

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5135 OF 2020

1. Umedmal Jugraj Jain,
Age 69 years, Occu. Business & Agriculture,
R/o. Kharadi Galli, Near Lokseva Hospital,
Main Road, Bazar Peth, Chopda,
Taluka Chopda, District Jalgaon.
2. Panabai Umedmal Jain,
Age 60 years, Occu. Household,
R/o. Kharadi Galli, Near Lokseva Hospital,
Main Road, Bazar Peth, Chopda,
Taluka Chopda, District Jalgaon.
3. Mahaveer Umedmal Jain,
Age 41 years, Occu. Business & Agriculture,
R/o. Kharadi Galli, Near Lokseva Hospital,
Main Road, Bazar Peth, Chopda,
Taluka Chopda, District Jalgaon.
4. Yogita Mahaveer Jain,
Age 35 years, Occu. Household and Agriculture,
R/o. Kharadi Galli, Near Lokseva Hospital,
Main Road, Bazar Peth, Chopda,
Taluka Chopda, District Jalgaon.
5. Gautam Umedmal Jain,
Age 37 years, Occu. Business and Agriculture,
R/o. Kharadi Galli, Near Lokseva Hospital,
Main Road, Bazar Peth, Chopda,
Taluka Chopda, District Jalgaon.
6. Nisha Gautam Jain,
Age 32 years, Occu. Household,
R/o. Kharadi Galli, Near Lokseva Hospital,
Main Road, Bazar Peth, Chopda,
Taluka Chopda, District Jalgaon .. Petitioners

Versus

1. Sandip Narayan Mahajan,
Age 44 years, Occu. Agriculture,
R/o. Chunchale, Taluka Chopda,
District Jalgaon.

2. Narayan Ganpat Mahajan,
Age 83 years, Occu. Agriculture,
R/o. Chunchale, Taluka Chopda,
District Jalgaon.
3. The Sub Divisional Officer,
Amalner Division, Amalner,
Taluka Amalner, District Jalgaon.
4. The Tahsildar, Chopda,
Chopda, Taluka Chopda,
District Jalgaon.

.. Respondents

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Mr. Girish S. Rane, Advocate for Petitioners
Mr. Paresh B. Patil, Advocate for Respondents no. 1 and 2
Mrs. V. S. Choudahri, Assistant Government Pleader for
Respondents no. 3 and 4 – State

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 15-12-2021

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the parties.

2. This petition impugns order dated 13-01-2017 passed by Tahsildar, Chopada, in Case No. Wahiwat/Case/S.R./12/2011 filed by the respondents no.1 and 2 against the present petitioners, which is confirmed in Revision no. RTS/Appeal/76/2017 by the Sub Divisional Officer, Amalner Division, Amalner.

3. Said Wahiwat Case was filed by the respondents no. 1 and 2, claiming that 10 years prior to the date of filing of the application, the respondents changed the natural course of water

channel. Thereafter, on 16-04-2011, again the natural flow of water channel was changed with the help of J.C.B. machine by damaging the boundaries/bandh of 7 feet between Gat no. 38 and 40/1 and 40/2/A. The natural course of water channel was changed, which is causing hardship to the respondents.

. Site inspection panchnama was conducted, wherein, it was found that the boundaries / bandh between Gat Nos. 38, 41, 40/2A was damaged and instead of 7 feet bandh, only 1 and 1½ feet bandh is remaining on the spot. The Mamlatdar, therefore, allowed the application filed by respondents no.1 and 2 vide order dated 13-01-2017. The petitioners challenged the said order by filing Revision no. RTS/Appeal/76/2017 before the Sub Divisional Officer, which is rejected. Hence, this petition.

4. Heard the learned Advocate for the petitioners, the learned Advocate for respondents no.1 and 2 as well as the learned Assistant Government Pleader for respondents No.3 and 4 – State.

5. The learned Advocate for the petitioners strenuously submits that the cause of action claimed by the respondents in the application filed before the Tahsildar was beyond six months, and therefore, the Mamlatdar ought to have rejected the claim in terms of section 5(3)(1) of the Mamlatdar's Courts Act, 1906 (in short, "**the Act**"). Admittedly, the first cause of action

mentioned in the plaint was 10 years prior to the date of filing of the plaint. The subsequent cause of action of was claimed to be on 16-04-2011. The plaint was filed on 22-12-2011. Thus, it was beyond the limitation of six months prescribed under the Act. In terms of Section 13(c)(ii) of the Act, the Mamlatdar ought to have rejected the plaint, as the cause of action arose more than six months before the plaint was presented.

. He further submits that the Mamlatdar has failed to decide the points as mandated by Section 19(1)(aa) of the Act. There is no discussion on all these aspects in the impugned order, and therefore, the impugned order is vitiated. In the operative order, a direction is given to restore the position, but, it is not clear as to whether the position as was there prior to ten years or as on 16-04-2011, which is required to be restored.

. According to him, since the land of respondents no. 1 and 2 is at the height of 3 to 4 feet of the land of petitioners, no prejudice is caused to the respondents no. 1 and 2 by changing of the course of channel. He, therefore, submits that, the impugned order is vitiated on account of non-application of mind on the part of the Mamlatdar and the Sub Divisional Officer. Hence, the impugned order is liable to be quashed and set aside.

6. Per contra, the learned Advocate for respondents no. 1 and

2 submitted that the cause of action available to the respondents was a continuing cause of action. The respondents no.1 and 2 had also lodged criminal prosecution for damaging the natural course of water channel. The respondents also approached the Tahsildar and, on 12-09-2011, the Tahsildar asked them to file present proceedings, and accordingly, the proceedings were filed. He, therefore, submits that the proceedings were well within limitation. Further submission is that, the ground of limitation or not following procedure prescribed under the law, are not taken in the say filed by the petitioners before the Mamlatdar. He submits that, since concurrent findings are recorded by the Mamlatdar and the Sub Divisional Officer, they need no interference in the extraordinary writ jurisdiction.

7. The learned Assistant Government Pleader supports the impugned orders, by submitting that as per site inspection panchnama, the Mamlatdar was justified in passing the impugned order.

8. The averments in the plaint filed by the respondents no. 1 and 2 clearly state that the first cause of action accrued to them prior to ten years. Thereafter, the second cause of action alleged by respondents no. 1 and 2, is on 16-04-2011. However, the plaint was presented before the Mamlatdar on 22-12-2011 i.e. after eight months. Even if, the contention of respondents no.1

and 2 that the ground of limitation is not raised in the say filed by the petitioners is accepted for the sake of arguments, Section 12(c)(ii) of the Act casts duty on the Mamlatdar to reject the plaint, if it is found by him that the cause of action arose more than six months before the plaint was presented.

9. Section 19 of the Act provides the points to be decided by the Mamlatdar at the stage of hearing. Section 19(1)(aa)(3) of the Act provides that the Mamlatdar has to decide, "whether such erection impeded to such natural flow of water within six months before the suit was filed". The impugned decision of the Mamlatdar is totally silent on all these aspects, and therefore, for not following aforesaid provision, the decision is vitiated and cannot be sustained. From the operative order passed by the Mamlatdar, it is not clear as to whether the direction given is that the water channel should be restored as it was before ten years or as it was on 16.04.2011. The impugned order passed by Mamlatdar, therefore, is vitiated also on the ground of non-application of mind.

10. It is not possible at this stage, to accept the arguments of respondents no.1 and 2, that the cause of action was continuing one and since they approached the Tahsildar and on 12-09-2011, the Tahsildar asked them to file the proceeding, hence, they filed proceedings. Merely because the concurrent findings are recorded

by both the authorities, that itself is not sufficient to sustain the order, which is vitiated for not following procedure prescribed under the Act and on the ground of non-application of mind. The respondents are at liberty to avail the appropriate legal remedy.

11. Hence, the order :-

ORDER

- I. The writ petition is allowed.
- II. The impugned order dated 13-01-2017 passed by Tahsildar, Chopada, in Case No. Wahiwat/Case/ S.R./ 12/2011 and the order passed by the Sub-Divisional Officer, in Revision No. RTS/Appeal/76/2017, is hereby quashed and set aside.
- III. Rule is made absolute in above terms with no order as to costs.

**(NITIN B. SURYAWANSHI)
JUDGE**

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