IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.836 OF 2018

Mukesh J. Shah
aged 54 years, of Mumbai, Indian
Inhabitant, presently residing at 2301,
Happy Home Society, Near J.B.Khot
School, Sai Baba Nagar, Borivali (W),
Mumbai – 400 092 (Husband of
Respondent No.1) … Petitioner

versus

1) Kiran Mukesh Shah nee
Chandrakant Shah, aged 54 years,
of Mumbai, Indian Inhabitant (Wife
of the Petitioner), having last known
address at Deepak Chandrakant Shah,
1st Floor, Kailash Kiran No.2, First
Floor, Flat No.16, Opp. Sindhu Baugh,
Tilak Road, Ghatkopar (E), Mumbai -
400 077 and presently residing at 1302,
Mapple, Runwal Green, Mulund (W),
Mumbai – 400 080

2) Jigar Mukesh Shah
Aged 29 years, of Mumbai, Indian
Inhabitant, residing at (son of the
Petitioner and Respondent No.1)
having last known address at
Deepak Chandrakant Shah, 1st Floor,
Kailash Kiran No.2, First Floor,
Flat No.16, Opp. Sindhu Baugh,
Tilak Road, Ghatkopar (E), Mumbai -
400 077 and presently residing at 1302,
Mapple, Runwal Green, Mulund (W),
Mumbai – 400 080

3) Kinjal Mukesh Shah
Aged 26 years, of Mumbai, Indian
Inhabitant, residing at (daughter of the
Petitioner and Respondent No.1)
having last known address at
Deepak Chandrakant Shah, 1st Floor,
Kailash Kiran No.2, First Floor,
Flat No.16, Opp. Sindhu Baugh,
Tilak Road, Ghatkopar (E), Mumbai -
400 077 and presently residing at 1302,
Mapple, Runwal Green, Mulund (W),
Mumbai – 400 080 … Respondents

APPEARANCES :
Mr. Rajiv Narula I/by M/s. Jhangiani Narula and Associates, for Petitioner.
Mr. P.S.Chavan I/by M/s. Pradeep Chavan and Associates, for Respondents.
Mr. J.P.Sen, Senior Advocate – Amicus Curiae.

CORAM: S.J. KATHAWALLA, J.

JUDGMENT RESERVED ON : 3rd AUGUST, 2018
JUDGMENT PRONOUNCED ON : 22nd DECEMBER, 2018

JUDGMENT :

1. By the present Petition, the Petitioner seeks interlocutory reliefs under Section 9 of the Arbitration and Conciliation Act, 1996 pending arbitral proceedings that the Petitioner proposes to initiate.

2. The Petitioner (Mukesh) is the husband of Respondent No. 1 (Kiran) and the father of Respondent Nos. 2 (Jigar) and 3 (Kinjal). Mukesh and Kiran have admittedly fallen out. On account of their differences, and with a view to a dissolution of their marriage, Mukesh and Kiran along with their children, Jigar and Kinjal entered into a

document styled as a 'Memorandum of Arrangement of Family Settlement' dated 25th April 2017. The Memorandum, to the extent that it is material, is reproduced hereinbelow:

> ***WHEREAS:***
>
> *(a) The party of the First Part to the party of Fourth Part are members of the Shah Family. The said Mukesh and the said Kiran are husband and wife and out of their wedlock, they have the said Jigar and the said Kinjal as son and daughter respectively;*
>
> *(b) The said Mukesh, the said Kiran, the said Jigar and Kinjal have been living together as a family at the flat bearing No. 902, Mayfair Kumkum, S.V. Road, Near M.A. High School, Andheri (West), Mumbai 400 058.*
>
> (c) *The said Mukesh has also formed the HUF in the name of "Mukesh J Shah (HUF)" and the said HUF holds certain immovable properties in the shape of commercial galas at Borivali, more particularly described in the* ***Annexure-1*** *annexed hereto;*
>
> *(d) The said Mukesh in his life time has acquired various movable and immovable properties in his name as well as in the name of the said Jigar and the said Kinjal (members of HUF) for the benefit of family including development rights in his firm name of M/s. Alta Sadguru Joint Venture in respect of property bearing CTS No. 539-A situate at Village Malad belonging to one Sham Nirmal Co-operative Housing society Ltd.;*
>
> (e) *The said Mukesh has also allotted six flats coming to his share in the name of the said Jigar and Kinjal as enumerated in* ***Annexure-2*** *annexed hereto;*
>
> *(f) The said Mukesh also has formed and registered a company known as "Alta Construction Pvt. Ltd." And the said Jigar is a shareholder and holding 3000 equity shares of Rs. 10/- face value and has a deposit of Rs. 30,000/- (Rupees thirty Thousand Only) in the said Company.*
>
> *(g) In view of discord and differences between the parties hereto, i.e. Mukesh J Shah on one hand and the said Kiran and the said Jigar and the said Kinjal on the other hand, the said*

Mukesh and the said Kiran have agreed to dissolve their marriage and stay separately. The said Jigar and the said Kinjal have decided to stay with their mother (the said Kiran). The terms and conditions of the said separation has been agreed upon between the family members:

(h) The parties hereto have arrived at a family settlement and the parties are desirous of recording the terms and conditions of sharing the benefits of the properties and estate held by the family members as under.

NOW THIS MEMORANDUM OF ARRANGEMENT OF FAMILY SETTLEMENT WITNESSETH as follows:

1. *The parties hereto agree and declare that this Family Settlement is being executed to put an end to all disputes and differences amongst family members.*

2. *The said Mukesh and the said Kiran hereby agree, declare and confirm that in view of constant several disputes, discord and differences between them, they are unable to live together as husband and wife and as such they have decided to make an application for dissolution of their marriage under Section 13-B of Hindu Marriage Act, 1955 within a period of 15 days of signing of these presents.*

3. *The said Kiran hereby agrees and assures that after filing of the Divorce Petition referred hereinabove, she shall diligently without fail appear at all the hearings before the court as well as before the Counselor and shall give her express consent for dissolution of marriage and shall not do any acts of commission or omission by which the dissolution of marriage is refused and/or the petition is dismissed.*

4. *In the event the said Kiran failing to appear before the court and give her express consent to the dissolution of marriage upon the terms contained herein, the entire amount received by her out of the sale of the said residential flat being Flat No. 902, Mayfair Kumkum, S.V.Road, Near M.A. High School, Andheri (W), Mumbai 400 058 shall be refunded to the said Mukesh along with interest @ 15% per annum, which shall be payable within 15 days calling upon the said Kiran to pay the said amount in view of any default committed by the said*

Kiran in complying with the terms hereto.

5. *It is mutually decided that the residential flat being Flat No. 902, Mayfair Kumkum, S.V.Road, Near M.A. High School, Andheri (W) Mumbai 400 058, shall be sold and disposed of by mutual consent of all the family members and the sale proceeds shall be first applied to repayment of outstanding housing loan of appox. Rs.2,55,00,000/- (Rupees Two Crores Fifty Five Lakhs only) taken by the said Mukesh from Axis Bank Ltd. Goregaon, Mumbai.*

6. *It is agreed that out of the sale proceeds receivable, after deducting the expenses of the sale and re-paying loan as well as due interest thereon, and capital gains if any, the entire balance sale proceeds estimated approx. Rs. 2,57,00,000/- (Rupees Two Crores Fifty Seven Lakhs only) shall be paid over to the said Kiran, Jigar and Kinjal towards:*

(a) *the claim of the said Kiran's residence and maintenance;*

(b) the claim of Jigar is respect of the following property::

(i) Flat No. 1005 on the 10th floor of "B" Wing of the building Shyam Nirmal Heights to be constructed on the aforesaid property bearing CTS No. 530-A and 539-B situate at Nursing Lane, Village Malad (North).

(ii) Flat No. 1104, on the 11th Floor, of "B" Wing of the building Shyam Nirmal Heights to be constructed on the aforesaid property bearing CTS No. 530-A and 539-B situate at Nursing Lane, Village Malad (North).

(iii) Flat No. 104, on the 1st Floor, of "B" Wing of the building Shyam Nirmal Heights to be constructed on the aforesaid property bearing CTS No. 530-A and 539-B situate at Nursing Lane, Village Malad (North).

(c) the claim of Kinjal in respect of the following property:

(i) Flat No. 704, on the 7th floor of "B" Wing of the building Shyam Nirmal Heights to be

constructed on the aforesaid property bearing TS No. 530-A and 539-B situate at Nursing Lane, Village Malad (North).

(ii) Flat No. 705, on the 7th floor of "B" Wing of the building Shyam Nirmal Heights to be constructed on the aforesaid property bearing TS No. 530-A and 539-B situate at Nursing Lane, Village Malad (North).

(iii) Flat No. 1204, on the 12th floor of "B" Wing of the building Shyam Nirmal Heights to be constructed on the aforesaid property bearing CTS No. 530-A and 539-B situate at Nursing Lane, Village Malad (North).

(d) The claim of the said Jigar and the said Kinjal and the said Kiran in respect of their share in the said HUF of Mukesh J Shah.

(e) Transfer of the said Jigar's Shareholding in Alta Construction Pvt. Ltd. as well as repayment of his outstanding deposit of Rs. 30,000/-.

…"

The said Memorandum also provided for the children surrendering in favour of the father their rights in various assets on receipt of payment by Respondent No. 1 of the amount stipulated in the Memorandum. The Memorandum also contained an arbitration clause which is reproduced hereinbelow:

"*19. In the event of there being disputes and differences between the parties with regard to implementation of these presents, or and/or interpretation of any of the terms contained herein and/or any other dispute consenting and/or relating to this Memorandum of arrangement of family settlement, the same shall be referred to the arbitration of a Sole Arbitrator, Mr. S.K. Jain, Advocate. The arbitration shall be conducted at Mumbai and the award given by such Arbitrator shall be conducted at Mumbai and the award given by such*

Arbitrator shall be final and binding on the parties."

3. Flat No. 902 in the building Mayfair Kumkum in which the family was staying was indeed sold as proposed in the Consent Terms. According to Mukesh, an amount of Rs. 2,57,00,000/- out of the sale proceeds was paid over to Kiran, Jigar and Kinjal and in addition thereto, a further sum of Rs.5,00,000/- was paid over by him to Kiran. Kiran, on the other hand, contends that only a sum of Rs. 1,01,00,000/- was paid over to her and a sum of Rs. 28,00,000/- to each of the children i.e. Jigar and Kinjal, thus making in aggregate a sum of Rs.1,57,00,000/-. While Mukesh and Kiran in April 2017, filed a Divorce Petition by mutual consent in the Family Court at Bandra under Section 13B of the Hindu Marriage Act, 1955, according to Mukesh, after receipt of the said sum of Rs. 2,57,00,000/- and a further sum of Rs.5,00,000/- which he claims to have paid in excess, Kiran withdrew her consent to the grant of divorce. As a consequence of this withdrawal, the joint petition filed by Mukesh and Kiran for divorce came to be disposed off by an order dated 20th January 2018 of the Family Court. Prior to withdrawing her consent on 20th January, 2018, Kiran had also filed M.J. Petition no. C-289 of 2017 along with an interim application seeking maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956 as also seeking an injunction under Section 39 of the Specific Relief Act read with Order 39 Rule 1 of the Code of Civil Procedure, 1908 restraining Mukesh from creating third party rights in respect of certain properties.

4. Mukesh now seeks to recover from the Respondents the said sum of Rs. 2,57,00,000/- along with interest thereon @ 15% p.a. on the strength of clause 4 of the Memorandum.

5. In aid of this, by the present Petition, Mukesh seeks a direction that Kiran, Jigar and Kinjal either deposit or secure the said sum in this Court pending arbitration proceedings between the parties. Kiran, Jigar and Kinjal have raised a preliminary objection that the Petition would not be maintainable insofar as any disputes arising out of the said Memorandum and in particular arising out of Mukesh's demand for refund of the said sum of Rs. 2,57,00,000/-, would be within the exclusive jurisdiction of the Family Court and thus incapable of reference to arbitration. Mukesh, on the other hand, would contend that the dispute is essentially contractual in nature, not within the exclusive jurisdiction of the Family Court and therefore arbitrable. It is these competing positions that are required to be resolved in deciding the preliminary issue as to the maintainability of the present Petition.

6. Mr. J.P.Sen, Senior Advocate is appointed as Amicus Curaie in the above matter. Mr. Sen has by pointing out relevant provisions of law and by citing several Judgments relating to the issue before the Court, ably assisted the Court in the above matter.

7. Section 7 of the Family Courts Act, 1984, defines the jurisdiction of the Family Court and reads thus:

"7. Jurisdiction - (1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first

class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

8. Section 8 of the Act excludes the jurisdiction of the Civil Court in respect of matters within the jurisdiction of the Family Court in the following terms:

"8. Exclusion of jurisdiction and pending proceedings. —

Where a Family Court has been established for any area, —

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been

> *established, shall stand transferred to such Family Court on the date on which it is established."*

9. Section 20 of the Family Courts Act provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. From a conjoint reading of Sections 7, 8 and 20, it would appear that a Civil Court would have no jurisdiction in respect of any matter that is within the jurisdiction of the Family Court.

10. Given the nature of the present dispute, what would appear to be relevant are Explanations (c) and (d) to Section 7(1). Explanation (c) to Section 7(1) confers on the Family Court jurisdiction in respect of any 'suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them', while Explanation (d) does so in respect of 'a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship'. Courts have construed both Explanations (c) and (d) broadly.

11. The Hon'ble Supreme Court in its judgment in *K. A. Abdul Jaleel* ***v.*** *T.A. Shahida*[1] held that a proceeding by a wife filed after dissolution of marriage for recovery of property promised to her would lie in the Family Court. In doing so, the Court repelled the husband's contention that an action could be brought in this behalf in the Family Court only during the subsistence of a marriage and not after its

1 (2003) 4 SCC 166

dissolution. The Court observed:

> "*10. The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. From a perusal of the Statement of objects and reasons, it appears that the said Act, inter alia, seeks to exclusively provide within the jurisdiction of the Family Courts matters relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Court in respect of suits and proceedings as referred to in the Explanation appended thereto. Explanation (c) appended to Section 7 refers to a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them.*
>
> *11. …The wordings 'disputes relating to marriage and family affairs and for matters connected therewith' in the view of this Court must be given a broad construction. The Statement of objects and reasons, as referred to hereinbefore, would clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would clearly mean the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.*
>
> *12. The submission of the learned counsel to the effect that this Court should read the words "a suit or proceeding between the parties to a marriage" as parties to a subsisting marriage, in our considered view would lead to miscarriage of justice.*
>
> *13. The Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.*
>
> *14. It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should*

> *be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, in our opinion, would frustrate the object wherefor the Family Courts were set up.*"

12. Similarly, the Kerala High Court in *Shyni* ***v.*** *George & Ors.*[2] held that a wife would be entitled to bring an action in the Family Court against her husband and father in law for property entrusted to them at the time of marriage. The Court held that the parties to the proceeding need not necessarily be parties to the marriage, so long as the claim arose out of the matrimonial dispute. In doing so, the Hon'ble Court observed:

> "*5. On the scheme of the Act and considering the conferment of jurisdiction on the Family Court, it is clear that a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them comes within the purview of the Family Court. When a wife sues her husband for recovery of her property or which she claim to be her property, obviously the suit could be tried and disposed of only by the Family Court and when in such a suit the wife is obliged to add a close relative of their husband or even a stranger on the allegation that the husband had made over the property to that close relative or stranger, it will be too much to hold that the jurisdiction of the Family Court is ousted to deal with the claim of the plaintiff in view of the mere presence of the stranger or the close relative of the husband. In such a situation, the close relative of the husband or the stranger could only be the agent of the husband or a confident of the husband holding the property claimed by the wife on behalf of the husband. It is not possible to accept the argument that in such a circumstance also the wife would be obliged to file the suit against the stranger in an ordinary Civil Court even while she is forced to maintain her suit against the husband in the Family Court. Would it make any difference if in a given case, the property of the wife was entrusted not merely to the husband but also to a close relative of the husband, in this case, the father-in-law? I think that it will be the*

2 AIR 1997 Ker 2317

very negation of the scheme of the Family Court Act and the attempt made by that Act to constitute a Special Civil Court for the purpose of dealing with all matrimonial disputes including dispute about property to hold that the wife would not be entitled to maintain a suit for recovery of her property against the father-in-law in the Family Court. If it were merely a suit against the father-in-law it is quite clear that the suit could be instituted only in the ordinary Civil Court. Equally, if it is merely a suit against the husband for recovery of property, the same could only be maintained in the Family Court.

In a case where the claims have to be combined or the same has to be made against both the husband and the father-in-law as in the present case, could it be said that the jurisdiction of the Family Court would stand ousted? My answer is an emphatic no. The suit will remain as a suit against the spouse for recovery of the property of the wife. No doubt even at the time of the marriage the property was handed over not only to the husband but also to the father-in-law. But that would not make the suit anything other than for recovery of the property of a party to the marriage from the other party to the marriage and persons connected with him or related to him. It is notorious that in our State, what is called Streedhanam or what is understood as the share of the bride in the properties of her father is normally handed over at the time of the marriage not to the husband but to the father-in-law who receives it on behalf of the husband. It is really a case of the father-in-law acting for and on behalf of the husband while he receives the property of the wife. In the case of the streedhanam paid at the time of the marriage of a Christian woman, this Court has held that the father-in-law would be holding the property as a trustee for the bride. Taking in the sweep of the Family Court Act the objects sought to be achieved by the Family Courts Act, I am of the view that merely because a stranger is also impleaded in the suit on the ground that the property of the wife or a portion of it also been handed over to him the suit cannot be entertained by the Family Court is not warranted. In any view such a construction of the statute to confine the jurisdiction of the Family Court only to the other spouse and not to anyone else who acts either for that spouse or under that spouse would tend to defeat the very object of the enactment of the Act and the establishment of the Family Courts. One of the important aims of the setting up of the Family Courts Act to bring about a reconciliation between the spouses if possible and to permit them to separate with dignity only if all

> *attempts at conciliation fail. Can there not be a conciliation even in a case where the wife sues her husband and her father-in-law for recovery of the property which she claims to be hers? The answer can only be in the affirmative. There cannot be any doubt that a special machinery has been constituted by the Family Courts Act counselling, and for bringing about a conciliation between the spouses. Then, Family Court Judge is charged with the duty to attempt conciliation. Should the spouses be deprived of that machinery specially provided by the Family Courts Act not available in that form in the ordinary Civil Court merely, because, one of them is compelled to sue not only the other spouse but also a close relation of that spouse or a confident or assignee of that spouse? The answer can only be 'no' since an answer otherwise would mean that the very scheme of the Act would stand defeated and the spouse who is sued can always take up the stand that he had made over the property to a stranger and when the suing spouse is compelled to implead that person, the suit would be taken put of the purview of the Family Court. I have therefore no hesitation in holding that so long as the suit is by one spouse against the other the suit would be maintainable in the Family Court even if for the purpose of seeking relief in respect of the cause of action put forward in the suit, the suing spouse is forced to implead persons other than the other spouse or including the close relatives of the other spouse.*"

13. The position that parties outside the marriage may be joined in a proceeding in the Family Court under Section 7 of the Family Courts Act has been confirmed by other judgments of the Kerala High Court. In *Leby Issac* ***v****. Leena M. Ninan alias Lincy and others*[3]*,* a Division Bench of the Kerala High Court while holding that a suit for damages by the husband against the wife and father in law for suppression of material facts and fraudulent inducement would lie in the Family Court, opined:

> *"12. The expression, "circumstances" means `the surroundings of an act', as per Law lexicon by P. Ramanatha Aiyar, reprint edition, 1992. It also means `the particulars which accompany an act', The word*

3 AIR 2005 Ker 285

"circumstances" is explained in Salter v. State, 163 Ga. 80, 135 SE 408, 409 also as, "related or accessory facts, occurrences or things which stand around, or about, which attend upon, which closely precede or follow, which surround and accompany, which depend upon, or which support or qualify a principal fact or event. (vide Black's Law Dictionary Forth edition).

13. So, `circumstances' in relation to a marital relationship will be those particulars which closely precedes, surrounds, accompanies and follows a marital relationship. That means, primarily those can be the marriage itself and the surrounding occurrences in connection with marriage. The main requirement is that such `circumstances' must have a direct bearing on marriage, since the marriage precedes, the existence or origin of a `marital relationship'. `Circumstances' arising out of a marital relationship are therefore, `occurrences or things which stand around or about, which attend upon, which closely precede or follow, which surround and accompany, which depend upon, or which support or qualify the principal event' of a marriage or marital relationship.

14. The expression `in circumstances arising out of marital relationship' thus means not only those occurrences which transpired during marital life, but those also include such circumstances which led to the marriage, which developed thereafter, which took place during marital life, which resulted in breaking down of marriage and also those which `closely' followed as a consequence of all these. If the intention of legislature was to take in only those occurrences which take place during a `marital relationship', there was no necessity to use the word `circumstances' in explanation (d) to Section 7(1) of the Act. The same purpose could have been achieved if explanation (d) is worded without the term `circumstances' also. So, the inclusion of word `circumstances' in the relevant provision is quite significant and it must have been done to include all such circumstances surrounding, preceding and closely following a marital relationship i.e. the principal event of marriage and the eventualities surrounding the same."

14. In *Suprabha v. Sivaraman K. K. & Anr.*[4], a Division Bench of the High Court held that a suit would lie at the instance of the wife before the Family Court against

4 AIR 2006 Ker 187

the relatives of the husband after his demise for return of items belonging to her. While holding that a suit or proceeding under section 7(1)(c) would lie only between the parties to the marriage, the Court held that there was no such limitation in Section 7(1)(d).

15. In *Vasumathi N.* ***v.*** *Valsan & Anr.*[5], a Division Bench of the Kerala High Court came to consider two proceedings before it – (a) an action for maintenance under Section 125 of the Cr.P.C., filed by the wife claiming a charge over an item of property standing in the name of her husband; and (b) a suit filed in the Civil Court by a close relative of the husband to whom the husband had purported to transfer the property over which the charge was claimed. Both the wife and the husband were arrayed as party Defendants in the Suit. The High Court was called upon to consider the question as to whether the suit filed in the Civil Court was also required to be transferred to the Family Court as being within its exclusive jurisdiction. The Court, while holding that to be so, observed:

> *"14. Thus, the crucial question is only whether under Explanation-(c) and/or (d) of* Section 7(1)*, the dispute is one exclusively within the jurisdictional competence of the Family Court.*
>
> *15. We shall initially consider the applicability of Explanation-(c). Ext.P4 is not technically a suit or proceedings between the parties to the marriage. The parties to the marriage are together on one side on the party array whereas the second respondent is the party on the other side. But, virtually, the*

5 2011 SCC Online Ker 4183

dispute is between the parties to the marriage and the dispute is with respect to the property standing in the name of one of them. The jurisdiction under Explanation-(c), according to us, is not to be determined by looking at the position of the parties or the array of parties. What has virtually got to be considered is the very nature of the dispute which is sought to be resolved in such suit or proceedings. So reckoned, we have no hesitation to agree that the suit/ proceedings is initiated virtually to resolve the disputes O.P.FC 976 OF 2010 between the petitioners on the one hand and respondent No.1 on the other, though they together are arrayed as defendants in the suit filed by the second respondent. In that view of the matter, we hold that the real dispute raised in O.S.No.173 of 2006 is between the parties to the marriage with respect to the property of one of them. The mere fact that immediately after the commencement of the dispute, before the institution of the suit, there has been a transfer of property by the first respondent in the name of respondent No.2 under Ext.P2 sale deed and that the second respondent as a mercenary of the Ist respondent has initiated the proceedings does not militate against the real nature of the dispute between the parties. The dispute raised in both the suit and the O.P. are hence disputes (suit/proceedings) falling under Explanation (c) to Sec.7(1) and consequently within the exclusive jurisdiction of the Family Court.

16. We now come to Explanation-(d) of Section 7(1). As per the explanation, "a suit or proceedings for an order or injunction in circumstances arising out of a marital relationship" falls within the jurisdictional competence of O.P.FC 976 OF 2010 the Family Court. The language of clause-(d) is of course not found to be elegant. It relates to a suit or proceedings and such suit or proceedings must be in circumstances arising out of a marital relationship. In the instant case, the real dispute is between the first petitioner and the first respondent about their rights over Ext.P2 property. The dispute has arisen out of the marital relationship. In this view of the matter, we are of the opinion that the dispute squarely comes within the sweep of explanation-(d), if

the suit or proceedings is "for an order or injunction".

17. A suit or proceedings "for an order or injunction" in circumstances arising out of a marital relationship falls within the jurisdictional competence of the Family court. Thus, the words "for an order or injunction" qualifies both the suit or proceedings. This is the first aspect that causes difficulty. The expression 'a suit for an order' is cumbersome and contrary to the nature of the proceedings initiated by way of a suit. A suit can be only for a decree. The expression "for an order or injunction" in that strict view of the matter does not appear to be O.P.FC 976 OF 2010 intended to qualify the suit referred to in clause-(d). 'Proceedings' referred to in clause-(d) can certainly be "for an order or injunction".

18. Therefore, it appears to be more appropriate to assume that the expression "for an order or injunction" qualifies proceedings and not the suit. A suit for injunction also appears to be possible. In that view of the matter, both O.S.No.173 of 2006 and O.P.No.322 of 2006 are for injunction. In that view of the matter also, it is possible to conclude that both these proceedings would fall within the sweep of clause(d). It appears to us that it will be appropriate to understand that "suit or proceedings" for whatever relief including "for an order or injunction" must be within the jurisdictional competence of the Family Court, if such suit or proceedings are in circumstances arising out of the marital relationship. The expression "for an order or injunction" in clause(d), we must assume, only conveys that the suit or proceedings may be for any relief whatsoever including an order or injunction. If such relief is claimed and the suit or proceedings are in O.P.FC 976 OF 2010 circumstances arising out of a marital relationship, such suit or proceedings will be exclusively within the jurisdictional competence of the Family Court. This appears to be the only fair and reasonable way of understanding the expression "suit or proceedings for an order or injunction". It is not possible to read clause(d) as meaning "a suit for injunction or proceedings for an order". It also appears to be not possible to read the same as 'a suit for an order or injunction'. It is hence that we

feel it appropriate to understand clause(d) as intending to convey that it must be a suit or proceedings - whether for an order or injunction or whatever relief, in circumstances arising out of a marital relationship. Parties who file the suit or proceedings is not important. The nature of the relief claimed is also not of significance. Any relief - any order (including decree) or injunction can be claimed. It is enough if in the suit/proceedings relief is sought in circumstances arising out of a marital relationship.

19. That we note is of crucial significance when we consider the Explanations to Sec.7(1) of the Act. All the O.P.FC 976 OF 2010 explanations i.e. (a) to (g) deal with "suit or proceedings". All proceedings under Section 7(1) before the Family Court, going by the Rules are to be numbered before the Family Court as applications (OAs) notwithstanding the fact that before the Civil Court such proceedings if initiated would have been numbered as suits. It is to cover all such instances - whether the proceedings are pending/initiated as suits or other proceedings, that Sec.7 employs the expression "suit or other proceedings" in explanation a to g, we feel. Explanation (a) and (c) refer the parties to a marriage. Such disputes under (a) and (c) must be between the parties to the marriage. If the real dispute is between the parties to the marriage, the fact that there are other parties also arrayed in the suit is irrelevant. A party to a marriage cannot nullify the jurisdiction of the Family Court under explanation (c) by arraying one more party to the array of parties. According to us, their position in the array of parties is also not crucially relevant so long as the suit or proceedings in substance and in its core is between the parties. Application of clause (c) cannot be decided in a myopic O.P.FC 976 OF 2010 manner by ascertaining the position of the parties on the array. They may be on opposite sides or may be together on one side on the array, but the suit or proceedings does not lose its character as one "between the parties" because they happen to be arrayed together on one side on the array. In a dispute like the one in this case, merely because the dispute between the parties is brought before the Court by another

mercenary or name lender to one of the spouses, the suit or proceedings cannot lose its character as one between the parties to the marriage. A purposive interpretation is warranted and when so reckoned, the position in the party array cannot be given undue importance. A suit/ proceedings does not lose its essential character as one between parties merely because that proceedings is initiated by a name lender to one of the parties who on his own showing has no dispute with one of the spouses.

20. Other explanations to Sec.7 (1) i.e. Explanation (b) and (d) to (g) do not make specific reference to the parties to the suit or proceedings. They refer only to the nature of disputes that are brought before Court. In that O.P.FC 976 OF 2010 view of the matter explanation (d) refers to the nature of the suit or proceedings only and does not refer to the parties to the litigation. The emphasis under clause (d) as we perceive it, is on the fact that the suit or proceedings must stem from circumstances arising out of a marital relationship. Any one can be parties to the suit or proceedings. The suit/ proceedings will be exclusively cognizable by the Family Court if the dispute in such suit or proceedings is in circumstances arising out of a marital relationship. The words "for an order or injunction" together cover, according to us, all reliefs that can be claimed in such suit or proceedings. The non specification of the nature of the "order or injunction" in clause (d) must convey that the relief claimed in such suit or proceedings can be anything i.e. "any order or injunction". The expression "for an order or injunction" cannot obviously be read as an "order of injunction". The arguments that Explanation (d) can apply only when the relief claimed is one of injunction cannot certainly be accepted. The fact that a decree is not specifically referred to in clause (d) also appears to be irrelevant as O.P.FC 976 OF 2010 "as an order or injunction" must certainly be held to cover all possible reliefs that may be claimed in such suit or proceedings including a decree. This it appears to us, is the only way of purposively interpreting clause (d) of explanation to Section 7(1)."

16. The finding in *Vasumathi* (supra) that, even under Explanation (c) to Section 7 (1), the Family Court may entertain proceedings in which parties other than a husband and wife are arrayed is the broadest statement of the law on the scope of that explanation. It is somewhat at odds with the view expressed by the Kerala High Court in *Suprabha* and *Devaki Antharajanam*[6] that a suit or proceeding under Explanation (c) to Section 7 (1) must be between the parties to a marriage. However, the authorities appear unanimous that the language of Explanation (d) to Section 7 (1) suffers from no such limitation and a suit or proceeding relating to circumstances arising out of a marital relationship would lie in the Family Court regardless of the parties to it.

17. More recently, in *Krishna Moorthy* ***v.*** *Soumya Krishnan and Anr.*[7]*,* a Division Bench of the Kerala High Court held to be maintainable before the Family Court an action brought by a divorced wife and her sons against her husband for recovery of amounts spent on the daughter's marriage. This was held to be a dispute arising out of the matrimonial relationship between the divorced parties and therefore within the exclusive jurisdiction of the Family Court. In this regard, the Court observed:

> "*3. It is a fact that the original Petition before the Family Court is not between the parties to the marriage. Hence, the suit will not come within the purview of Explanation (c) to section 7 (1) but a question arises as to whether the suit will be maintainable under Explanation (d) to Section 7 (1)For a proper appraisal, it is necessary to have a scanning of the cause of action agitated in the suit. Allegations leveled by the Respondents herein before the Family Court is that the appellant is not taking care of any of the needs of the*

6 AIR 2007 Ker 38
7 AIR 2016 Ker 81

respondents, who are his children, Marriage of the 1st respondent was solemnizer on 15.09.2010 with the help of the mother of the respondent and her relatives with borrowings made from both. It is alleged that at the time of the marriage of the 1st respondent the appellant had agreed to meet all the expenses, to the extent of Rs.40,00,000/-. Despite such promise made by the appellant in the presence of many persons and despite the fact that the appellant got huge amounts when h took voluntary retirement from the Bank, he had failed to make payment of any amount. It is further contended that the respondents have got right in the scheduled property upon which the appellant had derived title by virtue of a Will executed by the Appellant's mother. According to the respondents each of them have got 1/3rd title and right over the said property. Hence, they are approaching the court below seeking declaration of their 1/3rd right each in the said property and to recover the amounts mentioned as above.

4. The expression 'in circumstances arising out of the martial relationship' contained in clause (d) of the Explanation thus means not only those occurrences which transpired during the martial life., but should also include such circumstances which led to the marriage, which developed therefore, which took place during the marital life, which resulted in breaking down of the marriage and also those which closely followed as a consequence of all these. In the decision cited above, Justice Hema J. speaking for the Bench observed that if the intention of the legislature was to take in only those circumstances. Which took place during marital relationship, there is on necessity for use word 'circumstances' in Explanation (d) to Section 7 (1) of the Act. Therefore, the inclusion of word 'circumstances' in the relevant provision is quite significant and it must have been done to include all the circumstances surrounding preceding and closely following a marital relationship in which the principal event is the 'marriage' and the eventualities surrounding it."

18. Mr. Narula on behalf of the Petitioner has submitted that section 7 of the Family Courts Act does not necessarily encompass within it every proceeding to which a husband and wife may be party. He submits that it is entirely conceivable that there may be a proceeding between husband and wife which does not arise out of the

matrimonial relationship, does not constitute a matrimonial dispute and is therefore perfectly capable of being tried by a civil Court. This is no doubt true. Thus, for example, in *P. Srihari* ***v.*** *Kum. P. Sukunda and Anr.*[8], a suit by the Plaintiff against her brothers in respect of property jointly held was found to be maintainable in the regular civil Court. A Division Bench of the Andhra Pradesh High Court, after considering section 7 of the Family Courts Act, held:

> "*5. In view of the above, the essential ingredient should be a dispute between the husband and the wife and the said dispute can be with regard to their marital status, divorce, restitution of conjugal rights, judicial separation, child custody, maintenance, as also property sharing. But, in no event, the Family Court can have jurisdiction if the above dispute is absent. By no stretch of imagination, can the Family Court assume jurisdiction, if there is a dispute between the brothers, sisters, mothers, fathers etc., concerning property and the case on hand being one such, the Family Court had clearly no jurisdiction.*"

19. To the same effect is, the judgment in *Krishnan Namboodiri* ***v.*** *Thankamani*[9], where a Single Judge of the Kerela High Court held that a suit by the Plaintiff against her husband and daughter for partition of jointly owned assets would lie in the Civil Court.

20. Similarly, in *Devaki Antharjanam* ***v.*** *Narayanan Namboodiri & Anr. (*suprra*)* a Single Judge of the Kerala High Court held that a partition suit including parties not parties to a marriage would lie in the regular civil Court. In doing so, the Court observed:

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8 AIR 2001 AP 169

9 (1994) 1 KLT 607

"7. What is the meaning of "a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them"? Does that expression include a suit for partition in which apart from the parties to the marriage, other sharers are also parties? Does the expression "property of the parties" mean "property of the parties to the marriage" or the "property of the parties to the litigation"? These questions are to be resolved in this case for the decision of point No. 1.

17. The property to be partitioned in the present case belongs not only to the plaintiff and his wife but also to their son. Therefore, in the strict sense, it cannot be said that the suit or proceeding is with respect to the property of the parties to the marriage or either of them. Though a person other than the party to the marriage happens to be a party to the suit or proceeding before the Family Court, that by itself cannot be a ground to hold that it is not a suit or proceeding between the parties to the marriage. Decision on such questions depends on the facts of each case. There may arise a case where a person other than the party to the marriage may be made a party to the suit or proceeding- as a formal party; or as a party with whom the money or property of the parties to the marriage or either of them is entrusted; or as a person claiming through either or both the parties to the marriage; or as a legal representative of either party to the marriage; or as a person in possession of the property of either or both the parties to the marriage; or an adulterer in a proceeding for divorce; or a person who keeps custody of a minor. These are only some examples in which a person other than a party to the marriage may be arrayed as a party to the suit or proceeding. The examples are hot exhaustive. The existence of a person other than a party to the marriage in the array of parties may not be a conclusive test to determine whether or not the suit or proceeding is "between the parties to the marriage".

18. A suit for partition implies existence of co-ownership rights of the sharers. They have pre-existing rights in the co-ownership property. Each sharer is entitled to claim his or her share. Such sharer need not necessarily be a "party to a marriage". A sharer other than "a party to a marriage" may seek partition of his share against the other co-owners including persons who are "parties to a

marriage." Existence of such parties to a marriage in the array of defendants/respondents is not a ground to hold that only the Family Court has jurisdiction. In a given case, the husband or wife may be arrayed as a party to the partition suit though he or she is not entitled to share, but his or her spouse has share, in order to make such other person, who is not a co-owner, bound by the decree. To my mind, there is a sure test which could be adopted in the present case. Could the 2nd defendant (son of the plaintiff and first defendant) File a suit or proceeding before the Family Court against the plaintiff and the first defendant claiming partition? I am of the view that he could not. The reason is that it would not be a "a suit or proceeding between the parties to a marriage". It may also be that there is no dispute between the husband and wife and they may jointly oppose the claim of the son. If so, how could it be said that the civil court has no jurisdiction to deal with such a suit? If the son files such a suit for partition before the civil court, how could it be successfully contended that the civil court has no jurisdiction? Could it be said that if the husband or wife files the suit, it should be filed before the Family Court and if the son files the suit, it could be filed before the Civil Court? Certainly not. There cannot be different forum for filing the suit for partition depending on who files the suit. There may be cases for partition where there are several sharers; those sharers may include parties to a marriage. It may also be true that in such a case, there may be dispute between the parties to the marriage. That does not mean that the Family Court has jurisdiction to entertain and decide the suit, only on the ground that two of the parties to the suit consist of parties to a marriage. The disputes involved in a partition suit, may, sometimes, be complex. Different parties may set up different rights and may sometimes claim exclusive rights. Some of the parties may claim reservation or equity. Some may set up tenancy rights under the Land Reforms Act having been created in their favour or in favour or strangers. If the question of tenancy arises, it has to be referred to the Land Tribunal which has exclusive jurisdiction to decide the question of tenancy, in view of Section 125(3) of the Kerala Land Reforms Act. These are all matters for the civil court to decide and they do not come within the jurisdiction of the Family Court. If the property sought to be partitioned belongs to either or

both the parties to the marriage and they are the only parties to the suit or proceeding, the Family Court would have jurisdiction to decide that suit or proceeding. But that is not the position where there are other sharers or persons claiming independent rights. The rights of the 2nd defendant in the present case are distinct and independent. Such rights are not dependent on the rights of his father or mother or of both. As a member of the illom, he has right by birth in the property.

19. The next question to be considered is what is the meaning of the expression "with respect to the property of the parties" occurring in Explanation (c) to Section 7(1). Does it mean property of the parties to the proceedings or property of the parties to a marriage? The words "or of either of them" following the expression "with respect to the property of the parties" would unmistakably lead to the conclusion that the expression refers to parties to a marriage and not parties to the proceedings. In order to attract Clause (c), the litigation must be with respect to the property of either the husband or wife or both of them. It excludes any other person who has independent rights in respect of the property. Could it be said that the co-ownership property of the husband, wife and son is the property of "the parties to a marriage or either of them"? Evidently not. Therefore, I am of the view that the ingredients of Clause (c) of the Explanation are not attracted in the present case. It cannot even be contended that the present case is covered by Clause (d) to the Explanation to Section 7(1). Therefore, I am of the view that the civil court had jurisdiction to decide the suit and that the decree is not a nullity. I respectfully follow the decisions in Krishnan Nambodiri v. Thankamani, 1994 (I) KLT 607 and Kamalasanan v. Valsala, 1994 (1) KLT 737 and Shyni v. George and Ors., 1997 (1) KLJ 573. Point No. 1 is accordingly held against the appellant."

21. This position is also affirmed by a later judgment of the Kerala High Court in *Valsala & Ors.* ***v.*** *Geetha Rajmohan*[10], where it was held that a suit by the Plaintiff against her sister in law and her nephews for recovery of property that had come to her

10 2016 SCC Online Ker 10590

in a family partition would lie in the civil court.

22. The proposition that a suit between various parties, some of whom are not parties to the marriage and which does not arise out of a matrimonial dispute would lie in the regular civil court and not in the Family Court is one that is accepted by this Court as well. Thus, in *Pearl Chesson* v. *Sean Lawrence and Ors.*[11]*,by an*, a learned Single Judge of this Court while considering Explanations (a) and (c) to Section 7(1) of the Family Courts Act, held that a suit filed by a wife against her husband and her father in law asserting her title in respect of a property purchased from her own funds and seeking a declaration in respect thereof was properly brought in the High Court. In doing so, this Court relied on the judgment of the Supreme Court in the case of *Samar Kumar Roy (Dead) through Legal Representative* v. *Jharna Bera*[12], where the Hon'ble Supreme Court held that a Plaintiff who seeks a declaration under section 34 of the Specific Relief Act that no valid marriage occurred at all was not seeking a relief in *rem* under the Hindu Marriage Act or the Special Marriage Act and was therefore entitled to file a suit in the civil Court. This Court observed :

> "*8. Coming now to the facts of our case, it is clear that the present suit does not arise out of or in any way concern any of the provisions under Hindu Marriage Act or Sepcial Marriage Act. Though the parties here simply happen to be husband and wife, the suit is in respect of a property, which is owned as an individual by the Plaintiff-wife. In the suit, she is seeking a declaration as to her title or right to the property against two individuals, who happen to be her husband*

11 Order dated 19th January 2018 in Suit No. 2544 of 2012 along with Notice of Motion No. 2609 of 2012.

12 (2017) 9 SCC 591

> *and father-in-law, both of whom are interested in denying that title or right to her. The suit is typically a suit under Section 34 of the Specific Relief Act and not a proceeding between a husband and a wife relating to property coming within Clause (a) of the Explanation to Section 7 the Family Courts Act. The suit not being covered under the provisions of Section 7, it cannot be said to be barred under Section 8 for the civil courts to exercise their jurisdiction.*
>
> *9. Secondly, it is also important to note that the suit is not only against the Defendant-husband, but also against the father-in- law of the Plaintiff, who is also interested in denying the Plaintiff's title to the suit flat. The Plaintiff cannot in such an action be asked to split her cause of action and take a part of it before the Family Court and prosecute the other part before the Civil Court. As far as the Defendant-father-in-law is concerned, the suit claiming a declaration and perpetual injunction against him obviously cannot be filed before the Family Court under clause (c) of the Explanation to Section 7 of the Act.*"

23. Thus, it would appear that the question as to whether a suit or proceeding is within the exclusive jurisdiction of the Family Courts Act must necessarily depend on the nature of the dispute between the parties. It is Mr. Narula's case that the dispute in the present proceeding is one that is purely contractual. While the dispute undoubtedly arises out of a contract, one of the covenants of which the Petitioner seeks to enforce, it does not necessarily follow that it would by that mere fact lie outside the jurisdiction of the Family Court. It is clear, from a bare reading of the Memorandum entered into by the parties, that the Agreement had its origin in the marriage between the Petitioner and Respondent No. 1, the differences that arose between them, their intention to secure a divorce and the consequent need to redistribute properties between the members of the family including, of course, the

children born out of the marital relationship. The fact that the agreement related to the sale of the matrimonial home and the description of the amount paid over to the Respondents as being at least partly towards the wife's claim to residence and maintenance clearly point to the Memorandum, and by extension any dispute relating to it, being one arising out of a marital relationship and therefore clearly within the scope of Explanation (d) to Section 7(1) of the Family Courts Act. The mere fact that the Petitioner seeks reliefs not only against his wife but also against his children would not preclude the exercise of jurisdiction by the Family Court. In fact, Mr. Narula concedes that the presence of third parties would not by itself be a decisive factor in determining whether a suit or proceeding is properly brought in the Family Court as long as such proceeding otherwise meets the test of Section 7.

24. In support of his submission that the dispute which is the subject matter of the present petition is capable of reference to arbitration, the Petitioner has also relied on certain observations in paragraph 35 of the judgment of the Hon'ble Supreme Court in *Olympus Superstructures Pvt. Ltd.* ***v.*** *Meena Vijay Khetan & Ors.*[13], which is reproduced hereinbelow:

> "*35. It is stated in Halsburys' Laws of England 4th Ed., (Arbitration Vol.2 para 503) as follows:*
>
> > *"Nature of the dispute or difference: The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of*

13 (1999) 5 SCC 651

> *this is whether the differences can be compromised lawfully by way of accord and satisfaction (Cf. Bacon's Arbitrament and Award A)."*
>
> *Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, (say) physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir vs. Leeman) (1846) 9 Q.B. 371. Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux vs. Herbst) (1801) 2 Bos & p. 444; Wilson vs. Wilson (1848) 1 HL Cas 538; (Cahill vs. Cahill) (1883) 8 App Cas 420(HL).*"

25. The aforesaid observation in *Olympus Superstructures Pvt. Ltd.* was also reproduced in the judgment of the Hon'ble Supreme Court in *Booz Allen & Hamilton Inc.* ***v.*** *SBI Home Finance Limited & Ors.*[14]*,* in the following terms:

> *44. Approving the decision of the Calcutta High Court in Keventer Agro Ltd vs. Seegram Comp. Ltd - (Apo 498 of 1997 etc. dated 27.1.1998), this Court held that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) will not be attracted. This Court held:*
>
> > *"36. Further, as pointed in the Calcutta case, merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms. Ruma Pal, J. observed:*
> >
> > > *...merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not means that parties cannot agree that the discretion will be exercised by a forum of their*

14 (2011) 5 SCC 532

> *choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties should be precluded from referring the dispute to arbitration."*
>
> *This Court further clarified that while matters like criminal offences and matrimonial disputes may not be subject matter of resolution by arbitration, matters incidental thereto may be referred to arbitration: (Meena Vijay Khetan case, SCC p. 669, para 35)*
>
> *"35. Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, (say) physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman) (1846) 9 Q.B, 371. Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter .....*"

26. The judgment in *Olympus Superstructures Pvt. Ltd.* (supra) was dealing with the issue as to whether a claim for specific performance of a contract can be decided by an Arbitrator. The Court in *Booz Allen* (supra) was considering the question as to whether a claim arising out of a mortgage could be enforced before an arbitral tribunal. It is in this context that the Hon'ble Supreme Court had the occasion in both judgments to discuss the distinction between rights *in rem* and rights *in personam* and the arbitrability of each. While, generally speaking, rights in *rem* are not arbitrable and rights in *personam* are, this is not an invariable rule. Thus, e.g., while the rights of a tenant under the Maharashtra Rent Control Act, 1999 are rights in *personam*, any action to recover possession of rented premises is required to be brought before the Small Causes Court as a special tribunal established for that purpose. Such a claim has

been held not to be arbitrable in *Natraj Studios (P) Ltd.* ***v.*** *Navrang Studios*[15] and more recently followed in *Himangni Enterprises* ***v.*** *Kamaljeet Singh Ahluwalia*[16]. The Family Court is a special tribunal, much like the Small Causes Court in rent cases, which has been established to decide a particular class of cases viz. the one referred to in Section 7 of the Family Courts Act. By virtue of Section 8 which excludes the jurisdiction of Civil Courts, only Family Courts would be qualified to entertain any suit or proceeding which matches the description in Section 7. Such a suit or proceeding would therefore not be arbitrable. The Court in both *Olympus Superstructures* and in *Booz Allen* did not have the occasion to consider the language of Section 7 of the Family Courts Act. They had no reason to do so. The reference to the English law regarding the arbitrability of the terms on which a husband and wife shall separate is not a pronouncement of the law on the subject in India and certainly not on the purport of Section 7 of the Family Courts Act. In fact, the Petitioner himself concedes that the distinction between rights in *rem* and rights in *personam* in the context of arbitrability is not a perfect one. He also concedes that there may be subordinate rights in *rem* that are arbitrable and rights in *personam* which are not. The question as to whether a particular right in *personam*, viz., a claim to maintenance would be arbitrable would necessarily depend on the language of the Act providing for its adjudication, in other words, Sections 7 and 8 of the Family Courts Act. In the present case , it is quite clear

15 (1981) 1 SCC 523
16 (2017) 10 SCC 706

that the Memorandum between the parties in the present Petition and the disputes relating to it are circumstances arising out of the marital relationship between the Petitioner and Respondent No. 1. The Family Court would have exclusive jurisdiction to determine such a dispute. Such a dispute would therefore be incapable of being brought in a civil court or referred to arbitration. That being so, Mukesh would be disentitled to seek any reliefs under Section 9 of the Arbitration and Conciliation Act, 1996 in aid of such an arbitration. The present petition would therefore be liable to be dismissed as not maintainable.

27. The position canvassed by Mukesh would in fact have consequences that are distinctly awkward. Kiran has filed an application in the Family Court for maintenance in which she has placed in issue the legality of the Memorandum including, among others, on the ground that it was procured under pressure. She has sought maintenance over and above the sums received by her from the Petitioner and has asserted her right to a residence as well. The Family Court undoubtedly has jurisdiction to entertain Kiran's application for maintenance and to decide all issues ancillary thereto including the legal effect, if any, of the Memorandum. If the dispute raised by the Petitioner were held to be arbitrable, issues identical to or very similar to the ones raised in the application filed by Kiran before the Family Court would fall for determination by the Arbitrator with potentially embarrassing consequences including the possibility of conflicting findings. These considerations, while not decisive, are

certainly compelling and can be avoided if it is held, as the language of Explanation (d) to Section 7(1) would appear to require, that the Family Court has jurisdiction to decide any claim relating to circumstances arising out of a marital relationship including that of the Petitioner.

28. Public policy would also appear to favour such a construction. As noted by the Kerela High Court in *Shyni* v. *George (*supra*)* one of the important aims of the setting up of Family Courts is to bring about a reconciliation between the spouses if possible and to permit them to separate with dignity only if all attempts at reconciliation fail. Indeed, Section 9 of the Act imposes on Family Courts a duty in every suit or proceeding to endeavor, 'in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding.' The existence of such a mechanism for resolution of domestic disputes would also favour all disputes arising out of a marital relationship, including the present one, being heard and disposed of by the Family Court rather than relegated to the regular civil courts or to arbitration.

29. Given these considerations, I have no hesitation in holding that the disputes that have arisen between the parties to the present petition fall within the exclusive jurisdiction of the family court and would be incapable of reference to arbitration. It follows that no reliefs can be granted under section 9 of the Arbitration and

conciliation Act, 1996 as sought by the Petitioner. The Petition is accordingly dismissed with no order as to costs. Needless to state, this order does not in any way touch upon the merits of the dispute between the parties and the Petitioner will be at liberty to adopt such proceedings before the Family Court as he may be advised. Before parting with the Judgment, I would like to place on record the Court's appreciation for the able assistance rendered by the amicus curaie, Senior Advocate Mr. J.P. Sen in the matter.

(S.J.KATHAWALLA, J.)