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

+ **W.P.(C) 3520/2024 & CM APPL 33925/2024**

SHUBHADA KHOSLA & ANR.

.....Petitioners

Through: Mr. Rajiv Khosla, Ms. Apoorva
Khosla, Ms. Sumeeta Sharma and Mr.
Rahul Khosla, Advs.

versus

MUNICIPAL CORPORATION OF DELHI & ORS.

.....Respondents

Through: Mr. Sanjeev Sabharwal, SC for
MCD
Mr. Ashish Kumar and Mr. Shailesh
Chandra Jha, Advs. for R-3
SI Mohit, P.S. Timarpur

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

ORDER

22.08.2024

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1. The grievance raised in the instant writ petition relates to maintenance and use of the ornamental park in a particular way.
2. Learned counsel who appears on behalf of the petitioners points out that the ornamental park is being used by the children as a playground area which is in violation of the respondent-Corporation's guidelines.
3. The respondent-Corporation has placed on record its brief Status Report and has stated that the park in question that is near flat no. 93 and 104, mall apartment, is not an ornamental park. The Status Report further



states that the park can be used by the children as play area/recreation area as well as by the residents of the mall apartment. According to the respondent-Corporation, there is no prohibition for using the park as play area/recreation area.

4. I have heard the learned counsel appearing for the parties and perused the record.

5. Once the park is open to all categories of people, the Court cannot restrict its usage to a particular use. In the considered opinion of the Court, if the petitioners have any grievance 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, [“BNSS”] which is the corresponding provision to Section 133 in the erstwhile Code of Criminal Procedure, 1973 [“CrPC”].

6. 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. 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.”

¹ (1980) 4 SCC 162.



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 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 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 read 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 timebound basis is justified in the circumstances. The nature of the judicial process is not purely adjudicatory nor is it functionally that of 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)

7. 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 BNSS, 2023. 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 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.”

8. Admittedly, in the present case, there is nothing on record to indicate that the petitioners have resorted to the said remedy for redressal of their



grievances. Moreover, no explanation has been offered by the petitioners as to why these available remedies are deemed inefficacious. In view of the aforesaid, the Court is unable to pass any mandatory directions to use the park in a particular way.

9. Leaving all rights and contentions open, at this stage, the Court leaves it open for the petitioners to take necessary recourse, in accordance with law.

10. With the aforesaid observations, the petition stands disposed of alongwith pending application.

PURUSHAINDR KUMAR KAURAV, J

AUGUST 22, 2024

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