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

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Date of Decision: 25.02.2015

% **TR.P.(CRL.) 11/2015**

NAVEEN MALHOTRA

..... Petitioner

Through: Mr. Dayan Krishnan, Senior Advocate along with Mr. O.P. Gulabani & Ms. Swati Goswami, Advocates.

versus

STATE (GOVT OF NCT OF DELHI) & ANR Respondents

Through: Mr. Lovkesh Sawhney, APP along with SI Vijender, PS-S.J.Enclave for the respondent No.1/State.
Mr. Rajan Chawla, Advocate for respondent No.2.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

VIPIN SANGHI, J. (OPEN COURT)

Crl. M.A. No.2807/2015

1. Exemption allowed subject to all just exceptions.
2. The application stands disposed of.

TR.P.(CRL.) 11/2015 and Crl. M.A. No.2806/2015

3. This petition has been preferred under Section 407 Cr.P.C. to seek transfer of the Complaint Case Nos.818, 819, 820, 821, 822, 827, 828 &

829/2013, all under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) pending trial in the Court of Ms. Deepti Devesh, learned M.M., Karkardooma Courts, Delhi, titled “*Gulshan Sethi Vs. Naveen Malhotra*”, to the Court of Ms. Purva Sareen, Learned M.M., South, Saket, where C.C. No.54/1/2013 (subsequently converted to First Information Report (FIR) No.485/2014, Police Station – Safdarjung Enclave, New Delhi) titled *Naveen Malhotra Vs. Gulshan Sethi & Ors.*, is pending.

4. The facts in brief are that the aforesaid complaint cases under Section 138 of the NI Act have been preferred by Gulshan Sethi against the petitioner herein as the accused in respect of several cheques allegedly issued by the petitioner, which have been dishonoured upon presentation. The petitioner has also preferred a complaint under Section 200 read with Section 156(3) Cr.P.C., which is presently pending in the Court of Ms. Purva Sareen, learned M.M., South, Saket, New Delhi. The learned Magistrate directed registration of FIR, which has been registered as FIR No.485/2014. The investigation is in progress and is being monitored by the learned Magistrate. However, no final report has been filed, and cognizance has not yet been taken. The accused, who is Gulshan Sethi, has not yet been summoned. The substance of the said case preferred by the petitioner is that the cheques – which have been dishonoured upon presentation, were extorted from the petitioner by the respondent.

5. The submission of Mr. Dayan Krishnan, learned senior counsel for the petitioner, in support of this petition is premised on two counts. Firstly, he submits that in view of the judgment of the Supreme Court in *State of M.P. Vs. Mishrilal (Dead) & Others*, (2003) 9 SCC 426, the correct course to

adopt would be to direct that both the cases are tried by the same Magistrate simultaneously.

6. He further submits that in view of the decision of the Supreme Court in ***Dashrath Rupsingh Rathod Vs. State of Maharashtra & Another***, (2014) 9 SCC 129, particularly in view of the observation made in paragraph 22 thereof, the complaint cases preferred by the respondent Gulshan Sethi should be transferred to the Court of a competent Magistrate at Saket Courts since the bank of the petitioner accused, wherefrom the cheques were dishonoured, is within the jurisdiction of the said Court.

7. Mr. Krishnan has referred to and relied upon several other decisions which I do not consider necessary to take note of as they are on the same aspects as aforesaid.

8. So far as the complaint preferred by the petitioner is concerned, no final report has been filed by the Police as yet. The Court is yet to take cognizance of the matter. The accused in the said case, i.e. Gulshan Sethi has not yet been summoned. Therefore, merely filing of the said complaint case by the petitioner cannot be a reason to transfer the complaint cases preferred by the respondent Gulshan Sethi under Section 138 of the NI Act to the Court of Ms. Purva Sareen, learned M.M., South, Saket. The situation may have been different, had cognizance been taken and summons issued to the respondent in the said complaint of the petitioner.

9. So far as the argument founded upon the decision in ***Dashrath Rupsingh Rathod*** (supra) is concerned, it needs to be noted that as early as on 05.05.2014, the application of the accused under Section 145(2) of the NI

Act had been allowed in the above complaint cases under Section 138 of NI Act. The complainant made a statement through his counsel that he would adopt his pre-summoning affidavit as the post-summoning affidavit. Accordingly, the learned Magistrate directed that the case would be tried as a summons trial. The matter was put up for the complainant's evidence on 27.06.2014 & 28.06.2014.

10. In ***Dashrath Rupsingh Rathod*** (supra), the Supreme Court observed in paragraph 22 as follows:

*“22. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e. applicability to Complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged accused/respondents who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable consideration we think it expedient to direct that only those cases where, **post the summoning and appearance of the alleged Accused, the recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that place.** To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. **To obviate and eradicate any legal complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have been transferred by us***

from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All other Complaints (obviously including those where the accused/respondent has not been properly served) shall be returned to the Complainant for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred.” (emphasis supplied)

11. The submission of Mr. Krishnan is that the stage of recording of evidence, as envisaged in Section 145(2) of the NI Act, has not been reached. He submits that the cross-examination of the complainant's witness has not commenced. Merely because the application under Section 145(2) of the NI Act had been allowed in May 2014, the said complaint cases under Section 138 of the NI Act cannot be directed to be tried by the learned M.M. at Karkardooma Courts.

12. In this regard, he has placed reliance on the judgment of the Supreme Court in **Radhey Shyam Garg Vs. Naresh Kumar Gupta**, (2009) 13 SCC 201, and in particular on paragraph 15 of this decision, which reads as follows:

“15. Examination in terms of the provisions of the Indian Evidence Act envisages examination in chief, cross-examination and re-examination, as would appear from Sections 137 and 138 thereof. A person whose evidence has been taken by way of an examination in chief by way of affidavit, keeping in view the statutory scheme noticed both in the Code of Civil Procedure as also in the Code of Criminal Procedure, there cannot be any doubt whatsoever that a person intends to summon a witness who had filed his affidavit would be only for the purpose of his cross-examination. It is, however,

possible that a party examining his own witnesses including the complainant may not affirm an affidavit or would like to examine himself in court. Sub-section (2) of Section 145 as also sub-section (2) of Section 296 of the Code of Criminal Procedure, in our opinion, should be interpreted in that manner.” (emphasis supplied)

13. In my view, paragraph 15, as extracted above, in fact, goes against the submission of the petitioner since the examination in terms of the provisions of the Evidence Act envisages examination-in-chief, cross-examination and re-examination. Since in the present complaint cases under Section 138 of the NI Act, the stage of Section 145(2) had reached even before the decision of the Supreme Court in ***Dashrath Rupsingh Rathod*** (supra), merely because the cross-examination did not take place, the said complaint cases are not liable to be transferred from the Court where they are presently being tried.

14. Accordingly, I find no merit in this petition and dismiss the same.

VIPIN SANGHI, J

FEBRUARY 25, 2015

B.S. Rohella