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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 12486/2024 & CM APPL 51919/2024**
METRO BAZAR WELFARE ASSOCIATIONPetitioner

Through: Mr. Rajendra Kr. and Mr. Ashutosh
Saini, Advs.

versus

UNION OF INDIA & ORS.Respondents
Through: Mr. Rajendra Kumar, CGSC with Ms.
Aishwarya Chhabra, G.P. for UOI
Mr. Pushkar Sood, Mr. Satya
Pushkar Singh and Ms. Monika
Saini, Advs. for R-2
Mr. Bahuli Sharma, ASC for R-4.

CORAM:
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER
06.09.2024

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1. The prayer sought in the instant writ petition reads as under:-

"i) Issue a writ of mandamus or any other writ, order or directions whereby directing the respondent no.3 to remove the wall in front of the two Main Gates marked A and B of the Metro Bazar, Nangloi, Delhi-41 as reflected in Annexure-C (colly) and to clear the road from the two Main Gates of the Metro Bazar, which have been illegally closed by the respondent no. 3 by raising illegal wall, to the main Rohtak Road;

ii) Issue a writ, orders or directions in the shape of writ of Mandamus whereby directing the respondent no.4, 5 and 6 to remove the encroachment (Patri Bazar) along the main Rohtak Road below the entire Nangloi Metro Station resulting in a great traffic chaos and inconvenience to the road peddlers and great hindrance for customers coming to Metro Bazar, Nangloi, Delhi- 41 from Main Rohtak Raod, Nangloi, Delhi;



iii) Issue a writ, orders or directions in the shape of writ of Mandamus whereby directing the respondent no. 3 to stop the construction of charging station in parking of Nangloi Metro Station as reflected in Annexure-C (colly);

iv) Any other writ, order or directions as this Hon'ble court may deem fit and proper under the facts and circumstances of the present case be granted in favour of the petitioner.”

2. Upon a perusal of the prayer in the instant writ petition, it is seen that the relief sought by the petitioner in seeking directions against respondent no.3 to remove the wall in front of the two main gates marked as (A) and (B) of the Metro Bazar, Nangloi, Delhi-41, as shown in *Annexure-C (colly)* and to clear the road from the two main gates of the Metro Bazar, can be agitated before and addressed by the concerned Executive Magistrate in terms of Section 152 of the Bharatiya Nagarik Suraksha Sanhita, 2023 [“BNSS”].

3. 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 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.”*



11. 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 ineffectual.

12. 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 petitioner to approach the concerned jurisdictional District Magistrate for redressal of its grievance at first place.

13. Let the concerned jurisdictional District Magistrate deal with the grievance of the petitioner strictly in accordance with law and to pass appropriate orders.”

4. In case the petitioner is of the opinion that the aforesaid remedy is not efficacious, he is at liberty to seek recourse by way of civil proceedings in accordance with law.

5. In light of the facts of the instant case, the Court is of the considered opinion that adjudication of the controversy would require the parties to adduce evidence, both oral and documentary, to substantiate their claims. The Court ordinarily refrains from doing so under writ jurisdiction in view of the position taken earlier in order dated 20.08.2024 in W.P.(C) 10649 of 2015 in the matter of **Sardar Singh v. The East Delhi Municipal Corporation & Anr.** The relevant extract of the said decision is culled out for reference:-

“5. Having heard the arguments advanced by the learned counsel for the petitioners, the Court is of the considered opinion that the petitioner has to resort to the appropriate civil remedy. The remedy under Article 226 of the Constitution of India cannot be a substitute to the proceedings under Civil Suit.

6. The question of whether the petitioners are entitled to possession of the land in question must be determined based on various facts and circumstances, which can only be properly assessed when the parties are given an appropriate opportunity to present oral and documentary evidence. Granting the relief sought would effectively amount to decreeing a suit for possession, a remedy typically not entertained within writ



jurisdiction. The Court, therefore, leaves it open to the petitioner to pursue the appropriate remedy under civil law.

7. The stand adopted by this Court is fortified in view of the law laid down by the Supreme Court in **Sohan Lal v. Union of India**, where the Court held that it does not adjudicate on the merits of rival claims to property title under writ jurisdiction. The relevant portion is extracted hereunder: -

“5. We do not propose to enquire into the merits of the rival claims of title to the property in dispute set up by the appellant and Jagan Nath. If we were to do so, we would be entering into a field of investigation which is more appropriate for a civil court in a properly constituted suit to do rather than for a Court exercising the prerogative of issuing writs. There are questions of fact and law which are in dispute requiring determination before the respective claims of the parties to this appeal can be decided. Before the property in dispute can be restored to Jagan Nath it will be necessary to declare that he had title in that property and was entitled to recover possession of it. This would in effect amount to passing a decree in his favour. In the circumstances to be mentioned hereafter, it is a matter for serious consideration whether in proceedings under Article 226 of the Constitution such a declaration ought to be made and restoration of the property to Jagan Nath be ordered.”

8. Further reliance is placed on **Sri Tirumala Venkateswara Timber & Bamboo Firm v. CTO**, wherein, the Supreme Court has held that even in a case of mixed questions of fact and law, the appropriate forum has to determine such mixed questions and the same cannot be determined under Article 226 of the Constitution of India. The relevant paragraph of the said decision reads as under:-

“It is manifest that the question as to whether the transactions in the present case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the appellant might be able to place before the appropriate authority. The question is not one which can properly be determined in an application for a writ under Article 226 of the Constitution.”

9. Further, the Supreme Court in **P.R. Murlidharan v. Swami Dharmananda Theertha Padar**, has held that a writ proceeding cannot be a substitute for a civil suit. The relevant paragraph reads as under:-



“12...In this view of the matter, we are of the opinion that such disputed questions could not have been gone into by the High Court in a writ proceeding.

13. Furthermore, the jurisdiction of the civil court is wide and plenary. In a case of this nature, a writ proceeding cannot be a substitute for a civil suit.”

6. Reserving the aforesaid liberty in favour of the petitioner to seek appropriate recourse in accordance with law, the instant writ petition stands disposed of alongwith pending application. All rights and contentions are left open.

PURUSHAINDRA KUMAR KAURAV, J.

SEPTEMBER 6, 2024

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