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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 9199/2024**

ANIL BHASIN

.....Petitioner

Through: **Mr. Ankur Bhasin, Adv.**

versus

MUNICIPAL CORPORATION OF DELHI & ORS.

.....Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

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10.09.2024

1. The petitioner in the instant writ petition has prayed for the following reliefs:-

“(i) Issue a writ in the nature of a writ of mandamus or a writ in the nature of certiorari or a writ/direction of a similar nature directing the Respondent no. 1 & 2 to clear the illegal encroachments in the form of second hand cars/ resale cars/other cars parked, sofas and other furniture and hawkers on the sidewalk/pedestrian track at Road No. 51, take suo-motto cognizance of the illegal putting up of encroachments on public way/ pedestrian track on Road no. 51, Azadpur-Kewal Park, 110033 and to ensure such encroachments are not done in the future;

(ii) Issue a writ in the nature of a writ of mandamus or a writ in the nature of certiorari or a writ/direction of a similar nature directing the Respondent no. 1 & 2 to ensure that the sidewalks are properly cleaned alongwith drainage so as to avoid breeding of mosquitoes specially in view of the upcoming rainy season so as to avoid spread of plague, malaria & other deadly diseases owing to non cleaning of the drainage beneath the pedestrian track;

(iii) Issue a writ in the nature of a writ of mandamus or a writ in the nature of certiorari or a writ/direction of a similar nature directing the



Respondent no. 3 & 4 to maintain law and order situation in lieu of prayer so made in clause (i) & (ii) hereinabove, besides directing them to provide petitioner with a contact number of a police official/ensuring petitioner's security owing to apprehension of threat in the hands of such encroachers on the government land;

(iv) a writ in the nature of a writ of mandamus or a writ in the nature of certiorari or a writ/ direction of a similar nature against the respondents to have permitted encroachers despite being apprised of the Order passed by Hon'ble High Court of Delhi dated 25/08/2021 in W.P.(C) 8632/21 titled as "RAJAN VS NORTH DELHI MUNICIPAL CORPORATION & ORS";

(v) Award compensatory costs as well as costs of the litigation in favour of the petitioner and against the respondents, for the present compelling litigation, to the satisfaction of this Hon'ble Court"

2. The status report has been placed on record by the respondent-Corporation, which reads as under:-

"2: That the deponent is filing this short affidavit with the liberty to file a detailed affidavit if the necessity arises or as directed by this Hon'ble Court.

3. That further encroachment removal action taken on 24.07.2024 at round about Kewal Park Extension, Azadpur. During the encroachment removal action, removed the bamboos, old furniture & clear the Junk material. Photographs taken at the time of encroachment removal action are enclosed herewith as "Annexure A" Colly.

4. That further encroachment removal action was fixed for 26.07.2024 but due to heavy rain, no encroachment removal action was taken.

5. That the encroachment removal action was fixed on 01.08.2024 and removed old furniture & clear the Junk material and removed the temporary shed with the help of JCB. Photographs taken before & after encroachment removal action are enclosed herewith as "Annexure B" Colly. Further encroachment removal action is fixed for 06.08.2024."

3. Learned counsel appearing for the petitioner submits that he has placed on record the objection to the status report. According to him, the respondent-Corporation has failed to take any concrete action.

4. I have considered the submissions made by learned counsel appearing



for the parties and have also perused the record.

5. The Court is conscious of the nature of the relief prayed in the instant petition, which would require issuance of continuing mandamus. This Court in W.P.(C) 4206/2024 has taken a view that the exercise of continuing mandamus is not required unless the facts of the case so warrant. Following pertinent observations have been made in paragraph Nos.6 and 7 in the said order:-

“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.”

6. In the instant case, if the petitioner feels that there is an encroachment on the public way, pedestrian tract etc., the petitioner can very well approach the Special Task Force in accordance with law.

7. In the considered opinion of the Court, if the petitioner has any grievance which is allegedly leading to public nuisance, the appropriate recourse is to agitate the same before the concerned Executive Magistrate, as envisaged in the Bharatiya Nagarik Suraksha Sanhita, 2023 [“Sanhita”]. The Court takes note of the provisions enshrined in Chapter XI (B) and (C) of the Sanhita and finds that Sections 152 to 163 therein provide a mechanism as to how such a grievance can be redressed by the District Magistrate or by a Sub-Divisional Magistrate or any other Executive



Magistrate especially empowered in this behalf by the State Government.

8. A perusal of the Section 152 of the Sanhita 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 remedy is efficacious as the concerned Magistrate will have first hand information about the ground reality. He is capable to even personally inspect the site. The scope and extent of Section 152 of Sanhita can be understood from the following discussion in the case of ***Municipal Council, Ratlam v. Vardichan***¹, 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.”

9. This Court, vide order dated 20.08.2024 in W.P.(C.) 11400/2024 titled as ***Sh. Nilabh Sharma v. Municipal Corporation of Delhi***, wherein, the issue revolved around the causing of public nuisance due to placement of dustbins near the petitioner’s house, dismissed the petition while reserving the right in favour of the petitioner to avail the remedy under Section 152 of Sanhita. The relevant observations of the Court in the said case read as under:-

“9. In another case titled as Gobind Singh v. Shanti Sarup, which involved the magistrate directing the owner of the bakery to demolish his

¹ AIR 1980 SC 1622



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 Punjab, while dealing with a case where the prayer involved removal of garbage reinforced the position that the subdivisional 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:-

“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.

*12. The writ petition is accordingly disposed of with liberty to the petitioners to seek revival of the same, if need be.”
(emphasis supplied)*

*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.”

10. In view of the aforesaid, at this stage, the Court, instead of passing any positive directions against the respondents, disposes of this petition with liberty to the petitioners to approach the concerned Executive Magistrate.

11. Let the concerned Executive Magistrate deal with the grievance of the petitioner strictly in accordance with law and to pass appropriate orders.

12. In no case, the nature of the relief which is sought in the instant writ petition can be adjudicated by Writ Court in exercise of powers under Article 226 of the Constitution of India.

13. Accordingly, leaving that liberty in favour of the petitioner, at this stage, the instant petition stands disposed of.

PURUSHAINDR KUMAR KAURAV, J

SEPTEMBER 10, 2024/p