

M/S HARMON ELECTRONICS (P) LTD. & ANR. -VS- M/A  
NATIONAL PANASONIC INDIA LTD., A.I.R. 2009 S.C. 1168-

- A CRITIQUE

By

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## 1. INTRODUCTION

The Judgment of the Supreme Court dated 12.12.2008 named in the title of this essay referred hereinafter as HARMON sets down in para 2 thereof the point for consideration as the question of territorial jurisdiction of a Court to try an offence under Section 138 of the Negotiable Instruments Act 1881 (N.I. Act hereinafter). After referring to the facts, the submissions of learned counsels and two previous decisions of the Supreme Court HARMON pinpoints the core question at the end of para 13 which reads thus :

“The only question therefore, which arises for consideration is that as to whether sending of notice from Delhi itself would give rise to a cause of action for taking cognizance under the Negotiable Instruments Act.”

From para 14 onwards in the Judgment a load of case law has been considered and at para 28 the answer to the question posed earlier in the Judgment is given thus :-

“For the view we have taken it must be held that the Delhi High Court has no jurisdiction to try the case, We, however, while exercising our jurisdiction under Article 142 of the Constitution of India direct that Complaint Case No.1549 pending ..... be transferred to the Court of the District & Sessions Judge, Chandigarh.....”

Apart from the mismatch between the question and the answer the Judgment raises two other seminal questions. This critique of the judgment is an attempt to explore all these.

## 2. THE FACTUAL MISTAKES

Section 142 of the N.I. Act provides that the cases under Section 138 of the N.I. Act are to be tried by Magistrates. From para 3, 5 and 28 of the Judgment one may get a contrary impression. Statements in those paragraphs do not make any mention of Magistrate but speak only of Additional Sessions Judge and the High Court. Indeed the mistakes are so obvious that a Division Bench of Bombay High Court in *M/S PREETHA S. BABU -VS- VOLTAS LTD.* 2010 CRI.L.J 2709 thought it appropriate to rephrase the facts of *HARMON* thus :

“Cognizance of the offence was taken by the learned Magistrate. The accused questioned the jurisdiction of the Magistrate at Delhi before the Additional Sessions Judge, New Delhi. Learned Sessions Judge held that the Magistrate at Delhi had jurisdiction ..... The Delhi High Court dismissed the petition filed by the accused.”

Indeed, there is no single clear and explicit statement in *HARMON* that court of Magistrate at Delhi has no jurisdiction.

## 3. THE PREDECESSORS

*HARMON* has two predecessors. The earliest is *K. BHASKARAN -VS- SANKARAN VAIDHYAN BALAN*, AIR. 1999 S.C. 3762, 1999 (3) SCC 510 (*K. BHASKARAN* hereinafter) dated 29.09.1999 and *SHAMSHAD BEGUM -VS- B. MUHMEED*, AIR 2009 S.C. 1355 (2008) 13 SCC 77 (*SHAMSHAD BEGUM* hereinafter) dated 03.11.2008. Along with its two predecessors *HARMON* constitutes a trilogy dealing with the question of territorial jurisdiction of a criminal Court to try a case under Section 138 of the N.I. Act. *HARMON* considered *K. BHASKARAN* but tended to disagree with it. There is no mention at all of *SHAMSHAD BEGUM*. All these three decisions are rendered by two Judge Benches of the Supreme Court. *SHAMSHAD BEGUM* unequivocally reiterates the law enunciated in *K. BHASKARAN*. If the validity of a precedent is amenable to a democratic test the incipient dissent in *K. BHASKARAN* could have been nailed by four against two. But that is not how the law of precedent works. Be that as it may one may

examine first whether the “only question” posed at para 13 of HARMON has been concluded by K. BHASKARAN.

#### 4. K. BHASKARAN AND HARMON

In K. BHASKARAN the question of territorial jurisdiction of the trial Court squarely fell to be determined in the following circumstances. The trial Court there held that it had no jurisdiction because the cheque was dishonoured at a Bank situated outside its jurisdiction. The accused was acquitted, perhaps forgetting Section 201 of the Code of Criminal Procedure. On appeal the High Court found jurisdiction of the trial Court from the fact that the cheque was issued at a place within the jurisdiction of the trial court. The High Court convicted the accused. The Supreme Court dealt with the question of jurisdiction in great detail from para 11 to 16 (SCC Report). The bull points emerging from these paragraphs are that :

- (1) The question of jurisdiction in a criminal case under Section 138 of the N.I. Act has to be determined under the provisions of the Code of Criminal Procedure (Cr.P.C.).
- (2) Most relevant of the provisions thereof would be those of Section 178 (d) Cr.P.C.
- (3) The offence under Section 138 of the N.I. Act has five components (a) drawing of the cheque (b) presentation of the cheque to the Bank (c) Returning the cheque unpaid by the drawee Bank (d) giving notice in writing to the drawer demanding payment of the amount of the cheque and (e) failure of the drawer to make payment within fifteen days of the receipt of the notice.
- (4) The above five acts namely the drawal, the presentation, the return, the giving of notice and the failure to pay may take place at five different places and on the clear terms of Section 178(d) Cr.P.C. all these five places would have territorial jurisdiction to try a case under Section 138 of the N.I. Act. The enunciation of the law as above in K. BHASKARAN is not amenable to any distinguishing on facts. It is applicable as a pure mandate of Law. It does not mention the phrase “cause of action” because that was to be found only in Section 142 of the N.I. Act.

In contrast HARMON is full of the phrase “cause of action” Para 5 and 6 of HARMON record the submission of the Counsels. The counsel for the appellant submitted that the entire cause of action arose within the jurisdiction of the Court at Chandigarh and therefore Delhi Court has no jurisdiction. The counsel for the respondent made two submissions, one about the cheque being presented at Delhi and other relating to the

notice having been issued from Delhi. He did not mention cause of action. Having disposed of the first submission in the negative the other submission took the form it did in the question with cause of action as its core. There is obvious mismatch between the submission and the question framed. However, the question in reality covers the fifth fact indicated in K. BHASKARAN which is a component of the offence as enunciated in that case. Thus the “only question” though not in terms but in reality has been concluded by K. BHASKARAN. A co-ordinate Later Bench is bound to follow the precedent or record a clear-cut dissent and have the matter referred to a larger Bench. HARMON did neither. HARMON did not even hold that K. BHASKARAN is distinguishable on facts. But what started as a dissent has ended differently by the short-cut of transfer in exercise of the powers under Article 142 of the Constitution of India. It is trite that a decision under Article 142 of the Constitution cannot be considered as a precedent declaring the law as regards territorial jurisdiction of the criminal court in cases relating to the offence under Section 138 N.I. Act within Article 141 of the Constitution. HARMON read as constituting a dissent from K. BHASKARAN on the point that the place wherefrom only the notice demanding payment is issued will also have territorial jurisdiction confronts the High Courts and the Courts subordinate thereto with a Hamletian dilemma, to follow the earlier or the later. On this precise question the writer is unable to discover any pronouncement from the Supreme Court. For a solution to the problem- what would be the duty of the High Court and the Subordinate Courts when two conflicting decisions of the Supreme Court rendered by Benches of equal strength – one has to turn to Books of Jurisprudence. SALMOND ON JURISPRUDENCE, 12<sup>TH</sup> Edition, Chapter 5 from pages 141 to 188 extensively deals with precedents. A solution of the problem indicated above arrived at from a perusal of the chapter would be as follows- The lower court before which the conflicting precedents rendered by Benches of equal strength can ignore either the former or the later of the precedents. “Which of these two courses the Court adopts depends, or should depend upon its own view of what the law ought to be”. In other words preferring the later decision is not the rule but the rule is to prefer the better decision.

Can it be shown that law as to territorial jurisdiction relating to a criminal case under Section 138 of the N.I. Act laid down in K. BHASKARAN is better than that in HARMON ? HARMON cannot be said to be free from prevalent tendency of many High Courts and some times even of the Supreme Court to

deal with criminal cases under the new (since 01.04.1989) provision enacting a crime within a Statute of 1881 vintage primarily dealing with civil law relating to Negotiable Instruments influence by concepts from Law relating to Civil Procedure. The way the matter has been dealt with in HARMON reminds one of Section 20 of the Code of Civil Procedure and not of Section 178 of the Code of Criminal Procedure. Statements in para 14 (SCC Report). Such as “that receipt of a notice would ultimately give rise to a cause of action for filing the complaint” and “issuance of notice would not by itself give rise to a cause of action but the communication of the notice would” do not reflect the text of the provisions of Section 138, proviso (c) and those Section 142 (b) of the N.I. Act. K. BHASKARAN does not lay down any such law and dealt with the matter solely within the provision of Section 178 Cr.P.C. It is obvious that the place of business or residence of the accused or the complainant simpliciter has no relevance at all in a criminal case to determine territorial jurisdiction of the Court, where as the place of business or residence may be the determining factor in a Civil Case.

HARMON shows considerable dislike for the concept of “deemed service” of the notice demanding payment of the amount of the cheque developed in K. BHASKARAN. But apart from decisions earlier to HARMON like (2004) 8 SCC 774 of 22.11.2004 and (2006)6 SCC 456 of 25.05.2006 a Three Judge Bench in C.C. ALAVI HAJI -Vs- PALPETTY MUHMMED & ANR (2007) 6 SCC 555 has followed and reiterated the law in K. BHASKARAN in this regard.

HARMON also appears to advocate strict construction of penal statutes in general and of the provisions of Section 138 of the N.I. Act in particular. But even before K. BHASKARAN of 1999 vintage a three Judge Bench of the Supreme Court in MODI CEMENTS LTD. -VS- KUCHIL KUMAR NANDI, AIR 1998 S.C. 1057 dated 03.03.1998 has accepted and advocated adoption of purposive construction of Section 138 N.I. Act. Of the same view are the Division Bench Judgments of three different High Courts namely THOMAS VERGHESE, 1992 Cri.L.J 3080 from Kerala High Court, RAKESH NEM KUMAR PORWAL, 1993 Cri.J.L. 680 from Bombay High Court and M/S SYED RASOOL & SONS 1992 Cri.LJ.4048 from Andhra Pradesh High Court. AIR 1999 S.C. 1952, AIR 2002 S.C. 182 and AIR 2003 S.C. 2035 also lays down the same principle. A perusal of MAXWELL ON THE INTERPRETATION OF STATUTE, 12<sup>TH</sup> Edition at page 238 and of PRINCIPLES OF STATUTORY INTERPRETATION, by Justice G.P. Singh, 11<sup>TH</sup> Edition 2008 from page 845 to 74 under Synopsis 3 leave no scope to doubt that the principle of strict

construction of penal statute has largely yielded place to the modern doctrine of purposive construction so that modern statute like the N.I. Act becomes workable and not reduced to a dead letter by a process of interpretation.

The upshot is that if one has to choose either K. BHASKARAN or HARMON on the question of territorial jurisdiction of the trial court K. BHASKARAN though earlier in time being better in Law has to be preferred to HARMON though later in time.

It would be interesting to know how the High Courts have responded when confronted both with K. BHASKARAN and HARMON. One may take some samples in this regard.

## 5. THE VOICES FROM THE HIGH COURTS.

One may begin this Section by noting that even before HARMON came to be pronounced on 12.12.2008, the Bombay High Court attempted to lay down the same law as in HARMON by way of explaining K. BHASKARAN even giving an illustration which is at best in one sided. In this essay it has already been indicated that the language used in K. BHASKARAN in laying down the law as to territorial jurisdiction of the trial court in a case under Section 138 of the N.I. Act is so clear and unequivocal that easy way of distinguishing the precedent by picking out a fact is not possible. Be that as it may after 12.12.2008 a Division Bench of the Bombay High Court in M/S PREETHA S. BABU-VS- VOLTAS LTD., 2010 Cri.L.J. 2709 dated 03.03.2010 and a Single Bench decision of the Gauhati High Court in DINESH CHANDRA SHIB -VS- HIRALAL SAHA, 2009(3) GLJ 160 dated 12.06.2009 considered all three decision forming the trilogy. There are other decisions from the Delhi and Bombay High Court where both K. BHASKARAN and HARMON were placed. But none of the Judgments because of the facts there has either read a clash between K. BHASKARAN and HARMON or read para 28 of HARMON which establish HARMON as a Judgment on facts needing to be decided by applying Article 142 of the constitution of India and that the HARMON ended in a transfer and not a return of the complaint under Section 201 of the Code of Criminal Procedure as has been attempted to be done in this essay. The High Courts also did not notice the legal principle that the Judgment of a Bench of two Judges is binding on a later Bench of two Judges and that reference to a larger Bench is the only way to sustain a dissent by the later Bench. .

## 6. THE CONCLUSION

The article attempts to make the following points :

- (1) K. BHASKARAN reiterated by SHAMSHAD BEGUM lays down the correct law as to territorial jurisdiction of the trial court in a case under Section 138 of the N.I. Act.
- (2) HARMON need not be read as a precedent on the aforementioned question of territorial jurisdiction and may be read as a Judgment on facts disposed of under inherent powers of the Supreme Court to do what was considered to be complete justice in that case.