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

% *Date of decision: 2nd August, 2024*

+ **CRL.M.C. 5947/2024, CRL.M.A. 22731/2024 (stay)**

DELHI CANTONMENT BOARDPetitioner

Through: Mr. Anurag Ahluwalia, Mr. Ankur Mishra, Advocates.

versus

DEEN DAYAL TANWARRespondent

Through: Mr. Rakesh Sehrawat, Mr. Manish Sharma, Mr. Alkesh Tanwar and Mr. Ritesh Tanwar, Advocates.

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+ **CRL.M.C. 5948/2024, CRL.M.A. 22734/2024 (stay)**

DELHI CANTONMENT BOARDPetitioner

Through: Mr. Anurag Ahluwalia, Mr. Ankur Mishra, Advocates.

versus

SH DEEN DAYAL TANWARRespondent

Through: Mr. Rakesh Sehrawat, Mr. Manish Sharma, Mr. Alkesh Tanwar and Mr. Ritesh Tanwar, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)



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**CRL.M.A.22732/2024 (Exemption), CRL.M.A.22733/2024 (Exemption)
in CRL.M.C. 5947/2024
CRL.M.A.22735/2024 (Exemption), CRL.M.A.22736/2024 (Exemption)
in CRL.M.C. 5948/2024**

1. Exemption allowed, subject to all just exceptions.
2. The applications stand disposed of.

**CRL.M.C. 5947/2024 (under Section 528 of B.N.S.S. filed by the
petitioner against the impugned Order dated 25.07.2024 passed by
learned Judicial Magistrate, Dwarka Courts, Delhi & CRL.M.C.
5948/2024**

3. The present Petitions under Section 528 of the Bhartiya Nagarik Suraksha Sanhita, 2023 have been filed on behalf of the petitioner to challenge the Order dated 25.07.2024 *vide* which the Application dated 11.07.2024 for appointment and summoning of an expert witness to determine the age of construction carried out on the fourth floor and fifth floor of the subject property, has been dismissed.
4. It is submitted in these Petitions that a Complaint Case under Section 247 of the Cantonment Act, 2006, had been filed against the Respondent in regard to the unauthorized construction activities at the suit site bearing No. CB-144, Village Naraina, Delhi Cantt-110010, without seeking prior permission/sanction as required under Section 235/236 of the Cantonment Act, 2006, on the basis of the Report filed by the concerned Junior Engineer (Civil) of the petitioner.
5. The respondent appeared before the trial court and a copy of the complaint was supplied to him on 10.12.2015. Charge/Notice was framed on 03.03.2016, after which the petitioner produced two witnesses, namely, CW-



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1 Sh. Ram Sharan, J.E. Civil Delhi Cantt. Board, and CW-2, Mr. Sher Singh, after which the evidence was closed by the complainant on 02.12.2016.

6. The respondent in their defence, sought multiple adjournments and it has been finally concluded on 27.02.2023. The respondent successively filed eight Applications under Section 311 of CrPC for summoning of various defence witnesses and sometimes for recalling the witnesses. The evidence finally stood closed on 27.02.2023 and the matter now is at the stage of Final Arguments since 15.03.2023.

7. The petitioner thereafter moved an Application **under Section 311 of CrPC** for recalling CW1, Mr. Ram Sharan, Ex-JE (Civil) and CW-2 Sher Singh and one Sh. Ajay Gupta, JE (Civil)/AR of the Board being JE of the area. The Application was disallowed *vide* Order dated 21.03.2023. The Order dated 21.03.2023 was challenged by the Petitioner in Criminal Misc. No. 4653/2023, before this Court, which was allowed *vide* Order dated 29.04.2024. The witness, Mr. Ram Sharan, was duly examined and cross-examined by both the parties.

8. It is now submitted in the Application that according to the petitioner, the unauthorized construction was carried out on the fourth and fifth floor of the property in the year 2014. However, the respondent is claiming the construction to have been carried out in the year 2001-2002. Therefore, the present application under Section 311 of Cr.PC has been moved for appointing and summoning an Expert witness to determine the age of the construction carried out on the fourth and fifth floor of the subject property. The petitioner undertakes to meet all the expenses of the witness.

9. The Application was dismissed by the learned Judicial Magistrate,



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First Class *vide* impugned Order dated 25.07.2024.

10. The impugned Order is challenged on the ground that the respondent has denied having raised the unauthorized construction in the year 2014-2015 but it is alleging to have been completed in the year 2001-2002. The defence of the respondent rests on the construction being old and not of the year 2014. Therefore, the date of raising the construction becomes material for the adjudication of the case, to ascertain the veracity of the claim of the Respondent, about the age of the construction. It has become necessary to examine an independent witness for the purpose. The recent advancement in Technology has made it possible for the actual determination of the construction in a scientific manner. Therefore, the petitioner deserves one opportunity to falsify the defence of the respondent/accused.

11. Reliance has been placed on the case of State of Haryana vs. Ram Maheer & Ors., (2016) 8 SCC 762. After making reference to Natasha Singh vs. Central Bureau of Investigation, (2013) 5 SCC 741; Rajender Prasad vs. Narcotic Cell, 1999 (3) SCR 818. Reliance has also been placed on the case of Best Bakery.

12. It is, therefore, submitted that the impugned Order dated 25.07.2024 be set aside and Expert witnesses be appointed by the Court and be summoned, as has been requested by the petitioner.

13. **Learned counsel for the respondent** who appeared on advance Notice, has vehemently contested the present Petition. It is pointed out by him that the earlier Application under Section 311 CrPC filed on behalf of the petitioner, after the matter was listed for final arguments, has been allowed by this Court *vide* Order dated 29.04.2024. No such request for



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adducing or examination of additional witness was mentioned therein. The present application is nothing but an abuse of the process of law and has been rightly rejected by the learned Metropolitan Magistrate.

14. Submissions heard.

15. At the outset, there is no quarrel with the settled proposition as has been held in the case of Manju Devi vs. State of Rajasthan & Another, (2019) 6 SCC Cases 203 and Rajendra Prasad vs. Narcotic Cell, (1999) 6 SCC 110, to highlight the significance and importance of Section 311 CrPC, that Section 311 CrPC, has been enacted and can be filed at any stage of enquiry, trial or proceedings or any witness can be summoned or recalled, where it is essential to arrive at just decision of the case. It was held that the exercise of power under Section 311 CrPC should be resorted to only with the sole object of finding out the truth or obtaining actual proof thereof which could lead to just and correct decision of the case. This power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in serious prejudice to the accused, resulting in miscarriage of justice. The only circumstance circumscribing this power is where an endeavor is made to fill in the lacuna of the case under the garb of invoking the jurisdiction under Section 311 CrPC.

16. In the light of the above case law, the proposition of law is not under challenge and the petitioner's filing of an application even at the stage of final arguments can be entertained. However, what is necessary, is to consider whether there is any merit in the application and whether the witness as sought by the petitioner to be examined, is necessary for the just decision of the case.



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17. It is the case of the petitioner itself that the unauthorized construction allegedly carried out by the respondent on fourth and fifth floor, was booked and is sealed, after which the Demolition Orders were also passed, though not executed till date because of the Administrative Orders. However, the said Order of sealing and demolition, has not been challenged till date and are final.

18. The Criminal Complaint came to be filed in the year 2014 and the evidence of the petitioner was concluded in the year 2016. Since then till 2023, the Respondent has taken its own time to record the evidence in support of his defence that the construction pertains to the year 2001-2002.

19. However, the petitioner's contention is absolutely untenable for the simple reason that the earlier Application under Section 311 of Cr.P.C. filed on behalf of the petitioner in the beginning of this year 2024 was allowed in which no reference was made for examination of this Expert Witness. Successive Applications under Section 311 of Cr.P.C. are nothing but an abuse of process of the Court in so much as that the petition was filed way back in 2015 and the defence of the respondents that the alleged construction has been raised in the year 2001-2002 was well within the knowledge of the petitioner, since he had concluded its evidence way back in December, 2016 after which about eight years have been taken by the respondent to conclude his evidence in February, 2023. In the last about nine years, neither has the petitioner got the construction examined from an expert nor is there any document placed on record by the petitioner in support thereof. It is not a new fact which has come to the knowledge of the petitioner for which an additional evidence is now sought to be led after so many years. It is clearly an afterthought without any basis.



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20. The petitioner *herein* now seeks an opportunity to examine an Expert to corroborate and prove that construction is not of 2001-2002 as has been claimed by the respondent. The onus rests exclusively on the respondent to establish that the construction was carried out in the year 2001-2002.

21. Moreover, in considering the totality of the circumstances, the Application has been rightly dismissed by the learned Metropolitan Magistrate. There is no merit in the present Petitions, which are hereby dismissed.

22. The Petitions are disposed of accordingly. The pending applications also stand disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 2, 2024/RS