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

+ W.P.(C) 13173/2024, CM APPL. 55054/2024

MANOJ KUMAR

.....Petitioner

Through: Mr. Ajay Kumar Rai, Mr. Rohitash
Kumar, Mr. Amod, Advs.

versus

THE COMMISSIONER MUNICIPAL CORPORATION OF DELHI &
ORS.Respondent

Through: Mr. Arjun Mahajan, Ms. Neha Rai,
Advs.
Mr. Gaganmeet Singh Sachdeva, Adv
for DDA.
Ms. Uma Prasuna Bachv, SPC for R-3 &
4.

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

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19.09.2024

1. The petitioner in the instant writ petition seeks for directions for closure of alleged unauthorised weekly Tuesday market organised at the street connecting the two roads from Mehrauli - Badarpur Road, situated between F-1 and F-2 Blocks of Sangam Vihar.
2. Learned counsel for the petitioner submits that the same is being organised without due sanction from the MCD and in connivance/collusion of the local market mafia, MCD, Police Officials etc.
3. The Court takes note of the order dated 09.07.2024 passed by this Court in W.P.(C) No.8375/2019 titled as **Mr. Mekhtiyar Singh v. North Delhi**



Municipal Corporation & Anr., wherein, while considering an almost similar controversy, the Court observed that unless a conventional practice is clearly found to be against fundamental rights or in violation of statutory provisions, any interference by the Writ Court, without taking into consideration the stand of all the relevant stakeholders, may not be warranted.

4. Paragraph nos. 4 & 5 of the aforesaid order read as under:-

"4. In the instant case, the market which is stated to be organized on Saturday and Monday is consistently being held for last several years, as stated by the respondent-Corporation. The conventional practice being in uninterrupted operation for several years should not be readily interfered with in writ jurisdiction, unless the same is clearly found to be against fundamental rights or in violation of statutory provisions. Any interference, if at all is required to be made, the same has to be done only when all the stakeholders are party to the dispute.

5. It is thus seen that under the facts of the present case, large number of people are likely to be adversely affected by any order, which may be passed by the Court. Hence, at the instance of the petitioner, who has not been able to establish a case of issuance of such order, no writ can be issued. The Court, therefore, refrains from entertaining this petition and instead grants liberty to the petitioner to take up the issue with the official respondent(s)."

5. Having perused the nature of the grievance raised in the instant writ petition, the Court is of the considered opinion that if the petitioner has any grievance which allegedly leads to any public nuisance, the appropriate recourse is to agitate the same before the concerned Executive Magistrate, as envisaged in the Bharatiya Nagarik Suraksha Sanhita, 2023 [*hereinafter* "Sanhita"]. Provisions enshrined in Chapter XI (B) and (C) of the Sanhita envisage that Sections 152 to 163 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.

6. In W.P.(C.) 11400/2024, *vide* order dated 20.08.2024, titled as **Sh.**



Nilabh Sharma v. Municipal Corporation of Delhi, wherein, the issue revolved around the public nuisance caused 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 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.”

7. Reserving the liberty in favour of the petitioner to approach the concerned Executive Magistrate, at this stage, the Court is not inclined to entertain the instant writ petition. Needless to state that if the petitioner takes the aforesaid recourse, let the same be dealt with, strictly in accordance with law.

8. With the aforesaid observation, the petition stands disposed of alongwith the pending application.

PURUSHAINDRA KUMAR KAURAV, J

SEPTEMBER 19, 2024/KG