

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

**WRIT PETITION NO.4088 OF 2021
WITH
CIVIL APPLICATION NO. 4244 OF 2021**

**PUSHPABAI SHRIKRISHNA JOSHI
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS**

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Advocates for Petitioner:

Mr. A. S. Bajaj

AGP for Respondent No. 1: Mr. K. N. Lokhande

Advocate for Respondent No.2: Mr. S. S. Tope

Advocate for Respondent No. 3:

Mr. D. P. Bakshi

Advocate for Respondent No.4: Mr. A. M. Karad

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**CORAM: S. V. GANGAPURWALA &
SHRIKANT D. KULKARNI, JJ.**

Reserved for Orders On:	20.04.2021
Order Pronounced On:	04.05.2021

ORDER (Per S. V. Gangapurwala, J.):

1. The petitioner seeks directions against the respondents prohibiting them from carrying out work of Overhead Water Tank Reservoir in the open space of the layout in land Gut No.165/1, 165/2 and 171/5 at village Harsul, Taluka and District Aurangabad.

2. Mr. Bajaj, learned Advocate for the petitioner submits that the petitioner is owner and purchaser of Plot Nos. 1 to 11 of the layout carved out of Gut No. 165/1, 165/2 and 171/5 at village Harsul, Taluka and District Aurangabad under registered Sale Deed dated 19.07.2000. Plot Nos. 6 to 11 purchased by the petitioner are adjacent to the open space. The open space of the layout is handed over to respondent no. 2 – Aurangabad Municipal Corporation by the Developer / owners under registered Relinquishment Deed dated 13.09.2001. The petitioner noticed construction activity over the open space attached to his Plot Nos. 6 to 11. Upon enquiry the petitioner got the knowledge that respondent no. 2 through respondent no. 3 has undertaken the project of water supply to Aurangabad city and are constructing water reservoir tanks for distribution of water to nearby area. According to the learned Advocate, utility and value of the plots adjacent to the open space would diminish by construction of water reservoir tank.

3. The learned Advocate submits that respondent no. 2 / Corporation is merely trustee and custodian of the open space. The open space is relinquished in it's favour for maintenance and benefit of the plot holders of the layout. The open space in the layout is maintained for the residents of the said layout. Respondent no. 2 / Corporation does not have authority to deviate the use of the plot for any other purpose than for the beneficial use and enjoyment of the plot holders. The learned Advocate submits that the ownership of the open space vests with the owner. The learned Advocate relies on the Judgment of the Division Bench of this Court in case of Kishor Sharad Borawake and another Vs. State of Maharashtra and others reported in 2019 SCC OnLine Bom 1193 and another Judgment of the Division Bench of this Court dated 06.05.2014 in Writ Petition No. 5179 of 2003 with connected writ petition. The learned Advocate submits that without acquisition the respondents do not possess any authority to undertake the project of construction of Overhead

Water Tank Reservoir. The learned Advocate relies on the Judgment of the Division Bench of this Court in Writ Petition No. 461 of 1994 dated 23rd & 27th September, 2010. The learned Advocate submits that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. To buttress his submissions, the learned Advocate relies on the Judgment of the Ramchandra Keshav Adke (Dead) by Lrs. and others Vs. Govind Joti Chavare and others reported in (1973) 1 SCC 559.

4. Mr. Bajaj, the learned Advocate further submits that it is erroneous on the part of the respondent to contend that the selection of the open space as the site for carrying out work of Overhead Water Tank Reservoir is a part of sanctioned scheme. The said site is not reflected in the sanctioned scheme nor in the drawing prepared for implementation of the scheme. The Unified Development Control and Promotion Regulations for Maharashtra State came to be sanctioned and published for the first time on

02.12.2020 (*hereinafter referred to as UDCPR-2020*), as such the selection of open space as a site cannot be said to be on the basis of the regulations. The respondents to oblige and protect the third party interest in whose land the construction was proposed is now shifted to the open space of the private layout. The said act is arbitrary and violative of Article 14 of the Constitution of India. The UDCPR-2020 do not permit any construction over the open space of a private layout for public purpose. The Regulation 3.4.7 clearly states that construction in the open space will be permitted only for the purpose of benefit of the owners of the plot of the layout only. The Regulation Nos. 3.4.2, 3.4.7(i), 3.4.7(ii), 3.4.7(v), 3.4.7(vii) are to be read together. The construction is to be done in an area of 500 metres. If 10% is to be considered of both the open spaces together then the carpet area cannot be more than 230 Sq. Metres. The 10% area of the open space where the construction is to be carried out comes to 1317.75 Sq.Metres only. The

construction cannot be left open without boundary wall and if the same is constructed it would be beyond permissible limits. The residents of the locality are not interested in the water reservoir. The respondents have placed on record the signatures of various persons residing in other localities. The learned Advocate refers to Section 22 of the Maharashtra Regional and Town Planning Act, 1966 to submit that the reservations contemplated under the said provision would be rendered ineffective, if, such construction is allowed to be made on the open space. No acquisition proceedings are initiated for acquiring the open space for the construction. Regulation 3.4.7 of the UDCPR-2020 cannot be read in isolation; it has to be read with the statutory provisions. Moreover, as per condition No. 3.4.7 of the UDCPR-2020, the proposal of construction of such structure should be from the owners / owners' society and shall be meant for the beneficial use of the owners / owners' society. In the present matter, no such proposal has been made. The

learned Advocate further submits that the limit fixed of 10% on the ground and 15% of the total carpet area if utilised by the respondents will render the open space unavailable for the plot holders for recreational activities and more particularly, children and aged persons.

5. Mr. Tope, learned Advocate for respondent no. 2 / Corporation submits that the term open space is a part of the definition of amenity. Amenity is defined U/Sec. 2(ii) of the Maharashtra Regional and Town Planning Act, 1966. The Regulation 1.7.7 of the UDCPR-2020 defines Amenity Space. In the said definition also amenity space is a part of open space. The learned Advocate relies on Regulation 3.4.7 of the UDCPR-2020 and submits that the present work would be within the purview of Regulation 3.4.7 of the UDCPR-2020. The work would be carried out within the limits as laid down under Regulation 3.4.7 of the UDCPR-2020.

6. The learned Advocate further submits that as per present UDCPR-2020, the area of open space is 10% of the total area of the layout and as per the said UDCPR-2020, area of 15% can be used for construction of ESR. The respondents Authorities can construct ESR to the extent of 15% in that open space. There is no breach of any of the condition. The ESR can be constructed in the permitted area. The residents of the locality, so also, the plot holders of the said layout have time and again requested respondent no. 2 / Corporation for the construction of ESR. The construction of ESR would be for the benefit of the layout holders. The demand for supply of water of the said locality would be met with.

7. Mr. Bakshi, learned Advocate for respondent no. 3 – Maharashtra Jeevan Pradhikaran reiterates the arguments of learned Advocate for respondent no. 2 / Corporation and submits that if the boundary wall is not to be constructed then the proposed ESR can be constructed on 355 Sq. Metres

and the same would be permissible as per the UDCPR-2020.

8. Mr. Jarare, learned Advocate for the intervenors submits that the intervenors are the residents of the locality and some of them are also the owners of the plots in the layout. The residents of the said locality have filed representation with the Corporation for solving the water supply problem and if the water reservoir tank is constructed the same would solve the water problem of the residents of the said locality.

9. We have considered the submissions canvassed by the learned Advocates for respective parties.

10. It has been held in Judgments as referred to by the learned Advocate for the petitioner that the open space cannot be relinquished to the planning authority. The ownership of the open space vests with the owners and the same is meant for the use and enjoyment of the plot holders. The

open space of the layout is normally owned by the owner of the property. The open space is also meant for the beneficial use and enjoyment of the layout plot holders. The layout is consisting of 56 plots. The petitioner, it appears, has purchased about 11 plots out of 56 plots of the said layout; as per the contention of the petitioner.

11. Apart from the petitioner none of the owners of the layout plot holders have objected for the construction of the water reservoir. The Corporation and also the intervenors have placed on record the signatures of various persons requesting the Corporation to construct the water reservoir so that the crisis for supply of potable water would be resolved.

12. The proposition that, if, the statute requires a thing to be done in a particular manner the same has to be done in that manner does not require debate. The same is the settled proposition.

13. The Maharashtra Jeevan Pradhikaran / Respondent No. 3 has filed an affidavit clarifying that it is an implementing authority of water supply and sewerage scheme. The water supply scheme in Aurangabad city would be implemented by it. The tender of respondent no. 4 – M/s GVPR Engineers Limited is accepted. The water storage tank i.e. Elevated Service Reservoir (ESR) is undertaken on the open space of the sanctioned layout plan i.e. writ site. The technical sanction and administrative approval has been given by the State Government under *Nagarothan Abhiyan* for augmentation of the Aurangabad water supply project costing Rs.1680.50 Crores and on that basis work has been awarded to respondent no. 4. The capacity of the present ESR is 17.85 lakh litres. The writ land is technically most suitable as it is at a higher place in that vicinity. This ESR is supposed to be filled by gravity from Nakshtrawadi MBR (Master Balancing Reservoir)

14. The affidavit of respondent no. 3 further states that it is necessary to construct ESR at a higher place in the area to serve from that local reservoir so as to maintain required pressure of 12M at each household in that area as per the Government norms. If the ESR is constructed at a lower elevated place then all citizens of these areas would not get water with required pressure. The affidavit further states that the said ESR is in the interest of the plot holders of the said layout.

15. The UDCPR-2020 for Maharashtra State are applicable in the city of Aurangabad. Clause 3.4.7 of the said Regulations permits construction in the open spaces. The permitted structure and use in the open spaces without counting FSI in the recreational open spaces are specified. Clause (i) of Regulation 3.4.7 states that there may be maximum 2 storeyed structures with maximum 15% built up area of recreational open space, out of which, built up area of ground floor shall not exceed 10%. In case of stilt, additional floor may

be allowed. Clause (ii) of 3.4.7 specifies that the structures used for purpose of pavilion, gymnasia, fitness centre, club house, vipashyana and yoga centre, creche, kindergarten, library, or other structures for the purpose of sports and recreational activities are permitted. It further provides that other utilities such as water tank (underground or elevated), electric substation, generator set, power house, garbage treatment, public health out post / centre may be permitted only with the consent of the society of the residents. Clause (v) of 3.4.7 further states that the proposal for construction of such structure should come as a proposal from the owner/s, owners' society / societies and shall be meant for the benefit / use of the owners/ members of such society / societies.

16. The contention of the petitioner is that the plot holders of the layout where the ESR is to be constructed on the open space have not given any proposal for construction of the ESR.

It would be worth considering that apart from the petitioner none of the plot holder have objected to the construction of the ESR in the open space. 56 plots appear to be existing on the layout. Petitioner is the purchaser of 11 plots. 47 plot holders have not objected for construction of ESR on the writ site and some of the plot holders, it appears, has also signed representation for construction of the ESR. In a way, the majority of the plot holders have tacitly consented for the construction of the ESR. The capacity of the ESR is 17.85 Lakh litres. The said tank would be for the beneficial use of the plot holders. It would resolve the disrupted supply of water to the plot holders of the layout and other persons in the vicinity of the said locality. The construction of the ESR is in public interest. Of course, the said construction will have to be in accordance with the UDCPR-2020 i.e. the ground floor shall not exceed 10% and with the maximum built up area of 15%.

17. The majority plot holders of the society have consented for the construction of the ESR and the same would be in the interest of the plot holders and the other respondents of the locality. Water supply scheme is to be implemented for the entire city of Aurangabad and construction of the ESR in the writ open space is the part of the same. The petitioner, it appears, is only concerned with his commercial interest.

18. Under Article 226 of the Constitution of India the Court enjoins extraordinary powers. The jurisdiction exercised by this Court under Article 226 of the Constitution of India is equitable. The discretion that vests with the Court under Article 226 of the Constitution of India is a judicial discretion to be exercised according to the judicial principles. The discretion under the extraordinary powers of this Court need not be exercised to set right mere errors of law, more so, when the action complained of is in public interest. The Court would bear in mind the

principle of "*Salus Populi suprema lex*" i.e. the welfare of the people is of paramount importance.

19. In the present case, as observed supra, construction of ESR is permissible under Regulation 3.4.7 of UDCPR-2020, the only limitation is the proposal should flow from the owner / society. Except the petitioner the other plot holders of the layout have not opposed the construction of ESR on the open space; some of them have actively supported construction of ESR to be in the public interest and in the interest of the residents of the nearby locality.

20. In light of the above, the respondents shall construct the ESR on the writ site strictly within the area permissible as per Regulation 3.4.7 of UDCPR-2020.

21. Writ Petition and Civil Application is disposed of. No costs.

[SHRIKANT D. KULKARNI, J.]
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[S. V. GANGAPURWALA, J.]