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

+ **W.P.(C) 12445/2024**

SH ROSHAN KUMAR AND OTHERS

.....Petitioner

Through: Mr. Vijay Kumar, Mr. Anuj Kumar
Garg, Advs.

versus

GOVT OF NCT OF DELHI AND OTHERS

.....Respondent

Through: Ms. Shilpa Ohri, ASC.
Mr. Mukesh Gautam, Sr. P.C. Mr.
Rishav Dubey, Advs for R-2 & 3.
Mr. Mohit Bhardwaj, Adv for R-4.
Ms. Latika Malhotra, Adv.

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

ORDER

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05.09.2024

CM APPL. 51813/2024(Ex.)

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

W.P.(C) 12445/2024 & CM APP 51814/2024

1. The nature of the grievance which is raised in the instant writ petition relates to removal and demolition of the gates in question, which can be agitated before the concerned Executive Magistrate in terms of provisions of Section 152 of Bharatiya Nagrik Suraksha Sanhita, 2023 [“BNSS, 2023”]
2. 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.”

3. 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 the said remedy is inefficacious.
4. In view of the aforesaid, reserving that liberty in favour of the petitioner, the Court, at this stage, is not inclined to pass any directions.
5. Accordingly, the petition stands disposed of alongwith all pending applications.

PURUSHAINdra KUMAR KAURAV, J

SEPTEMBER 5, 2024/KG