

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

WRIT PETITION NO. 995 OF 2018

Shri Mohan Dayaram Choithani,
Aged : 56 Years, Occ. : Business,
R/o C/o M/s Choithani Developers
Pvt. Ltd., Shop No.3, Ganesh
Appartment, Kotwal Nagar, Ring Road,
Khamla, Nagpur

...Petitioner

// VERSUS //

Shri Ashok S/o Damodar Lamghare,
Aged 56 Years, Occ. Business,
R/o at present Gaikwad Colony,
Gadga Basti, Nagpur

... Respondent

Shri K.H.Dodani, Advocate for the petitioner.
Shri Nishit P. Parate, Advocate for the respondent no.1.

CORAM : ANIL S. KILOR, J.

DATED : 1st MARCH, 2023.

ORAL JUDGMENT :

Heard. Rule. Rule made returnable forthwith heard finally by consent of the parties.

2. In this writ petition, the challenge is raised to the order below Exhibit 11 dated 8th January, 2018 passed by the Additional Judge, Small Causes Court, Nagpur in Regular Civil Suit No.11 of 2017, rejecting the application moved under Section 9-A of Code of Civil Procedure, 1908 (hereinafter referred as "CPC") raising a preliminary objection to the tenability of the suit.

3. In this case, the respondent filed a suit for declaration and permanent injunction with following prayer clauses.

1] declare that the act of the defendant of construction of compound wall by blocking the passage/way to staircase to approach suit property by plaintiff to enjoying and use of his suit property situated on First Floor is illegal and unauthorized.

2] give direction to the defendant to remove the compound wall/ obstruction made by him to clear the way of staircase for enjoyment and use of plaintiff to approach his suit property.

3] restrain the defendant, his agent, attorney, representative etc. from disturbing the plaintiff by any mean from using the passage/way to approach staircase by the plaintiff's to visit his suit property.

4] saddle the cost of the suit on the defendant.

5] grant any other relief deems fit and proper under the facts and circumstances of the case, in the interest of justice.

4. The petitioner in the said suit filed an application under Order 9-A of the Code of Civil Procedure, 1908, for dismissal of the suit.

5. It is the case of the petitioner that no document is filed or pleading is made pointing out that there is a relationship of tenant and landlord between the plaintiff and defendant. It is submitted that the suit

is therefore, not maintainable before the Small Causes Court. Accordingly, it was prayed for dismissal of the suit.

6. The respondent filed his reply to the said application opposing the said application.

7. After hearing both the parties, the learned Small Causes Court passed the order dated 8th January, 2018 rejecting the application Exhibit 11 by holding that point or issue in relation to landlord and tenant can be decided in the main suit after recording a detailed evidence. Hence, this petition.

8. I have perused the writ petition, the documents filed along with the writ petition, the reply and the impugned order.

9. After going through the pleadings in the suit, it is evident that, there is no statement made by the respondent/plaintiff in the entire suit that he is a tenant of the defendant or there is any relationship of tenant and landlord between him and defendant. The rent receipts relied upon by the respondent are admittedly not issued by the defendant/petitioner.

10. Thus, in absence of any *prima facie* evidence or in absence of a case of the plaintiff that he is a tenant of defendant, the plaintiff cannot be permitted to lead any evidence on the said point.

11. Thus, considering the pleadings made in the plaint, I am of the opinion that the learned trial Court ought to have framed the preliminary issue as regards the relationship between the plaintiff and defendant as a tenant and landlord and should have decided the said issue first before proceeding further.

12. In the circumstances, I am of the opinion that the impugned order needs to be quashed and set aside. Accordingly, I pass the following order.

- i. Writ petition is allowed;
- ii. Order below Exhibit 11 dated 8th January, 2018, passed by the Additional Judge, Small Causes Court, Nagpur in Regular Civil Suit No.11 of 2017, is hereby quashed and set aside;
- iii. It is directed that the Small Causes Court shall frame preliminary issue on the point of relationship between the plaintiff and defendant as a tenant and landlord and after granting sufficient opportunity to both including to lead evidence by both the parties, the Small Causes Court shall decide the said issue as preliminary issue.

[ANIL S. KILOR, J.]

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