

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

% *Judgment Pronounced on: June 09, 2014*

+ **I.A. No.12186/2010 in CS(OS) No.411/2010**

AMINA BHARATRAM Plaintiff
Through Ms.Malavika Rajkotia, Adv. with
Mr.Ranjay N., Adv.

versus

SUMANT BHARATRAM & ORS Defendants
Through Mr.Dinesh Garg, Adv. with
Ms.Surbhi Sharma, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff, Mrs.Amina Bharatram has filed the suit for maintenance and separate residence under Sections 18, 20 & 23 of the Hindu Adoption & Maintenance Act, 1956 as well as for permanent and mandatory injunction and declaration, against the four defendants.

2. Defendant No.1, Mr.Sumant Bharatram is the husband of the plaintiff. Defendants No.2 & 3, namely, Dr.Vinay Bharatram and Ms.Panna Bharatram are the father-in-law and mother-in-law of the plaintiff and defendant No.4, Mr.Hemant Bharatram is the brother of defendant No.1.

3. Few relevant facts are necessary; the same are that the plaintiff and defendant No.1 were married according to the Hindu Rites and

Ceremonies on 5th January, 1994 at Delhi Air Force Officers' Mess at Dhaula Kuan, New Delhi. From the wedlock, two children were born, namely, Yuv Bharatram on 10th June, 1995 and Rahil Bharatram on 16th November, 1999. The plaintiff along with defendant No.1 is living at Panchsheel Park, New Delhi. The plaintiff is a housewife, and the children, who are minors, have all along been in her care and custody, as per averments made in the plaint.

It is alleged in the plaint that defendant No.1 for the past few years has been insisting upon the plaintiff to give him a divorce so as to let him live an independent life. There are various controversies between the husband and the wife. Therefore, the plaintiff has filed the suit for maintenance and separate residence under the various provisions of the Hindu Adoption and Maintenance Act, 1956.

4. It appears from the record that various applications are pending for disposal. Two main applications are pressed at this stage; one is I.A. No.12185/2010 filed by defendant No.1 under Order VII Rule 11 read with Section 151 CPC, for rejection of plaint, on the ground that the suit has not been properly valued for the purposes of Court fee and jurisdiction. The second application is I.A. No.12186/2010 filed by defendant No.1 under Section 8 of the Family Courts Act, 1984 (66 of 1984) (in short, called the "FC Act"). Both said applications were taken up on 15th May, 2014. However, when the matter was adjourned for 19th May, 2014, both parties have addressed their submissions only in I.A. No.12186/2010 as the order to be passed in this application may have some impact in other application.

5. The objections of defendant No.1 in the said application are that this Court has no jurisdiction to entertain the suit which has arisen out of the marital relationship between the plaintiff and defendant No.1. The jurisdiction only lies with the Family Courts, as the same is governed by Section 7 read with Section 8 of the FC Act which bars the jurisdiction of other Courts.

6. The application is strongly opposed by the plaintiff who states that the High Court has the jurisdiction to decide all the matters fall under its original civil jurisdiction. The Family Courts Act does not oust the jurisdiction of this Court. The application is merely a misuse and abuse to the process of the law.

7. In order to appreciate and decide the issues in hand, it is imperative to refer Sections 7 & 8 of the FC Act. The same read as under:-

“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 circumstances 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. 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 power 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 or 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.”

8. It is the admitted position that the Family Courts Act was enacted on 14th September, 1984. Its application was extended to Union Territory of Delhi on 19th November, 1986 vide notification dated 18th November, 1986. Pursuant thereto, the Family Courts

were established for the areas falling under the Union Territory of Delhi.

9. The statement of the objects and reasons for establishing the Family Courts is read as under:-

“STATEMENT OF OBJECTS AND REASONS

Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

2. The Bill, inter alia, seeks to:-

- (a) provide for establishment of Family Courts by the State Governments:
- (b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

- (c) enable the State Governments to set up such courts in areas other than those specified in (b) above;
- (d) exclusively provide within the jurisdiction of the Family Courts the matters relating to:-
 - (i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person.
 - (ii) the property of the spouses or of either of them;
 - (iii) declaration as to the legitimacy of any person;
 - (iv) guardianship of a person or the custody of any minor;
 - (v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;
- (e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;
- (f) provide for the association of social welfare agencies, counsellors, etc., during conciliations stage and also to secure the service of medical and welfare experts;
- (g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the Court may, in the interests of justice, seek assistance of a legal expert as amicus curiae;

- (h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;
- (i) provide for only one right of appeal which shall lie to the High Court.”

10. The Government of National Capital Territory of Delhi (Department of Law, Justice and Legislative Affairs) has also issued the Notification in exercise of powers conferred by Section 4 of the FC Act, and all other powers enabling him in this regard, the Lieutenant Governor of the NCT of Delhi has appointed the Judicial Officers for the post of Judges of Family Courts at District Court, Saket, Delhi, from the date they assume charge of their offices.

11. One set of decisions passed in various Courts is that the expression “District Court” will include the High Court having original jurisdiction. See –

- (i) ***Bakhshi Lochan Singh and others vs. Jathedar Santokh Singh and others***, ILR (1971) I Delhi 615 (DB), in which it was held as under:-

“It was held by the Division Bench that after the coming into force of the Delhi High Court Act, 1966, as amended, this Court (Delhi High Court) has become the principal Civil Court of original jurisdiction with respect to every suit the value of which exceeds fifty thousand rupees. In view of the non obstante clause contained in sub-section (2) of Section 5 of the Delhi High Court Act, 1966, the Court of the District Judge, Delhi, has ceased to remain the principal Civil Court of original jurisdiction with respect to any suit value of which exceeds fifty thousand rupees. Full effect has to be given to the language employed in sub-section

(2) of Section 5 "notwithstanding anything contained in any law for the time being in force" and that can be done only by saving that for purposes of Section 92 of the Code of Civil Procedure, the Court of the District Judge, Delhi, will be the principal Civil Court of original jurisdiction in every suit the value of which does not exceed fifty thousand rupees but in other suits the value of which exceeds fifty thousand rupees, this High Court will be the principal Civil Court of original jurisdiction."

- (ii) ***Raja Soad Factory and others vs. S.P. Shantharaj and others***, AIR 1965 Supreme Court 1449, in which it was held as under:-

"...The expression "District Court" has by virtue of S. 2(e) of Act 43 of 1958 the meaning assigned to that expression in the Code of Civil Procedure, 1908. Section 2(4) of the Code defines a "district" as meaning the local limits of the jurisdiction of a principal civil court – called the District Court – and includes the local limits of the ordinary original civil jurisdiction of a High Court. If, therefore, a High Court is possessed of ordinary original civil jurisdiction, it would, when exercising that jurisdiction be included, for the purpose of Act 43 of 1958, in the expression "District Court"."

12. In the case of ***Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff***, AIR 2000 Bombay 356, it was held that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Court Act, it would be a district Court. Similarly, in the case of ***Kamal V. M. Allaudin and etc. etc. vs. Raja Shaikh and etc. etc.***, AIR 1990 Bombay 299, in which it was observed that Sections 7 and 8 of the Act speak of a 'District Court',

when it exercises matrimonial jurisdiction, it covers by the definition of a 'District Court' contained in Section 2(4) of the Code of Civil Procedure.

13. Similar view has been taken in the following decisions. The relevant paras of the said judgments are as under:-

- (i) ***Kamal V. M. Allaudin and etc. etc. vs. Raja Shaikh and etc. etc.***, AIR 1990 Bombay 299, paras 64, 65 & 68 read as under:-

“64. In the light of the above discussion, I am inclined to interpret the words 'district Court' occurring in Sections 7 and 8 of the Family Courts Act in a wider sense. That does not come in conflict with the status of the High Court as superior and the Apex Court. Even assuming that the High Court may not be described as the district Court, it can certainly be held that it was exercising the same powers and same jurisdiction of the district Court if one were to exist in the city of Bombay prior to the establishment of the City Civil Court. In that sense, when this Court was entertaining suits between Muslim parties and Jews and even Hindus when the dispute did not fall within the confines of the Hindu Marriage Act, and was doing so to the same extent as the district Court would have done, taking away that jurisdiction and vesting it in the Family Court by enacting the Family Courts Act the Legislature cannot be said to have taken any step which comes in conflict with its inherent jurisdiction under the Letters Patent which is meant to be exercised in the absence of any other law. I am inclined to take the view that there is no reason not to hold the Family Court as a district Court within the meaning of Section 2(4) of the Code of Civil Procedure having regard to the context in

which the Court has come to be established and the purpose for which it would exist.

65. The main thrust of the argument of Mr. Dada is that the special jurisdiction of the High Court under its Letters Patent (under clauses 35 and 17) is sacrosanct and could not be equated with the exercise of powers by a district Court. It is not possible to accept that view as the Letters Patent can be amended by the Legislature. It would therefore be consistent with the scheme of the Act and its purpose and also in the public interest to take the view that the phrase 'district court' in Sections 7 and 8 of the Family Courts Act includes the jurisdiction that was being exercised by this Court on its Original Side in respect of matters covered by Clauses (a) to (g) of Explanation to Section 7. It is true, as submitted by Mr. Dada, that a Court would be zealous in guarding its own jurisdiction. Undoubtedly, this Court is the superior Court and its jurisdiction cannot be lightly tinkered with. However, times have changed. New dimensions of public interest and social reform are emerging taking us in the direction of fulfilment of the obligations arising under Chapter IV of the Constitution of India. This Court cannot be oversensitive and feel touchy over loss of its jurisdiction to entertain certain kinds of suits which cannot in any manner come in conflict with its position as the superior Court and a Court of Appeal.

66. x x x x x

67. x x x x x

68. This discussion made so far leads me to take the following view:-

i) All suits and petitions falling under any of the Clauses (a) to (f) the Explanation to Section 7 of the Courts Act, 1984, excluding matters governed by the Indian Divorce Act, 1869, and Parsi Marriage and Divorce Act, 1936; which were cognizable by the High Court on the Original Side, in exercise of jurisdiction Under the Letters Patent, lie to the Family Court as from 7-10-1989, and the jurisdiction of the High Court stands excluded to that extent in relation to the area over which the Family Court, Bombay, exercises jurisdiction;

ii) No final opinion is expressed as regards matters matrimonial to which Indian Divorce Act and the Parsi Marriage and Divorce Act applies. Prima facie, such matters will continue to be cognisable by the High Court until jurisdiction in that respect is conferred by express statutory provision upon the Family Court;

iii) All suits and petitions of the description mentioned in Clause (i) above and pending in this Court (High Court) on the Original Side on 7-10-1989 and thereafter stand transferred and are liable to be transferred to the Family Court, Bombay, under Section 8 of the Family Courts Act, 1984;

iv) However, each suit and/or petition will be required to be examined on merits after hearing the parties (unless they consent) to determine whether it falls under any of the Clauses (a) to (f) of the Explanation to Section 7 of the Family Courts Act and is required to be transferred to Family Court. If the cause does not fall under any of the aforesaid Clauses, it will continue to be entertained by the High Court;

v) Suits or petitions wherein matrimonial relief is not sought in the nature contemplated by any of the Clauses (a) to (f) of Explanation to Section 7 but is based on non-existence of matrimonial relationship such as where the marriage is denied or is alleged to be void will not be cognizable by the Family Court and will not be liable to be transferred from the High Court;

vi) Suits and petitions where relief of the nature covered by any of the Clauses (a) to (f) of Explanation to Section 7 of the Family Courts Act is sought only incidentally along with principal relief of general nature these will continue to be cognizable by the High Court and pending matters of such nature will not be liable to be transferred to the Family Court (e.g. share in a matrimonial home or maintenance is claimed in a suit for general partition of undivided Joint Hindu Family property).

vii) Petitions relating to guardianship falling under Clause (g) of Explanation to Section 7 of the Family Courts Act will be cognizable by the Family Court as explained earlier in Para 61 above;

viii) All suits and petitions relating to Muslim Women where the cause arises under the Dissolution of Muslim Marriages Act 1939, and Muslim Women (Protection of Rights on Divorce) Act, 1986 as well as matrimonial causes amongst Jews are cognizable by the Family Court and all such pending matters are liable to be transferred to the Family Court.”

(ii) ***S. Leelavathi & Anr. Vs. M.S. Shivashankar (deceased by L.Rs.) & Ors.,*** para 10 reads as under:-

“10. Before parting, it is necessary to obtain serve that even though the Civil Court had jurisdiction when the suit in O.S. No.62/1996 was instituted by the petitioners. The jurisdiction of the Civil Court was excluded by virtue of Section 8 of the Family Courts Act and consequently, on establishment of the Family Court for District of Mysore with effect from 25.05.1998, necessarily the suit had to be transferred to the said Family Court. Neither the learned District Judge of the District, nor the Civil Judge concerned have noticed this fact, as a result of which the bonafide legal pursuit of the petitioners has been frustrated. It is a matter of regret that despite clear mandate contained in Section 8 of the Family Courts Act, the learned Civil Judge concerned has continued to try the suit, who by then had no jurisdiction over the subject-matter. Non-transferring of the case to the Family Court as required under Section 8 and continuing to adjudicate the claim, has resulted in passing of a decree on 07.12.2001 and the petitioners could not realise the fruits of the decree as it, under law is a nullity. Consequent to such lapses on the part of the learned District Judge concerned in non-transferring the suit to the Family Court and the lapses on the part of the learned Civil Judge in continuing to try the suit while Family Court was functioning, has landed the petitioners in a serious predicament without their fault.”

14. Learned counsel for defendant No.1, apart from other judgments, has referred a decision of the Full Bench of Bombay High Court, in the case of ***Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff***, reported in AIR 2000 Bombay 356, where the Full Bench of

the Bombay High Court while dealing with Section 8 of the Family Courts Act and interpreting Section 2(4) CPC, has held as under:-

“24. With utmost respect of the learned Judges of the Full Bench of Madras High Court, if one turns to the provisions of the Family Courts Act and anomalous position, that will arise under the provisions of Family Courts Act, as submitted by the defendant, it will not be possible to hold that in spite of the said provisions of the Family Courts Act, the High Court retains its Ordinary Original Civil Jurisdiction.

25. Sections 7 and 8 are prescribed by section 6 providing for counsellors, officers and other employees of Family Courts. It is followed by the provisions of duty cast of Family Court to make efforts for settlement as well as for providing enough latitude to the Family Court to devise its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other, subject to this rider, the provisions of the Code of Civil Procedure and the Code of Criminal Procedure both, including Rules framed thereunder are made applicable to the Family Court. Section 13 provides for right to legal representation; section 14 provides for application of Indian Evidence Act, 1872 which has virtually been done away with; under section 15, an option is left to the Family Court to record oral evidence or not; and section 16 provides for Evidence of formal character on affidavit. In this background, if one turns to section 5 subject to the rules framed thereunder, the Family Court is free to take assistance of and allow the association of institutions or organization engaged in social welfare or the persons professionally engaged in promoting the welfare of the family and so on.

26. In this background, one has to turn to the provisions of section 20 where the Act shall have overriding effect, which reads as under:

"20. Act to have overriding effect.---The provisions of this 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 this Act."

27. Letters Patent would be included in expression any law for the time being in force, and would certainly be covered the expression "instrument". The overriding effect given to the Act is thus confined not only to the Code of Civil Procedure but also to the Evidence Act. The Evidence Act is also an instrument having effect by virtue of law. Looking to the provision of the restricted right of an Advocate to appear in a matter obviously, the Advocates Act of 1961 also has effect to that extent.

28. Virtually, the litigation before the Family Court is a mixture of inquisitorial trial, participatory form of grievance redressal and adversarial trial. As the Family Court is left to devise its own practice, it can have a judicious mixture of all three of them and can as well proceed under any of- them exclusively.

29. The anomaly would thus be obvious. The Ordinary Original Civil Jurisdiction is held to be retained as per the learned Judges of the Division Bench and the learned Judges of the Pull Bench of the Madras High Court. The procedure will be in accordance with the respective rules of the High Court on its Original Side when legal representation being a certainty with all trappings of a full-fledged trial and the Evidence Act, 1872 will apply with force and rigour.

30. The litigants deciding to litigate within the limits of the City of Mumbai will thus continue to operate under the existing system. The litigants other than that litigating with new system will have the benefit of the aforesaid Family Courts Act which with reference to the aforesaid changes brought about in the conduct of the matters before the Family Court is clearly radical departure from the accepted form of a trial of a Civil Court. If the Legislature in its wisdom has decided to make this departure while interpreting any provision of it, in our opinion, the interpretation should be in furtherance of the objective.”

15. Learned Full Bench of Bombay High Court in the case of **Romila Jaidev Shroff** (supra) also interpreted that, “.....In our opinion, the conclusion would be inescapable that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Court Act, it would be a District Court as understood therein. It would, therefore, lose its jurisdiction.”

16. Learned counsel for the plaintiff Ms.Malavika Rajkotia, Advocate, in her submissions, has raised various legal points in support of her arguments which are outlined as under:-

- (a) She states that there are differences between the Delhi High Court and other Presidency High Courts. The latter are the principal Civil Courts of the original side for their territory, though the Delhi High Court is for the State of Delhi and has below it District Courts as the principal Court of the original jurisdiction. There is no separate territory governed by the Delhi High Court as a Court of principal of original jurisdiction. The Delhi High Court constituted by the Delhi

High Court Act, 1966 which succeeded the Punjab Courts Act, 1918 who succeeded the Letters Patent Lahore.

- (b) Even Section 3(17) of the General Clauses Act defines the “District Court”. The High Court is excluded from the definition of a District Court, but in contrast, Section 2(4) CPC limits the definition to a “District” and then includes the High Court in exercise of its original jurisdiction as the principal Court in a District. The said expressions are used in relation to different context and it implies a limit to territorial jurisdiction.
- (c) Counsel has referred few decisions in which it was clarified that the High Court cannot be called as District Court. In the context of executing the money decree of ₹20 lac to mean only the “District Court” which is subordinate to the High Court when, in fact, the District Court has no jurisdiction whatsoever if such a suit is to be presented in the District Court. In Delhi, above ₹20 lac, it is the High Court which has jurisdiction in its capacity as the High Court. The Delhi High Court Act Section 4 and also under Section 6 CPC bars matters in other Court from entertaining the matter if it is outrightly above the pecuniary limits.
- (d) It is also argued that Section 21 of the FC Act makes a specific reference to the High Court with no qualification as to its meaning anything other than the High Court. Thus, Section 8 of the Act excludes jurisdiction only of the Civil Court limit to the District Court within city civil limits of the

High Court. She argued that there is no notification or amendment to the High Court Act and Rules that release the Family Court from its pecuniary jurisdiction limit. Thus, the suit cannot be entertained by the Family Courts where the pecuniary jurisdiction limit is more than ₹20 lac. She states that since the pecuniary jurisdiction limit of the present case is more than ₹20 lac, therefore, this Court has got the jurisdiction to entertain and try the present suit which is the civil suit and all the suits of civil nature except the same are expressly or implicitly barred.

- (e) Lastly, she has argued that even otherwise, the present suit is not entertainable in the Family Courts by virtue of the fact that the subject matter is the assets of Bharatram family held as a joint family (HUF) where besides the husband of the plaintiff, her father-in-law and brother-in-law continued to be the parties to the suit after the demise of her mother-in-law. Since the claim of the third party is involved, therefore, the said dispute cannot be adjudicated by the Family Court. As the question involved in the present case raises a question of scope of Section 18, which is a question of law that needs to be addressed by the High Court.

17. It is pertinent to mention that exactly, the contrary view is taken on the similar issue by the various Courts including this Court and Full Bench of Madras High Court. The Full Bench of Madras High Court has taken the view at earlier point of time which is contrary to

the view taken by Full Bench of Bombay High Court at the later stage who did not agree the view of Madras High Court. The relevant paras of the said decisions are mentioned and read as under:-

- (i) **Mary Thomas vs. Dr.K.E.Thomas**, AIR 1990 Madras 100, in which it was held as under:-

“20. On a consideration of the relevant provisions of law and the decisions which have been cited, we are clearly of the opinion that the jurisdiction of the High Court on its Original Side is not ousted by any of the provisions contained in the Act and the High Court shall continue to exercise the jurisdiction vested in it under the Letters Patent and all other laws, notwithstanding the provisions of S. 7 and S. 8 of the Act. In this view, therefore, we hold that the decision of Abdul Hadi, J. in Patrick Martin. In the matter of the Minor Rekha, (1989) 103 Mad LW 241, and confirmed by the Division Bench in O.S.A. No. 186 of 1988 and reported in Patrick Martin Mr. etc. Appellants, (1989) 103 Mad LW 246 : (AIR 1989 Mad 231) is no longer good law.

21. We answer the Reference as follows:

After the constitution of the Family Court for the Madras area, the original Jurisdiction of the High Court in respect of matters that may fall under the Explanation to S. 7 of the Act is not ousted and the High Court can continue to exercise its jurisdiction notwithstanding the coming into force of the Family Courts Act, 1984.”

- (ii) **Kanak Vinod Mehta vs. Vinod Dulerai Mehta**, AIR 1991 Bombay 337 (by Division Bench comprising S.P.

Bharucha and B.N.Srikrishna, JJ), in which it was held as under:-

“7. The principal question that must be answered is: Is the High Court a District Court when it entertains, hears and decides suits and proceedings of the nature referred to in the Explanation to sub-section (1) of Section 7 of the said Act. The Full Bench of the Madras High Court in Mary Thomas' case posed the same question in paragraph 10 and answered it in paragraph 20 thus:

"On a consideration of the relevant provisions of law and the decisions which have been cited, we are clearly of the opinion that the jurisdiction of the High Court on its Original Side is not ousted by any of the provisions contained in the Act and the High Court shall continue to exercise the jurisdiction vested in it under the Letters Patent and all other laws, notwithstanding the provisions of S. 7, and S. 8 of the Act."

8. This is a Central statute. It is a recognised principle that, so far as is possible, the same construction should be placed by a High Court upon a Central statute as has found favour with another High Court. Upon that principle alone we would be obliged to hold as the Full Bench of the Madras High Court has held. Additionally, the point here concerns the jurisdiction of the High Court. It would be awkward if suits and proceedings of the nature referred to in the Explanation to subsection (1) of Section 7 were entertained by one High Court and not by another. We have read the Full Bench judgment of the Madras High Court in Mary Thomas' case and are in respectful agreement with what is held therein.

We may, however, set out further grounds for taking the same view.

9. x x x x x

10. Emphasis was laid on behalf of the defendant upon Section 2(4) of the Code which defines "District" to mean "the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called the "District Court") and includes the local limits of the ordinary original civil jurisdiction of a High Court." It was submitted that, therefore, when the word 'Court' was appended to the word 'District' as defined in the Code, the High Court stood defined as a District Court and, therefore, fell within the meaning of that expression in the said Act. It is not possible to accept this submission because regard must be had to the terms of Section 3 of the Code which says, "For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes as subordinate to the High Court and District Court". It is clear that a distinction is drawn by the Code between a High Court and a District Court and the expressions are used therein in different contexts.

11. The learned Judge was right in placing reliance upon the Bombay Civil Courts Act, 1869; Section 7 thereof states that the District Court shall be the principal court of original civil jurisdiction in the district within the meaning of the Code. This is the Court which is relevant for the purpose of Section 2(4) of the Code. Though the area within which the High Court exercises original jurisdiction is a district, a High Court is not a District Court for it exercises jurisdiction, on its

appellate side, not only over that district but over the entire State.

12. We must also have regard to the canons of interpretation of statutes. The established rule is that a "statute should not be construed as taking away the jurisdiction of the Courts in the absence of clear and unambiguous language to that effect." This is a principle enshrined in the judgments of Indian and English Courts. The principle applies with even greater vigour when the statute purports to take away the jurisdiction of a superior Court such as the High Court. We do not find in the provisions of the said Act words that clearly or unambiguously indicate the intention of Parliament to oust the jurisdiction of the High Court in regard to the categories of suits and proceedings mentioned in the Explanation to sub-section (1) of Section 7. The words that are used apply in clear and unambiguous terms only to the jurisdiction of District Courts and subordinate Civil Courts.

13. It was argued on behalf of the plaintiff that even if the jurisdiction of the High Court had been ousted, as contended by the defendant, even so this suit did not stand transferred to the Family Court inasmuch as it was not a suit that fell within the Explanation to sub-section (1) of S. 7. It was pointed out that the suit as it was now laid involved joint family property and the karta thereof and was, therefore, not a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. This contention must be upheld.

14. It was also submitted that this clause of the Explanation (clause (c)) should be read down so that it was only property which had been acquired

by the parties to a marriage or either of them at or about the time of the celebration thereof that would be covered thereby. To so do would, it was urged, bring clause (c) in accord with S. 27 of the Hindu Marriage Act, 1955, and S. 42 of the Parsi Marriage and Divorce Act, 1936. Having regard to the frame of clause (c). It is difficult to accede to the submission, though we must say that we envisage some difficulties when we have regard to the provision in the said Act that evidence is not required to be taken in accordance with the provisions of the Indian Evidence Act, a full transcript thereof is not required to be maintained and legal representation is not ordinarily obtainable.

15. At this point we must note that each of the clauses of the Explanation refers to "a suit or proceeding". It is not as if the reliefs that are mentioned there are to be sought in a matrimonial proceeding of the nature indicated in clauses (a) and (b). Even when such reliefs are independently sought the suit or proceeding would be in the Family Court.

16. Clause (g) of the Explanation mentions a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Guardianship, custody and access to a minor are not sought only in matrimonial causes. Such reliefs may also be sought under the provisions of the Guardians and Wards Act, 1890, the Indian Lunacy Act, 1912 and the Hindu Minority and Guardianship Act, 1956. It is far from clear whether Parliament intended that proceedings even under these statutes in relation to guardianship, custody or access to a minor should be filed before the Family Court if instituted by a member of the minor's family."

- (iii) ***N. Kanageswary vs. T. Shrikandarah Rubindranathan***, 2013 (1) CTC 165, in which it was held as under:-

“21. There is no dispute that Sections 7 & 8 of the Family Courts Act confer jurisdiction on the Family Court to decide the disputes between the parties to a matter, including property disputes. In case, proceedings for dissolution of marriage or any other proceeding between the parties are pending adjudication before the Family Court, it would be in the best interest of both parties to resolve the property dispute also through the said Court. The Parallel proceedings would cause difficulties to the parties. In case the Matrimonial proceedings are pending before the Family Court and proceeding relating to property, before the Original Side of the High Court, it would be reasonable to make a request before the High Court to transfer the Suit to the Family Court. However, it cannot be said that the High Court has no jurisdiction at all to entertain the Suit between the spouses.”

- (iv) This Court in the case of ***Manita Khurana vs. Indra Khurana*** reported in 2010 (167) DLT 58 while dealing with section 7 of the Family Courts Act, in paras 12 to 17 has held that the right of a party in the proceeding before the Family Courts are materially different from it, such proceedings had been before the ordinary civil court so as the approach of a civil court. The claim of a third party to a marriage cannot be adjudicated before the Family Court. The cause of action for the suit is refusal of the defendant to vacate the house of which the plaintiff claims to be the exclusive owner. Merely because certain facts leading to

the cause of action referred to the marital relationship of the plaintiff and defendant would not make suit arising out of a marital relation.

Paras 18 and 19 of the said decision referred the various decisions of Supreme Court which are reproduced hereunder:

“18. The Supreme Court in ***State of Madhya Pradesh v. Shobharam***, AIR 1966 SC 1910 has held that our Constitution lays down in absolute terms a right to be defended by one’s own Counsel; it cannot be taken away by ordinary law. Though subsequently in ***Lingappa Pochanna Appelwar v. State of Maharashtra***, AIR 1985 SC 389 it has been held that no litigant has a fundamental right to be represented by a lawyer in any court and where the Legislature felt that for implementation of the legislation, it would not subserve the public interest if lawyers were allowed to appear, plead or act, the Legislature is entitled to provide so. However, the fact remains that where the Legislature has not expressly provided for depriving such right to Counsel, the said right cannot be taken away. There is nothing in the Act to show that the Legislature contemplated depriving the owner of a property suing for possession of such a right merely because the defendant was her daughter-in-law.

19. As far as the contention of the counsel for the petitioner of purposive interpretation is concerned, the same is to come into play only where the golden rule, that the words of the statute must prima facie be given their ordinary meaning, fails. The Supreme Court in ***Harbhajan Singh v. Press Council of India***, AIR 2002 SC 1351 cited with

approval the speech of Lord Simon in ***Suthendran v. Immigration Appeal Tribunal***, (1976) 3 All ER 611 to the effect – “*Parliament is prima facie* to be credited with meaning what is said in an Act of Parliament. The drafting of statutes, so important to a people who hope to live under the rule of law, will never be satisfactory unless Courts seek whenever possible to apply 'the golden rule' of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. Of course, Parliament is to be credited with good sense; so that when such an approach produce injustice, absurdity, contradiction or stultification or statutory objective the language may be modified sufficiently to avoid such disadvantage, though no further.” Yet again in ***Rishab Chand Bhandari v. National Engineering Industry Ltd.***, (2009) 10 SCC 601 it was held that only if a literal interpretation leads to absurd consequences, it should be avoided and a purposive interpretation be given. Similarly in ***Raghunath Rai Bareja Vs. Punjab National Bank***, (2007) 2 SCC 230 it was held that the mischief rule and the purposive interpretation rule can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute.”

18. In para 24 of the decision of ***Romila Jaidev Shroff*** (supra), the learned Full Bench of Bombay High Court did not agree with the Full Bench of Madras High Court and took the entirely different view that inspite of provisions, i.e. 7 and 8 of the Family Courts Act, the High Court retains its Ordinary Original Civil Jurisdiction and the anomaly

would thus be obvious and procedure will be in accordance with the respective rules of the High Court of its original side. When legal representation being a certain will all trapping of a full-fledged trial and the Evidence Act, 1872 will apply with force and rigour and on the other hand, virtually the litigation before the Family Court is mixture of inquisitorial trial, participatory form of grievance redressal and adversarial trial and Family Court is left to devise its own practice.

19. There is no doubt that under section 7, the Family Court shall have all the jurisdiction exercisable by any District Court or by any subordinate Civil Court under the law for the time being in force in respect of suit and proceedings for maintenance. The Family Court shall also have jurisdiction of the matter relating to maintenance including proceedings under Chapter IX of the Code of Criminal Procedure including the application filed under Section 125 Cr.P.C.

20. The relevant principles regarding ouster of jurisdiction of Civil Court were laid down by the Apex Court in ***Dhulabhai vs. State of MP***, AIR 1969 Supreme Court 78 at page 89 (para 32) which reads as under:

“(1) Where the statute gives a finality to the orders of the special tribunals the civil courts jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of juridical procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunal so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme

of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.”

21. It is also necessary to appreciate Section 9 of the CPC which provides when the jurisdiction of the civil court is either expressly or impliedly barred, it reads as under:

“9. Courts to try all civil suits unless barred – The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

[Explanation I] – A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[Explanation II]- For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]”

22. It is well-settled that the exclusion of jurisdiction of civil court cannot be readily inferred and the normal rule is that civil courts have jurisdiction to try all suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded. It is true that ordinarily, the Civil Court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated.

23. There is no express exclusion of jurisdiction under the Family Court Act that no High Court referred to in sub-section 7 shall exercise any jurisdiction in respect of any suit and proceeding of nature referred to in the explanation of that sub-section. It appears to me, that the decision rendered by the courts from time to time on the basis of either with a view to promote conciliation and to secure settlement of dispute regarding marriage and family affairs and for matters connected therewith as the Act inter alia seems to exclusively provide with the jurisdiction of the Family Court or perusal of section 20 of the Family Court which mandates that the Act shall have overriding effect on all other enactments in force dealing with this issue meaning thereby that the jurisdiction of the High Court in such matters is implicitly barred.

24. Implied exclusion of jurisdiction of civil court cannot be inferred from the mere fact of the existence of the statutory tribunal or court which may give the same relief as may be had in civil court. There must be something in the provisions of the statute for providing such proceedings to clearly rule out remedy of a suit in the civil court where a statutory enactment creates rights but does not provide the remedial form, the doors of the civil court are always open however where a complete machinery for redressal is available, civil courts' jurisdiction may be impliedly barred.

25. Having gone through all the decisions and important issues involved in the present matter, though my views are same with the views taken by the Division Bench of Bombay High Court in the case

of **Kanak Vinod Mehta** (supra) and in the case of **Manita Khurana** (supra) of this Court, due to undisputed fact in the present case that the plaintiff is claiming rights in the assets of Bharatram family held as joint family (HUF) and it was claimed that besides the husband of the plaintiff, her father-in-law and brother-in-law continued to be the parties after the demise of her mother-in-law. In a way third parties interest is also involved where evidence of the parties are necessary. Even otherwise, I feel that under Section 7 of the Family Courts Act, use the words 'only to the jurisdiction of District Courts and subordinate Civil Courts', the said expressions are used there in different contexts otherwise it amounts to ignoring Section 3 of the CPC which makes it clear "for the purpose of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District Court and every Court of small causes or subordinate to the High Court and District Court'. Anyhow, these are my views in the matter.

26. Although I have expressed my views in the matter as well as the analysis done above supports the same, yet as a matter of judicial propriety and in view of judicially inconsistent opinion existing in the field of law, I deem it expedient to refer the important questions to the larger Bench of this Court. These questions are required to be answered authoritatively by a larger Bench so that authoritative judgment may be rendered by the Court discussing the legal position so that the inconsistent trend of approvals and dissents can be put to quietus and there must be certainty in the field of law.

27. Thus, this Court deems it appropriate to refer the following questions to the larger Bench for their kind consideration, as finding of which, would help many Courts to decide various pending cases and many more to come in future of this nature.

28. Accordingly, the following questions are referred to the larger Bench which are:

- (i) Whether the High Court while exercising the Original Civil Jurisdiction is deemed to be a District Court within the meaning of Section 2(4) of CPC in the context of Section 7(1)(a) of the Family Courts Act, 1984?
- (ii) Whether the original civil jurisdiction of the High Court excluded for any suit or petition by virtue of Sections 7 & 8 of the Family Courts Act, 1984.

29. This matter be placed before Hon'ble the Chief Justice, on 30th July, 2014 for further directions.

(MANMOHAN SINGH)
JUDGE

JUNE 09, 2014