

Sh Nilabh Sharma vs Municipal Corporation Of Delhi Through ... on 20 August, 2024

Author: Purushaindra Kumar Kaurav

Bench: Purushaindra Kumar Kaurav

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IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P.(C) 11400/2024, CM APPL. 47315/2024
SH NILABH SHARMA

MUNICIPAL CORPORATION OF DELHI THROUGH I
DEPUTY COMMISSIONER SOUTH ZONE
& ANR.

Through: Mr. Ajjay Arora, M
Mr. Vansh Luthra,
Ms. Vaishali Gupta
for GNCTD.
Ms. Sehaj, SPC, Mr
GP for R-2.

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

% 20.08.2024

1. The petitioner appearing in person is seeking for directions to the respondent-MCD to remove the dustbins and storage depot (khatta) which is allegedly illegally encroaching the public land and causing nuisance to the public at large. He is also seeking direction to the respondent-Police Department to keep a regular check to stop the illegal and unlawful activity around the place where dustbin situates.

2. Among various submissions made, the petitioner has averred that the respondent-MCD had initially constructed dustbins within a designated This is a digitally signed order.

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storing personal belongings, contrary to the intended purpose of the facility. He, therefore, submits that the dustbin may be shifted to some other place so that the nuisance and encroachment is stopped.

3. I have considered the submissions and perused the record.

4. The prayer sought by the petitioner is in the nature of a continuing mandamus, as the relief requires ongoing monitoring and periodic directions from the Court. This Court, vide order dated 29.07.2024 in W.P. (C) 4206/2024 titled as Jangpura Extension Residents Forum RWA v. Delhi Urban Shelter Improvement Board & Ors., while dismissing a petition seeking continuing mandamus has held as under:-

"6. It is well-established that while the Court is vested with extraordinary jurisdiction under Article 226 of the Constitution of India, the essence of the remedy of continuing mandamus lies in eliminating the uncertainties of adjudication. This remedy empowers courts to supervise, superintend, and intervene to actualize specific socio-economic rights and rectify administrative non-compliance.

7. Examining the prevailing jurisprudence, the remedy of continuing mandamus is invoked exclusively in exceptional circumstances where persistent executive recalcitrance obstructs the delivery of justice. In such instances, judicial follow-up becomes imperative in accordance with the Court's constitutional and moral obligations to uphold the rule of law."

5. In the present case, the petitioner has raised multiple grievances against the respondent-MCD, however, the primary complaint pertains to the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:00 alleged nuisance caused to the public due to the installation of the dustbins. In the considered opinion of the Court, if the petitioner has any grievance with regard to the placement of the dustbins, which is allegedly leading to public nuisance, the appropriate recourse is to agitate before competent magistrate. The said remedy is available under Section 152 of the Bharatiya Nagarik Suraksha Sanhita, 2023, which is the corresponding provision to Section 133 in the erstwhile Code of Criminal Procedure, 1973. There is nothing on record to indicate that the petitioner has resorted to the said remedy for redressal of his grievances. Moreover, no explanation has been offered by the petitioner as to why these available remedies are deemed inefficacious.

6. For the ease of reference, a comparative table of the provisions dealing with the conditional order for removal of nuisance is provided below:-

Bharatiya Nagarik Suraksha Sanhita, Criminal Procedure Code, 1973

152. Conditional order for removal of Section 133. Conditional order for nuisance. removal of nuisance.

(1) Whenever a District Magistrate or a (1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Sub-Divisional Magistrate or any other Executive Magistrate specially Executive Magistrate specially empowered in this behalf by the State empowered in this behalf by the State Government, on receiving the report of a Government, on receiving the report of a police officer or other information and on police officer or other information and on taking such evidence (if any) as he thinks taking such evidence (if any) as he thinks fit, considers-- fit, considers--

(a) that any unlawful obstruction (a) that any unlawful obstruction or nuisance should be removed or nuisance should be removed from any public place or from any from any public place or from any way, river or channel which is or way, river or channel which is or may be lawfully used by the may be lawfully used by the public; or public; or

(b) that the conduct of any trade (b) that the conduct of any trade or occupation, or the keeping of or occupation, or the keeping of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:00 any goods or merchandise, is any goods or merchandise, is injurious to the health or physical injurious to the health or physical comfort of the community, and comfort of the community, and that in consequence such trade or that in consequence such trade or occupation should be prohibited occupation should be prohibited or regulated or such goods or or regulated or such goods or merchandise should be removed merchandise should be removed or the keeping thereof regulated; or the keeping thereof regulated;

or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary;

or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or

This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:00 possessing such animal or tree, possessing such animal or tree, within a time to be fixed in the within a time to be fixed in the order-- order--

(i) to remove such obstruction or nuisance; or
(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or
(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or
(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or
(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order, or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate (2) No order duly made by a Magistrate under this section shall be called in under this section shall be called in question in any Civil Court. question in any civil court.

Explanation.--A ☐public place includes Explanation.--A ☐public place includes also property belonging to the State, This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:00 also property belonging to the State, camping grounds and grounds left camping grounds and grounds left unoccupied for sanitary or recreative unoccupied for sanitary or recreative purposes.

purposes.

7. A perusal of the aforesaid provision would indicate that the underlying rationale behind the enactment of such provision is to prevent public nuisance. This Section empowers a magistrate to deal with specific public nuisance and it provides a summary remedy for their removal. The scope and extent of Section 152 of BNSS, 2023 can be understood from the following discussion in the case of Ratlam v. Vardichan², wherein, it was held as under:-

"9. So the guns of Section 133 go into action wherever there is public nuisance. The public power of the magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present as here. "All power is a trust -- that we are accountable for its exercise -- that, from the people, and for the people, all springs, and all must exist." [Vivian Grey, Bk. VI Ch. 7, Benjamin Disraeli] Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise."

8. In Ratlam (supra), the issue which was posited before the Supreme Court for adjudication pertained to the legality of the order passed by the magistrate under Section 133 of CrPC curbing the

alleged public nuisance. The Supreme Court, while upholding the order of the magistrate under Section 133 of CrPC to remove the public nuisance having a nexus with the drainage system, took a view that the an order abating the nuisance by taking a timely affirmative action may be justified in the given circumstances. Thus, it was clarified that there is no fetter on the power of (1980) 4 SCC 162 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:01 the magistrate to wield an authority to remove the public nuisance where the circumstances warrant such an invocation. The relevant paragraphs of the said decision reads as under:-

"13. Section 133 CrPC is categoric, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Sub-Divisional Magistrate, Ratlam, has before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The Magistrate's responsibility under Section 133 CrPC is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by Section 188 IPC. Therefore, the Municipal Commissioner or other executive authority bound by the order under Section 133 CrPC shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of Section 133 CrPC read with the punitive temper of Section 188 IPC make the prohibitory act a mandatory duty.

16. In this view, the Magistrate's approach appears to be impeccable although in places he seems to have been influenced by the fact that "cultured and educated people" live in this area and "New Road, Ratlam is a very important road and so many prosperous and educated persons are living on this road". In India "one man, one value" is the democracy of remedies and rich or poor, the law will call to order where people's rights are violated. What should also have been emphasised was the neglect of the Malaria Department of the State of Madhya Pradesh to eliminate mosquitoes, especially with open drains, heaps of dirt, public excretion by humans for want of lavatories and slums nearby, had created an intolerable situation for habitation. An order to abate the nuisance by taking affirmative action on a time-bound basis is justified in the circumstances. The nature of the judicial process is not purely adjudicatory nor is it functionally that of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:01 an umpire only. Affirmative action to make the remedy effective is of the essence of the right which otherwise becomes sterile. Therefore, the court, armed with the provisions of the two Codes and justified by the obligation under Section 123 of the Act, must adventure into positive directions as it has done in the present case. Section 133 CrPC authorises the prescription of a time-limit for carrying out the order. The same provision spells out the power to give specific directives. We see no reason to disagree with the order of the magistrate."

(emphasis supplied)

9. In another case titled as Gobind Singh v. Shanti Sarup³, which involved the magistrate directing the owner of the bakery to demolish his oven and chimney as it caused inconvenience to the public at large, the Supreme Court has held as under:-

"7. It is true that the learned Additional Sessions Judge did not agree with the findings of the Sub-Divisional Magistrate, but considering the evidence in the case, the reasons given by the Magistrate in support of his order and the fact that the High Court was unable to accept the recommendation made by the Additional Sessions Judge, we are of the opinion that in a matter of this nature where what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large, the safer course would be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of the bakery."

(emphasis supplied)

10. The Division Bench of the Punjab and Haryana High Court in the case of Vipan Kumar v. State of Punjab⁴, while dealing with a case where the prayer involved removal of garbage reinforced the position that the sub-divisional magistrate is invested with the powers under Section 133 of CrPC to remove nuisance. The relevant paragraphs of the said decision is reproduced herein for reference:-

(1979) 2 SCC 267 2017 SCC OnLine P&H 3420 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:01 "6. It is to be noticed that the Sub-Divisional Magistrate, Mukerian who is present in Court has powers under Section 133 of the Code of Criminal Procedure (Cr.P.C. - for short) for removal of nuisance.

7. Hon'ble the Supreme Court in Municipal Council, Ratlam v. Vardhichand, (1980) 4 SCC 162 : AIR 1980 SC 1622 has held that the Magistrate's responsibility under Section 133 Cr.P.C. is to order removal of nuisance within a time to be fixed in the order. This it was said is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. It was

said that Section 133 Cr.P.C., permits enforcement of civic rights under the Municipal Law where the neglect had led to a public nuisance. The Section permits affirmative action to abate the nuisance on a time bound basis by issuing specific directives. Failure to comply with the directions issued by a Magistrate would be visited with the punishment contemplated by Section 188 of the Penal Code, 1860 („IPC - for short). The Municipal or other Executive Authorities are bound by the order under Section 133 Cr.P.C. and they are to obey the directions of the Sub Divisional Magistrate because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment is to be punished with simple imprisonment or fine as prescribed in Section 188 IPC. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of Section 133 Cr.P.C. read with the punitive temper of Section 188 IPC makes the prohibitory act a mandatory duty.

9. In the circumstances, there is no reason whatsoever as to why the Municipal Authorities at Mukerian should not undertake the task of removing the garbage from the city to make the city clean and habitable for its residents. They are under a statutory duty and obligation to remove the garbage from the city. The Sub Divisional Magistrate, Mukerian is invested with the powers under Section 133 Cr.P.C. to remove the nuisance.

10. Therefore, the learned Sub Divisional Magistrate, Mukerian shall ensure that she performs her statutory duty and ensures that the garbage is removed from Mukerian Town preferably within a period of three months as has been submitted.

11. It is made clear that the Sub Divisional Magistrate shall exercise all powers contemplated by Section 133 Cr.P.C. for the removal of garbage and would be at liberty to initiate action under Section 188 IPC against those disobeying her orders.

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12. The writ petition is accordingly disposed of with liberty to the petitioners to seek revival of the same, if need be."

(emphasis supplied)

11. In the case of Ajeet Mehta v. State of Rajasthan⁵, it was held that stocking of fodder on a certain plot in a residential colony constitutes pollution of atmosphere and hence, public nuisance. The order of the magistrate directing removal of this nuisance was held valid and the respondents therein were directed not to do any business of fodder on that plot.

12. In a similar set of facts, the High Court of Andhra Pradesh in *Gunturi Varalakshmi v. State of A.P.*, while dealing with a writ petition seeking mandamus against the municipality to curb nuisance, the Court has held that when the petitioner had alternative remedies available under civil and criminal law, the petitioner should have exhausted these remedies before approaching the High Court for the extraordinary remedy of a writ of mandamus. The relevant paragraph is referred below:

"18. It is pertinent to note that the petitioner has got alternative remedies. It is obvious that she has not availed civil and criminal remedies. She is directed to approach the legal services authorities in the District for proper guidance and advice. Without exhausting the remedies available to her at the district level, she had approached this Court seeking for extraordinary remedy of writ of mandamus. It is not uncommon in many places public nuisance is taking place, and the remedies are available under civil and criminal laws, consumer forum, and even can approach legal services authorities for redressal of her grievance. People usually resort to above forums and after exhausting the remedies they resort to extraordinary jurisdiction of High Court.

19. In *Jawarchand Poonamchand Dassaji v. State of M.P.*, the Madhya Pradesh High Court held as under:

14. The celebrated dictum is „ubi jus, ibi remedium . Ordinarily 1990 Cri LJ 1956 (Raj) 2017 SCC OnLine Hyd 290 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 26/08/2024 at 20:35:01 there has to be course under ordinary law and the recourse to extraordinary provision like Article 226 should be an exception. In case of a public nuisance or other wrongful act affecting or likely to affect the public, a suit for declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted by two or more persons with the leave of the Court to combat public nuisance in an effort to incinerate public injury and to idolize public interest in terms of section 91 of the Code of Civil Procedure or section 133 of the Code of Criminal Procedure if so warranted by facts."

13. The Court finds it pertinent to refer to a judgment rendered by a Division Bench of this Court in *Surender Kumar Sood v. MCD*, wherein, it was observed that a remedy under the writ jurisdiction is to be invoked as a measure of last resort, only after the petitioner has exhausted all other available remedies. The relevant paragraph is referred below:

"4. It is a well settled principle of law of mandamus that before approaching the High Court for such a writ the petitioner should first approach the authority concerned for the relief he wants and only if that is not granted to him, then he can file a writ in the High Court. The party cannot directly come to the High Court for making such a grievance vide"

14. It is thus discernible from the aforesaid discussion that the concerned magistrate under Section 152 of BNSS, 2023 has the power to remove public nuisance in circumstances which warrant exercise of such powers. Therefore, in the instant case, the petitioner can duly approach the magistrate to ventilate his grievance rather than directly invoking writ jurisdiction under Article 226 of the Constitution of India.

15. Reserving that liberty in favour of the petitioner, the Court at this stage, is not inclined to pass any directions. Accordingly, the petition stands 2006 SCC OnLine Del 158 This is a digitally signed order.

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PURUSHAINDRA KUMAR KAURAV, J AUGUST 20, 2024/KG This is a digitally signed order.

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