

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

49 WRIT PETITION NO.9646 OF 2019

DINANATH RAMKRUSHNA SARAF AND ANOTHER
VERSUS
SURESH VASUDEO SARAF AND OTHERS

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Advocate for Petitioner : Mr. Bora Satyajit S.
AGP for Respondents-State : Mr. S S Dande
Advocate for Respondent 1 : Mr. Shah Subodh P.,
Advocate for Respondent Nos.2 & 3 : Mr. V D Gunale

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CORAM : SANDEEP V. MARNE, J.

Dated : November 21, 2022

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PER COURT :-

1. By this petition, petitioners challenge the order dated 18.6.2019 passed by the 2nd Jt. Civil Judge Sr. Division, Jalgaon by which petitioners' application for amendment has been rejected.

2. The suit is filed by petitioners challenging the Notice dated 7.2.2002 issued by the then Jalgaon Municipal Council calling upon the owner of the land to pull down the structure as the same was in dangerous and ruinous condition. In their plaint, petitioners referred to subsequent event of defendant no.1 obtaining permission dated 8.10.2008 for demolition of structure,

however, no challenge was set up with regard to permission dated 8.10.2008 in the suit so instituted.

3. After the trial in the suit commenced, petitioners moved an application for amendment to set up a challenge to the permission dated 8.10.2008. Amendment was sought after a period of 11 years from the date of filing of the suit. Trial court has proceeded to reject that application.

4. Learned counsel appearing for the petitioner Mr. Bora would submit that averments with regard to the notice dated 8.10.2008 have already been incorporated in the plaint. Due to sheer inadvertence, prayer to challenge the notice dated 8.10.2008 was left out. He therefore submits that proposed amendment would not change the nature of the suit. He has also produced on record copies of notices dated 7.2.2002 and permission dated 8.10.2008.

5. Per contra, Mr. Shah, the learned counsel appearing for respondent no.1 opposes the petition. He submits that the proposed amendment would change in

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the nature of the suit as permission dated 8.10.2008 was issued under the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short “the said Act”) and the suit challenging that notice would not be maintainable under the provisions of Section 149 of the said Act. He would further submit that factum of issuance of permission dated 8.10.2008 was within the knowledge of the petitioners; but they consciously omitted to incorporate the prayer to challenge the same. Referring to Proviso to Order 6 Rule 17 of the Civil Procedure Code, Mr. Shah would contend that petitioners were not at all diligent in moving an application for amendment and the same was moved only after the trial in the suit commenced. Alternately, learned counsel Mr. Shah contended that, in the event of this Court allowing this petition, it be clarified that amendment application would not relate back to the filing of the suit and it would be deemed to have incorporated only from the date of the filing of the amendment application.

6. Mr. Gunale, learned counsel appearing for respondent nos. 2 and 3 also opposes the petition.

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7. After having heard learned counsel appearing for the parties, it is seen that averments pertaining to the permission dated 8.10.2008 have been repeatedly made in the plaint. In fact, while making averments with regard to cause of action in paragraph no.21 of the plaint, issuance of permission dated 8.10.2008 is sought to be referred as accrual of cause of action. However, challenge to permission dated 8.10.2008 has not been incorporated in the prayer clause of the plaint. What is challenged is only earlier notice dated 7.2.2002. I have perused the notice dated 7.2.2002 and find that the same had called upon defendant no.1 to pull down the structure. Later, defendant no.1 sought permission for pulling down the structure and such permission was granted on 8.10.2008. In that view of the matter, proposed amendment in my view would not change the nature of the suit.

8. Coming to the delay in moving the application for amendment, the Petitioners are undoubtedly are responsible for such delay, without much valid

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justification. However this aspect can be taken care of by compensating defendant No. 1 by awarding costs.

9. Accordingly, the petition is allowed. The order dated 18.6.2019 passed by 2nd Jt. Civil Judge Sr. Division, Jalgaon is set aside. The application filed by petitioners/plaintiffs at exhibit 73 is allowed in terms of the prayers made therein. Petitioners to pay costs of Rs.10,000/- (Rs. Ten Thousand) to respondent no.1 within a period of four weeks from today. It is clarified that issue with regard to maintainability of added prayer with regard to the permission dated 8.10.2008 is left open. It is further clarified that, amendment would not relate to the date of institution of the suit and shall be deemed to be incorporated only on the date of filing of the application. The defendants in the suit shall have an opportunity of filing the additional written statement to the amended plaint.

(SANDEEP V. MARNE, J.)

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