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

+ W.P.(C) 2786/2019, CM APPLs. 12853/2019, 12854/2019,
9123/2020, 13802/2022, 46930/2023 & 46943/2023

SH. R.C. SHARMA

.....Petitioner

Through: Mr. G.A.V.Ravi Kumar and Mr. Niraj
Sharma, Advs.

versus

UNION OF INDIA AND ORS.

.....Respondents

Through: Mr. Nipun Sharma and Ms. Anjana
Gosain, Advs for R-1.
Mr. Anand Prakash, SC for MCD with
Ms. Varsha Arya, Adv for R-2.
Mr. Arun Mehta and Mr. Vinod
Kumar, Advs for R-6 & 8.
SI Ritu, PS Ashok Vihar.

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

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29.08.2024

1. The prayer clause in the instant writ petition, which seems to be not properly constituted and vague, indicates that the petitioner *inter alia* seeks damages on account of hardships faced by him.
2. However, upon perusal of the record, it is seen that the petitioner is essentially aggrieved by the alleged non-maintenance of the public park in question.
3. The Court has perused order dated 10.01.2024 passed by this Court, which reads as under:-

"1. Vide order dated 11.10.2021, in W.P.(C) 2786/2019, it was,
inter alia, directed as under:



CM. APPL. 35992/2021 (urgent hearing)

“ 1. Issue notice. Notice is accepted by learned counsel appearing for the respondents.

2. For the reasons stated in the application, application is allowed. Petition is taken up for consideration today.

W.P.(C) 2786/2019

1. The grievance of the petitioner is that the subject park at B-3 and B- 4, Ashok Vihar, Phase-II (also known as Bijli Wala park) is not being maintained properly and even the boundary wall of the park has withered away. He further submits that the residents, especially the elders, are not in a position to enjoy the benefits of the park.

2. This is disputed by learned counsel for the respondents.

3. However, without getting into the said controversy, it is directed that the officers of the North Delhi Municipal Corporation are directed to have the park inspected and file a status report with regard to the current status of the park, particularly, its vegetation as well as the boundary and construction, if any, made inside the park supported by photographs.

4. Further, the Corporation shall examine in case any restoration work is required, same shall be carried out before the next date of hearing.

5. Let the status report be filed before the next date of hearing.

6. List on 16.02.2022.”

2. A counter-affidavit has been filed on behalf of respondent no.1/MCD in CONT.CAS(C) 817/2023, wherein, it has been stated as under:

“1. The Petitioner has filed the captioned Petition in respect of the park situated at B-3 and B-4, Ashok Vihar, Phase-II, also known as Bijli Wala Park. The MCD Staff had visited the park and carried out the necessary repair and cleaning at the site. The inspection of the park was again conducted on 25.08.2023 and it was found that the boundary walls, gates, grills, pavements and walkway of the park is in satisfactory condition. The photographs in support of the aforementioned averments have been annexed herewith as ANNEXURE-A.

2. That it is most respectfully submitted the dilapidated gates and grills of the park have been repaired and reconstructed. The damaged benches have been removed from the park and one new bench has been installed and other benches would be installed in due course. The photographs in support of the



aforementioned averments have been annexed herewith as ANNEXURE-B.

3. That Municipal Corporation of Delhi in order to realize the goals of the Swachh Bharat Mission and to make areas under its jurisdiction garbage free, has been closing down many 'dhalao' in a time based and phased manner. Many of those have been converted to libraries, FCTS (fixed compactor transfer stations), MRF (Material Recovery Facility) spaces as banks for books, shoes and toys. 'Dhalaos' which have been closed are being converted into vibrant spaces such as libraries and book banks to promote education, especially for the underprivileged.

4. That with reference to the 'dhalao' at B-3 Block, Beriwalla Bagh (Ram Narayn Gupta Park) it is pertinent to note that the said 'dhalao' has been allotted to M/s Panchwati Social Welfare Society (Regd.) for establishing social activities like senior citizen entertainment and vocational center for entertainment and vocational center for children, women and disabled persons."

3. As such, it appears that the grievance made out in the writ petition filed on behalf of the petitioner stands taken care of and no further orders are required to be passed in the present petition i.e. W.P.(C) 2786/2019. 4. However, learned counsel for the petitioner submits that a copy of the aforesaid counter-affidavit has not been supplied to him. Let the same be supplied within a period of two days from today. 5. List in the category of 'supplementary matters' on 22.01.2024."

4. It is thus seen that the Court has recorded its satisfaction with respect to the stand taken by the respondent-Corporation and it was noted that no further orders are required to be passed in the present writ petition.

5. The petitioner, however, was directed to be supplied with a copy of the counter-affidavit.

6. Learned counsel appearing on behalf of the petitioner, while reading the rejoinder submissions, pointed out certain non-compliance and suggested some further steps to be taken by the respondent-Corporation.

7. The Court has given its thoughtful consideration to the nature of the controversy and has also considered the stand taken by the respondent-



Corporation.

8. In the instant writ petition, the substantial grievance raised by the petitioner stands satisfied. In absence of there being any further specific prayer, the Court cannot be expected to continue passing interim orders and to exercise the power of continuing mandamus.

9. Furthermore, the petitioner is well within his right to point out any further deficiencies or grievances to the respondent-Corporation and in case, the respondent-Corporation is unable to deal with the same, the petitioner has an equally efficacious remedy to approach the concerned Magistrate in terms of Section 152 of the Bharatiya Nagrik Suraksha Sanhita, 2023.

10. While dealing with the powers of the Executive Magistrate under Section 152 of the BNSS 2023, this Court, in W.P.(C) 11400/2024 has held 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 Vipin 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.”

11. In view of the aforesaid, at this stage, no further directions are required to be passed. However, liberty is reserved in favour of the petitioner either to approach the respondent-Corporation or, in case his grievance is not satisfied, to approach the concerned Magistrate.

12. Accordingly, the instant writ petition along with pending applications stands disposed of.

PURUSHAINDR KUMAR KAURAV, J

AUGUST 29, 2024/MJ