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

+ CRL.M.C. 5260/2024 & CRL.M.A. 20106/2024, CRL.M.A. 20108/2024

AEIFORIA CONSTRUCTIONS PVT. LTD. & ANR.Petitioners
Through: Mr. Mrinal Kumar Sharma and Mr.
Gyanesh Bhardwaj, Advocates.

versus

CONTINENTAL CARBON INDIA PVT. LTD. & ANR.

.....Respondents
Through: Mr. Tejas Karia, Mr. Prakhar Deep,
Mr. Nishant Doshi and Mr. Nitin
Sharma, Advocates with Ms. Shally
Goyal, authorised representative of
CC IPL.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

% **12.07.2024**

CRL.M.A. 20107/2024 (exemption)

Exemption granted, subject to just exceptions.

Let requisite compliances be made within 01 week.

The application stands disposed of.

CRL.M.A. 20108/2024 (condonation of delay)

By way of the present application filed under section 428 of the Code of Criminal Procedure 1973 ('Cr.P.C. '), the petitioners/ applicants seek condonation of 47 days' delay in *re-filing* the present petition.



2. For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed.
3. Delay in *re-filing* the petition is condoned.
4. The petition is taken on Board.
5. The application stands disposed-of.

CRL.M.C. 5260/2024

6. By way of the present petition filed under section 482 Cr.P.C., the petitioners seek quashing of summoning order dated 29.04.2023 passed by the learned Metropolitan Magistrate (NI Act), Patiala House Courts, New Delhi ('summoning order') and notice dated 31.08.2023 framed under section 251 Cr.P.C. arising from a complaint bearing No. 9670/2022 under section 138 of the Negotiable Instruments Act, 1881 ('NI Act').
7. Mr. Mrinal Kumar Sharma, learned counsel appearing for the petitioners submits, that on a bare reading of the summoning order, it is seen that the order has come to be passed on a mechanical basis, without any application of mind and without any reasons having been recorded for issuance of summons to the parties.
8. Mr. Sharma submits, that subsequently, notice under section 251 Cr.P.C has also been framed by the learned Magistrate purely mechanically, and the petitioners are being put through a trial. Counsel further submits, that the petitioners' defence is that the cheque had been issued in terms of a Security Bond dated 09.04.2021, clause 5 whereof had laid down certain pre-conditions before presentment of the cheque for encashment, including the requirement of prior intimation to the petitioner. It is pointed-out however, that none of this has even been



referred-to or discussed by the learned Magistrate before issuance of summons.

9. Though there is evident delay in the filing of the present petition challenging summoning order passed on 29.04.2023, this court is constrained to observe the perfunctory, casual and routine manner in which the summoning order has come to be passed. It is noticed that the summoning order does not carry even a passing reference to *any specifics whatsoever* relating to the cheque in question; the order does not mention the cheque number, nor the date on the cheque, nor the name of the bank on which it was drawn, nor any particulars of the cheque-return memo, such as the date on such memo etc. The summoning order also *does not carry any reference whatsoever* to any notice having been issued by the complainant under section 138 N.I. Act; nor any observation as to whether such notice was at all served upon the petitioners; nor to any proof of service of such notice having been placed on record by the complainant; nor any word on whether the petitioners responded to that notice, etc. Absent any reference to even the bare particulars relating to the cheque itself, needless to add that the summoning order does not carry any reference whatsoever to the transaction under which the subject cheque came to be issued, even as per the complainant's allegations.
10. It would appear therefore, that at least on a first blush, the summoning order proceeds on a 'template' which the court has used, with only some generalised observations in the opening paras as to the validity of the Board Resolution in favour of the authorised representative of the complainant company.



11. In view of the above of the matter, issue notice.
12. Mr. Tejas Karia, learned counsel appears for respondent No.1 on advance copy; accepts notice; and seeks time to file counter-affidavit.
13. Since the present matter arises from a private complaint, the State has no role in the matter; and accordingly respondent No. 2/State is deleted from the array of party-respondents. Amended memo of parties be filed within one week.
14. Mr. Karia submits, that in view of the statutory assumption that arises upon issuance of a negotiable instruments under sections 118 and 139 of the NI Act, the learned Magistrate was not required to discuss the evidence or the defence in the summoning order; and was not required to give any reasons before issuance of summons.
15. Mr. Karia has also drawn attention to the subsequent conduct of the petitioners, namely that they appeared in the proceedings; were admitted to bail; and even sought to cross-examine the complainant; which was allowed by the learned Magistrate; but thereafter they have been delaying the matter leading to the imposition of costs by the learned Magistrate *vide* order dated 07.03.2024.
16. Counsel submits, that other things apart, the present petition ought not to be entertained, since it is an abuse of process of this court.
17. At this stage what prevails with this court however, is the following :
 - 17.1. In its decision in ***Pepsi Foods Ltd. and Another vs Special Judicial Magistrate & Others.***¹, the Supreme Court has held that summoning of an accused in a criminal case is a serious

¹ (1998) 5 SCC 749



matter and that a summoning order must *reflect* application of mind and reasoning, before a court decides to issue summons to a person and converts him into an *accused* in a criminal proceedings. Para 28 of *Pepsi Foods* (supra) reads thus :

*“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must **reflect that he has applied his mind to the facts of the case** and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”*

(emphasis supplied)

- 17.2. Though proceedings in a case under section 138 NI Act are more in the nature of summary proceedings, this court is of the view that the mandate of the Supreme Court in *Pepsi Foods* (supra) that before issuing summons in a criminal proceedings, a court must apply its mind to the material on record, and that such application of mind and the reasoning based on which a person is sought to be summonsed *must be reflected in the*



summoning order, would apply with equal force even to a proceedings under section 138 NI Act. After all, even in a proceedings under section 138 NI Act, once summons are issued, a person is turned into an *accused* who is required to face *trial* in a criminal court.

- 17.3. As observed above, the summoning order in the present case *does not disclose any specifics or particulars whatsoever* in relation to the case at hand, so much so that even the date or number of the dishonoured cheque, the bank upon which it was drawn, the date of the cheque return memo, the particulars of the mandatory statutory notice required under section 138 NI Act, or the service of such notice upon the petitioners, *are nowhere referred to or mentioned* in the summoning order. It may be observed that the territorial jurisdiction of the learned Magistrate to even entertain the complaint would depend on such specifics and particulars. However, the learned Magistrate makes no reference to any of the foregoing matters.
- 17.4. The mere rote recitation in the impugned order that “... .. *There is sufficient material before this Court to proceed against the accused. I hereby take cognizance of the offence under section 138 of the NI Act*” does not in the least *reflect* application of mind by the learned Magistrate. In the opinion of this court, in *Pepsi Foods Ltd.* (supra), the Supreme Court has advisedly used the word ‘*reflect*’ in the context of ‘*application of mind*’ by the court, thereby emphasizing that not only should there be application of mind before issuance of



summons, the application of mind must *reflect* or *show* on a reading of the summoning order; and the appellate/revisional court should not be left to *imagine* what must have gone through the mind of the learned Magistrate who has issued summons.

- 17.5. This court is inclined to think that the summoning order of the kind impugned in the present case is based on a 'template order' that could be adopted to issue summons to *any* person in *any* complaint filed under section 138 NI Act, without any application of mind to the facts of a given case.
18. Let counter affidavit be filed within 03 weeks; response/rejoinder thereto, if any, be filed within 02 weeks thereafter; with copies to the opposing counsel.
19. In the meantime, as a sequitur to the above discussion, further proceedings in criminal appeal CC NI Act No. 9670/2022 pending before the learned Metropolitan Magistrate (NI Act), Patiala House Courts, New Delhi shall remain stayed, till the next date of hearing.
20. This court is of the view that the present case exemplifies a widely prevailing practice that needs to be corrected, namely the practice of issuing summons in criminal complaints under section 138 of the NI Act in a perfunctory and routine manner, without application of mind.
21. By reason of the above, it is necessary to lay down certain pre-requisites that a Magistrate must address and *that must be reflected* in summoning orders in cases under section 138 NI Act, so as to ensure that summoning orders are not issued mechanically; and that they



contain at least a brief discussion on the most basic but essential ingredients of the offence under section 138 of the NI Act.

22. In view of the above, counsel for the parties are directed to file brief synopses of their respective submissions, alongwith a list of judicial precedents they seek to rely upon, not exceeding 03 pages; with copies to the opposing counsel.
23. The matter be treated as 'part-heard'.
24. Re-notify on 20th August 2024.

ANUP JAIRAM BHAMBHANI, J

JULY 12, 2024/ak