

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 2761 OF 2022
WITH
WRIT PETITION NO.2430 OF 2022
.....
WRIT PETITION NO.2761 OF 2022

Gopal Keshavdev Sharma,
Aged about 46 years, Occupation : Service,
R/o. Flat No.7B, Building A1/2(10),
Nirmal Nagari, Umred Road,
Nagpur. **PETITIONER**

...VERSUS...

1. The Nagpur Municipal Corporation,
Civil Lines, Nagpur,
through the Municipal Commissioner.
2. Nirmal Ujjwal Credit Co-operative Society Ltd.
(Multi-State),
193, Nandanwan Main Road,
Nandanwan, Nagpur.
Through its Secretary.
3. Nirmal Nagari Condominium,
Having its office at RH-29,
Nirmal Nagari, Shitala Mata Road,
Umred Road, Nagpur.
Through its President.
4. M/s. SMC Infrastructure Pvt. Ltd.
101, SMC Square, Kapart, LBS Marg,
Thane (West)-400 601(Mah.)
Through its Director. .. **RESPONDENTS**

With

WRIT PETITION NO. 2430 OF 2022

Dr.Kanchan s/o Pandurang Wankhede,
Aged about 44 years, Occupation : Medical Practitioner
R/o. 3-A, Bldg.No.16, Nirmal Nagari,
Shitala Mata Mandir,
Umrer Road, Nagpur 400 009

..... **PETITIONER**

..V E R S U S..

1. The Nagpur Municipal Corporation,
Civil Lines, Nagpur,
through the Municipal Commissioner.
2. Nirmal Ujjwal Credit Co-operative Society Ltd.
(Multi-State),
193, Nandanwan Main Road,
Nandanwan, Nagpur.
Through its Secretary- Pramod Nathuji Manmode
3. Nirmal Nagari Condominium,
Having its office at RH-29,
Nirmal Nagari, Shitala Mata Road,
Umrer Road, Nagpur-09.
Through its President- Praful Namdeorao Karpe

Shri S.S.Ghate, Advocate for petitioner in Writ Petition No.2761 of 2022.
Shri S.D.Khati, Advocate for petitioner in Writ Petition No. 2430 of 2022.
Shri S.M.Puranik, Advocate for respondent No.1-Nagpur Municipal Corporation in both writ petitions.
Shri Y.N.Sambre, Advocate for respondent no.2-Society in both writ petitions.
Shri Anand Jaiswal, Senior Advocate with Shri Atul Pathak, Advocate for respondent no.3-Condominium in both writ petitions
Shri N.R.Nebhani, Advocate for respondent no.4 - Contractor in W. P. No.2761/2022.

CORAM :- A.S.CHANDURKAR AND M. W. CHANDWANI, JJ.
ARGUMENTS WERE HEARD ON : 25.04.2023
JUDGMENT IS PRONOUNCED ON : 09.06.2023

JUDGMENT (Per A.S.CHANDURKAR, J.)

These two writ petitions can be conveniently decided by this common judgment since they raise challenge to the communication dated 20.04.2022 by which the Nagpur Municipal Corporation has directed commencement of construction of Elevated Storage Reservoir at the open space of the layout of Nirmal Nagari Condominium.

Rule. Rule made returnable forthwith and heard the learned counsel for the parties.

2. The facts relevant for considering the challenge as raised is that land bearing Khasra Nos.15/1, 16/1, 18/1 as well as 20 admeasuring about 21 Acres/85,000 square meters belonged to Nagpur Vinkar Sahakari Sut Girni Maryadit. The aforesaid land came to be purchased by Nirmal Ujjwal Credit Co-operative Society Limited, Nagpur (for short, the Society) in an auction held on 26.10.2004. After following the prescribed procedure, the aforesaid land was submitted by the Society to the provisions of the Maharashtra Apartment Ownership Act, 1970 (for short, the Act of 1970). Thereafter by executing a Deed of Declaration on 30.11.2007, the Nirmal Nagari Condominium (for short, the Condominium) was formed. In the layout plan dated 22.11.2007 two open spaces were shown. Open space-I was kept for garden and green gymnasium. Open space-II was kept as open/

for playground. Under the Atal Mission for Rural and Urban Transformation - AMRUT, the Nagpur Municipal Corporation (for short, the Corporation) intended to construct an Elevated Storage Reservoir (ESR) having capacity of twenty lakh liters of water. The said ESR was to cater the need of various localities as well as the Condominium so as to meet water scarcity. On 16.09.2021 the Corporation proceeded to issue a work order to M/s. SMC Infrastructure Private Limited-Contractor for construction of the ESR. This was done after completing the tender process. The work of erecting the said ESR was undertaken by the Contractor but on 11.03.2022 the Society raised an objection stated therein that said construction was being undertaken at the amenity space without the consent of the Society. On 09.04.2022 the Corporation issued a communication to the Society seeking its no objection for erecting the ESR at open space-II. Such no objection was given by the Society on 12.04.2022. When the Contractor proceeded to start the work of construction of ESR at open space-II, an objection was raised by the members of the Condominium by stating that it was not permissible to erect the ESR at the open space-II. Since the Corporation and the Contractor did not stop the work of aforesaid construction, two members of the Condominium have filed these writ petitions raising a challenge to the communication dated 20.04.2022 issued by the Corporation by which the Contractor was directed to start the construction work of ESR at open space-II.

3. Shri S.S.Ghate, learned Advocate appearing for the petitioner in Writ Petition No.2761 of 2022 submitted that the action of the Corporation in directing the Contractor to commence the work of construction of the ESR at open space-II was without obtaining consent of the members of the Condominium. According to him, with the execution of the deed of declaration on 30.11.2007, the open spaces in the layout vested in the Condominium and without obtaining consent of its members, it was not permissible for the Corporation to proceed to erect the ESR at open space-II. With the execution of the Deed of Declaration the Society lost its interest in the said land since such rights stood transferred to the Condominium. The rights of the members of the Condominium were governed by the provisions of the Act of 1970. The no-objection stated to be given by the Society on 12.04.2022 had no legal significance since it was only the Condominium which was concerned with the issue of grant of no-objection. It was not permissible for the Corporation to deprive the members of the Condominium who had undivided share in the open spaces from utilization of the same. The members were being deprived of their undivided right in open space-II by such illegal act. The said open space was being utilized as a playground and the members could not be deprived of such user without following the prescribed procedure. The learned Advocate referred to various Clauses of Deed of Declaration as well as the provisions of the Act of 1970 to urge that

the Society had no locus whatsoever to select the area where the ESR could be erected. It was further submitted that this Court while issuing the notice in the writ petition had directed that the construction, if any, carried out by the Contractor would be subject to result of the writ petition. Since the construction of the ESR was not preceded by any permission of the members of the Condominium, the said construction was liable to be pulled down and open space-II ought to be restored to the Condominium.

Shri S.D.Khati, learned Advocate appearing for the petitioner in Writ Petition No.2430 of 2022 adopted the aforesaid submissions since similar relief was being sought by the said petitioner.

4. Shri S.M.Puranik, learned Advocate for the Corporation opposed the writ petitions. Referring to the affidavit in reply as filed in Writ Petition No.2761 of 2022 it was submitted that the ESR was being constructed with a view to ensure that there was no water scarcity in the nearby localities. The said construction was undertaken so as to serve larger public interest and the entire action was in accordance with law. According to him, in the layout plan of Nirmal Nagari two open spaces had been shown. Under Regulation 3.4.7(ii) of the Unified Development Control and Promotion Regulations for Maharashtra (for short, UDCPR) the construction of ESR was permissible in an open space of the layout. On 09.12.2021 the Board of Managers of the Condominium had conveyed their no-objection to the Corporation for the

construction of the ESR. Based on the aforesaid no-objection, such work commenced initially at the public utility land. However, since it was noticed that the said public utility land belonged to Society-Developer, the work was stopped and it was then shifted to open space-II. The said open space was used as playground but the same would not mean that it was reserved for playground. Since it was shown as open space in the layout plan, erection of the ESR therein was permissible. The learned Advocate also referred to the additional affidavit filed on behalf of the Corporation to submit that the site had been selected after conducting a survey by technical experts. Since the elevation available at Nirmal Nagari, Nagpur was 302 meters which was more than what was available in nearby areas and as the construction of ESR at a higher elevation would ensure adequate water pressure, the said open space-II was selected. It was thus urged that the aforesaid construction having been undertaken with a view to ensure water supply to public at large, there was no case for interference in writ jurisdiction.

5. Shri Anand Jaiswal, learned Senior Advocate appearing for the respondent no.3- Condominium supported the prayers made in the writ petitions. According to him each member of the Condominium had an undivided share in the land of the Condominium. This would include a share in the open space and hence consent of the members of the Condominium was material. Since the land of the Society was submitted to

the provisions of the Act of 1970, the Society/Developer lost its right therein and it had no authority to issue any no-objection with regard to open space-II. The learned Senior Advocate referred to various Clauses of the Deed of Declaration as well as the provisions of the Act of 1970 to urge that the undisputed right of the members of the Condominium could not be taken away in such manner so as to deprive the members use of common space which vested in the Condominium. Reference was also made to the Deed of Declaration dated 24.10.2008 as well as the provisions of UDCPR. It was thus submitted that the prayers made in both the writ petitions were liable to be granted.

6. Y.N.Sambre, learned Advocate appearing for the respondent no.2-Society opposed both the writ petitions. According to him, since construction activity on public utility land was not permissible, objection was raised by the Society on 11.03.2022. Thereafter on 12.04.2022 the Society gave its consent for undertaking erection of the ESR at open Space-II. Attention was invited to the no-objection given by the members of the Condominium on 09.12.2021 in that regard. In view of Regulation 3.4.7(ii) of the UDCPR, the erection of the ESR at open space-II was permissible. The petitioners were thus not entitled for any relief whatsoever.

Shri N.R.Nebhani, learned Advocate appearing for the respondent no.4-Contractor submitted that erection of the ESR was being carried out

pursuant to the issuance of work order by the Corporation on 16.09.2021. Though initially the work of construction was sought to be undertaken at the public utility land, on the directions of the Corporation the work of erection of the ESR commenced at open space-II. The construction in question was undergoing and it was a fact that such construction has been made subject to outcome of the writ petitions.

7. We have heard the learned Advocates for the parties at length and we have perused the documents placed on record. We have thereafter given due consideration to the rival contentions. The fact that land admeasuring about 85,000 square meters came to be purchased by the Society in an auction held on 26.10.2004 after which the land was submitted by the Society to the provisions of the Act of 1970 is undisputed. With the execution of the Deed of Declaration on 30.11.2007 as well as its registration, it is clear that the rights of the parties would be governed by the Act of 1970. In the layout plan as sanctioned by the Assistant Director, Town Planning of Department of the Corporation on 22.11.2007, open space-I is shown to admeasure 5320.54 square meters, open space-II is shown to admeasure 3911.31 square meters and the public utility land is shown to admeasure 3240.16 square meters. It is seen from the record that on 16.09.2021, the Corporation issued a work order to the Contractor for construction of ESR. The dispute in question pertains to its location. Initially

the construction of the ESR was undertaken at the public utility land-amenity space admeasuring about 3240.16 square meters which was objected by the Society on 11.03.2022. Thereafter by virtue of the impugned communication dated 20.04.2022 the Executive Engineer of the Public Health Engineering Department of the Corporation directed the Contractor to undertake the construction work of the ESR at open space-II as earmarked by the Assistant Director, Town Planning Department of the Corporation. The Condominium in turn opposed the location of the ESR at open space-II by its communication dated 20.04.2022.

8. The Corporation while selecting open space-II for erection has relied upon Regulation 3.4.7(ii) of the UDCPR. The said provision reads as under:

“3.4.7 Structures permitted in Open Space”:

If required, structure and uses which can be permitted without counting in FSI in the recreational open spaces shall be as under:-

(i)

“(ii) The structures used for the purpose of pavilion, gymnasia, fitness centre, club house, vipashyana and yoga centre, creche, kindergarten, library, or other structures of the purpose of sports and recreational activity (indoor or outdoor stadiums, etc. as per availability of area) may be permitted. Utilities such as water tank (underground or elevated), electric substation, generator set, pump houses, garbage treatment, public health outpost/centre may be

permitted only with the consent of the society of residents. Religious structure may be allowed with the permission of competent Authority as decided by Government from time to time.” (Emphasis supplied)

9. Chapter-3 of the UDCPR pertains to General Land Development Requirements and Part 3.4 thereof deals with Recreational Open Spaces. The open spaces referred to herein relate to such spaces earmarked in any layout or sub-division thereof and not to open space in the development plan. It is not in dispute that on 22.11.2007 the Assistant Director, Town Planning Department of the Corporation sanctioned the building permit-layout plan of the proposed group housing scheme belonging to the Society. Open space-II alongwith public utility land was earmarked therein. It is thus clear that open space-II is a part of recreational open space as indicated in the building permit-layout plan with regard to 85,000 square meters land. As per sub-clause (ii) of Clause 3.4.7 of the UDCPR water tank(underground or elevated) can be constructed in such open space with the consent of the Society of residents. The Corporation in its affidavit in reply dated 15.06.2022 has pleaded in paragraph 6 as under :

“6. It is respectfully submitted that the Board of Managers, a duly elected body of respondent no.3, had issued a communication to the answering respondent on 09.12.2021 offering 10,000 square feet of land for construction of ESR. On the basis of said communication, which is a no-objection certificate issued by respondent no.3, the answering respondent had undertaken the work. AMRUT is a flagship program of

Central Government and the same needs to be executed fast. Moreover, the timely erection of ESR would help in eradicating the water scarcity problem of various localities permanently and hence NMC had started the work on priority.”

10. Perusal of the communication dated 09.12.2021 indicates that the same has been issued on behalf of the Condominium through its President. It has been stated therein that the Board of Managers of the Condominium had no objection to offer possession of 10,000 square feet of land for construction of water tank by the Corporation. The Condominium however sought grant of certain essential facilities in the form of a cement road, a garden duly equipped for children and senior citizens, maintenance of street lights and repairs thereof by the Corporation, development of the public utility land, uninterrupted water supply for 24 hours as well as collection of waste and its management by the Corporation. It can thus be seen that the members of the Condominium through the Board of Managers consented to transfer of 10,000 square feet land to the Corporation for erection of the ESR. This consent is stated to be subject to the Corporation extending various benefits/facilities to the Condominium. It therefore cannot be said that there is absence of consent by the members of the Condominium. In this regard, the Condominium in its affidavit in reply dated 07.07.2022 has stated in paragraph 24 as under:

“24. Further the consent given by the Condominium, upon which the respondent no.1 is said to have acted

upon was conditional. The consent of the answering respondent was not a blanket one to act upon. Further, the consent was for the benefit of the Nirmal Nagari residents only and not in rem. Therefore, the construction activities need to be necessarily stopped.”

According to the Condominium the consent granted by it was conditional.

11. Undisputedly, what was sanctioned on 22.11.2007 was the layout plan which is totally distinct from a larger development plan as contemplated by Section 22 of the Maharashtra Regional and Town Planning Act, 1966. Regulation 3.4.7(ii) of the UDCPR permits erection of a water storage tank, either underground or elevated subject to consent of the residents. In view of the communication dated 09.12.2021 issued on behalf of the Condominium permitting erection of the water tank, the Corporation has proceeded in the matter and has issued the impugned communication dated 20.04.2022 directing the Contractor to start the work of construction of the ESR at open space-II as suggested by the Assistant Director, Town Planning Department of the Corporation. It therefore cannot be said that the construction of the ESR is not permissible at open space-II as urged by the petitioners.

It is no doubt true that the communication dated 09.12.2021 issued on behalf of the Condominium while granting its no-objection to the erection of water tank stipulates certain expectations of the members of the Condominium to services to be provided by the Corporation, while agreeing

for erection of the water tank. The grievance of the members of the Condominium appears to be non-fulfillment of the conditions stated therein as can be gathered from the statements made in paragraph 24 of its affidavit reproduced hereinabove. However, in that regard, the members of the Condominium would have a separate cause of action, if according to them the conditions stated while granting no-objection on 09.12.2021 have not been satisfied by the Corporation. The same cannot be the basis for holding that there was absence of consent of the members of the Condominium for erection of the ESR. It would be for the Condominium to seek relief in terms of the consent given by it on 09.12.2021 if the facilities sought by them have not been granted. Individual members, if aggrieved ought to raise a grievance in that regard through the Condominium and not independent of it.

12. Another aspect of the matter that cannot be lost sight of is that erection of the ESR is in larger public interest with a view to facilitate supply of water to residents of the Condominium as well as nearby areas. While granting such consent on 09.12.2021 the members of the Condominium were alive to the fact of scarcity of water in the area. That was the reason for extending consent to the erection of the water tank. Hence, given a choice between larger public interest and alleged breach of contractual obligations by the Corporation, larger public interest has to prevail in the matter of exercise of discretionary jurisdiction under Article 226 of the

Constitution of India. It is well settled that discretion under Article 226 of the Constitution of India has to be exercised keeping in mind larger public interest and not merely on the making out of a legal point, assuming that one has been made out. However, in the facts of the case, reserving the right of the members of the Condominium to seek appropriate relief against the Corporation in the light of the contents of the communication dated 09.12.2021 while granting consent to the erection of the water tank would serve the interests of justice.

13. For aforesaid reasons, we do not find any case made out to set aside the impugned communication dated 20.04.2022 permitting construction of the ESR at open space-II as per the building permit-layout plan dated 22.11.2007. If the members of the Condominium have any grievance against the Corporation for non-fulfillment of the expectations/conditions mentioned in the communication dated 09.12.2021 granting no-objection to the erection of the water tank at open space-II, they are at liberty to take such steps as are permissible in law for seeking redressal of such grievance.

Subject to what has been observed hereinabove, Rule stands discharged with no order as to costs.

(M. W. CHANDWANI, J.)

(A.S.CHANDURKAR, J.)