes, Office Memoranda of Coram,  
appearances, Court's orders of directions  
and Registrar's orders  
-----

Court's or Judge's orders

-----  
Shri R.S. Thengne, Advocate for the petitioner  
-----

**CORAM : Z.A.HAQ, J.**

**DATED : 14/06/2019**

Heard.

The original defendant, who has suffered the decree, has filed appeal before the District Court under Section 96 of the Code of Civil Procedure which is pending at the stage. In the appeal, when it is ripe for hearing, the defendant filed the application (Exh. 34) under Order 26 Rule 9 of the Code of Civil Procedure praying that Commissioner be appointed for inspection and ascertainment of the factual position of the properties after partition was effected in the year 1987 to ascertain separate possession of the respective shares. This application (Exh. 34) is dismissed by the learned District Judge by the impugned order observing that the petitioner cannot be permitted to collect evidence and to fill up the lacunae through the Commissioner and that too at the appellate stage.

The learned advocate for the petitioner - original defendant, relying on the judgment given in the case of Shri

Vasant Tukaram Prabhu vs. Smt. Xalinibai Borcar alias Smt. Shalinibai Borkar (expired) Rep. by her L.R's & Anr. reported in 2014 (4) ALL MR at page 726 has submitted that the appellate Court can exercise jurisdiction under Order 26 Rule 9 of the Code of Civil Procedure and can appoint Commissioner.

There cannot be any dispute about this proposition, however, the question is whether appointment of Commissioner is necessary to enable the Court to decide the controversy effectively, or under the garb of seeking report of the Commissioner, the party wants to fill up the lacunae and / or collect evidence. In the facts of the present case, I find that the petitioner – original defendant is seeking to collect evidence and fill up the lacunae in respect of the factual aspects which the defendant has to prove and this cannot be permitted.

I find that the impugned order is just and proper and it cannot be said that it suffers from any illegality or error of jurisdiction which necessitates interference by this Court in the extra-ordinary jurisdiction.

Hence, the writ petition is **dismissed**. No costs.

**JUDGE**

*Ansari*