

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 13802 OF 2023

KARBHARI TOLAJI KATE
VERSUS
APPASAHEB VILAS KATE AND ANOTHER

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Advocate for Petitioner : Mr. Bhosale Sanjaykumar B.

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CORAM : SHAILESH P. BRAHME, J.

DATE : 1st NOVEMBER 2023

PER COURT :

Heard the learned Counsel for the petitioner.

1. The order rejecting application for appointment of Commissioner made at the appellate stage is questioned in this petition. The petitioner is original plaintiff who prosecuted RCS No.240/2011 for declaration, perpetual injunction and possession. The suit was dismissed on 03.05.2016. He has preferred RCA No.212/2016, which is pending. In that appeal, application at Exhibit-11 is submitted under Order 26 Rule 9, which is rejected.

2. The learned Counsel submits that the relief claimed in application (Exhibit-11) is innocuous but necessary to determine real controversy involved in the petition. His substantive appeal is pending and additional evidence can be taken into account. By the application (Exhibit-11) only measurement is sought for. The impugned order is against principles of natural justice and perverse.

3. The recourse to Order 26 Rule 9 is taken at the stage when appeal is pending. The petitioner has already suffered adjudication. The appointment of the Commissioner is not warranted to decide the controversy involved. I do not find any perversity or illegality in the impugned order. There cannot be endless pursuit for collecting evidence by the parties at all the stage.

4. For the reasons stated above, I am not inclined to cause interference. The writ petition is dismissed.

[SHAILESH P BRAHME, J.]

Najeeb.